Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/19/0811

Re: Property at 19 Turfbeg Place, Forfar, DD8 3LQ ("the Property")

Parties:

Mrs Karen Buckley Nee Craig, 23 South Tay Street, Dundee, DD1 1NR ("the Applicant")

Mr Jason McLean, Mrs Pauline McLean, 19 Turfbeg Place, Forfar, DD8 3LQ ("the Respondent")

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Application is refused.

1. The Case Management Discussion (CMD) took place on 24 May 2019. Present was Ms Amber Milne from BS Properties as representative for the Applicant. The tribunal was satisfied that the Respondent had received notification of the CMD by Sheriff Officer Service on 30 April 2019.
2. The application for an order for possession in terms of Rule 65 dated 12 March 2019 had been received by the Tribunal on 13 March 2019 and was accompanied by a copy of the tenancy agreement commencing 3 November 2014, copy unsigned 2 pages starting "The law, the Rent (Scotland) Act 1984", copy AT5, copy AT6 document dated 15 February 2019 with entry of date proceedings could commence in Part 4 stated as 2 March 2019, copy Notice to Quit dated 15 February 2019, copy recorded delivery slip and copy rent statement dated 11 March 2019.
3. The tribunal initially requested further documentation and received a copy of the S 11 Notice to Angus Council and a letter of authorisation by the Applicant for Amber Milne dated 15 March 2019.

[redacted]

4. On 26 March 2019 the Tribunal notified the Applicant's Representative of 4 issues, which required to be further addressed. The letter is referred to for its terms and held to be incorporated herein.
5. On 26 March 2019 the Applicant's Representative stated that one notice was served on the joint tenants, the two pages included with the application were handed to the tenants as part of the tenant information pack and the AT6 and Notice to Quit allowed 24 hours for delivery and gave sufficient 14 days notice.
6. Both parties were notified of the CMD date and time. Only the Applicant's representative attended. No further representations in writing were received by either party.
7. Ms Milne pointed out that the arrears had since further increased to over £7,000 and no contact had been made by the Respondents, who are still living in the property.
8. The Legal Member had set out at the start of the CMD the issues identified with regard to the validity of the Notice to Quit, the AT6 Part 4 entry, S 18 (6) (b) of the Housing (Scotland) Act 1988 and referred to the decisions of Royal Bank of Scotland Plc v Boyle, 1999 Hous.L.R. 63 and Eastmoor LLP v Bulman 2014 G.W.D.26-529 as issues which required to be addressed.
9. Ms Milne stated they had always produced the same documentation for these type of cases and this had never been an issue. The Notice to Quit and the AT6 gave 14 days notice and this was allowed in terms of Ground 8 of the Housing (Scotland) Act 1988 and stated in the clause 9.1 on the additional papers.
10. When asked what clause 9.1 referred to she stated this would refer to the Tenancy Agreement. However after considering the terms of the Tenancy Agreement she stated it referred to the tenant information pack, which was not submitted in evidence. She was not aware of the terms of that specific clause.
11. Ms Milne was offered the option of a further Case Management Discussion to address the issues raised at the Case Management Discussion and previously referred to in the letter of the Tribunal of 26 March 2019 but declined this option.

Findings in Fact:

1. The property is let on a Short Assured Tenancy, which in terms of Clause 1 a) commenced on 3 November 2014 and stated as the original end date of 2 November 2015.
2. In terms of Clause 1 b) it continued from month to month thereafter "until brought to an end by either party serving written notice upon the other party on a period of not less than 2 calendar months"
3. In terms of Clause 1 d) "The tenancy may be ended by the tenancy reaching its end date and the landlord/landlords agents providing 2 months written notice of possession.; The landlord/landlords agents serving a Notice to Quit due to breach of this agreement or a ground as per S18 of the Housing (Scotland) Act 1988: Schedule 5 Parts I and II, The tenancy reaching its end date and the tenant providing 1 months written notice to the landlord/landlords agent.
4. The tenancy agreement does not provide any further information regarding the grounds of Schedule 5 of the Housing (Scotland) Act 1988.
5. The 2 page document lodged contains the following information: "for the landlord or his agent to commence legal proceedings to repossess the premises based on a breach of the tenancy (where the tenant has failed to

[redacted]

remedy the breach in good time), which might result in the court evicting the tenant or issuing a court order terminating the tenancy earlier than might otherwise be lawful, the law requires that the tenancy contains an Irritancy Clause. Clause 9.1 is such a clause."

6. Clause 9 of the Tenancy agreement deals with "Declaration". There is no clause 9.1 in the tenancy agreement.
7. In terms of Clause 2 the monthly rent is £530 payable at the 3rd day of the month in advance.
8. The rent arrears on 16 February 2019 at the service of the AT6 document were £4,995.
9. The rent arrears relevant to the application as at 12 March 2019 were £5,251.45 as per the schedule of arrears produced.
10. At the date of the CMD the arrears were in excess of £7,000.
11. Form AT6 was served on the Respondent on 16 February 2019 stating as the grounds of repossession grounds 8 and 11.
12. One Notice to Quit was served by recorded delivery on the joint tenants on 16 February 2019 for a date of 2 March 2019.
13. The AT6 document states as the earliest date proceedings can be raised 2 March 2019.
14. The tenancy is as at the date of the hearing a contractual assured tenancy.
15. The Respondents continue to occupy the property.

Reasons for Decision: The requirement for an order for possession are set out in Sections 18 and 19 of the Housing (Scotland) Act 1988 (the Act) :

18 Orders for possession.

(1)The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.

(2)The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3)If the First-tier Tribunal is satisfied that any of the grounds in Part I of Schedule 5 to this Act is established then, subject to subsections (3A) and (6)] below, the Tribunal shall make an order for possession.

(3A)If the First-tier Tribunal] is satisfied—

(a) that Ground 8 in Part I of Schedule 5 to this Act is established; and

(b)that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit,the Tribunal] shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4)If the First-tier Tribunal is satisfied that any of the grounds in Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal] considers it reasonable to do so.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit.

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(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.
(6)The First-tier Tribunal shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless—
(a)the ground for possession is Ground 2 or Ground 8 in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9. Ground 10, Ground 15 or Ground 17; and
(b)the terms of the tenancy make provision for it to be brought to an end on the ground in question.
(6A) Nothing in subsection (6) above affects the First-tier Tribunal] 's power to make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.
(7)Subject to the preceding provisions of this section, the First-tier Tribunal] may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.
(8)In subsections (3A) and (4A) above—
(a)"relevant housing benefit" means—
(i)any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or
(ii)any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;
(aa)"relevant universal credit" means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;]
(b)references to delay or failure in the payment of relevant housing benefit or relevant universal credit] do not include such delay or failure so far as referable to any act or omission of the tenant.]
19 Notice of proceedings for possession.
(1)The First-tier Tribunal shall not entertain proceedings for possession of a house let on an assured tenancy unless—
(a) the landlord (or, where there are joint landlords, any of them) has served on the tenant a notice in accordance with this section; or
(b) the Tribunal considers it reasonable to dispense with the requirement of such a notice.
(2)The First-tier Tribunal shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the Tribunal.
(3)A notice under this section is one in the prescribed form informing the tenant that—
(a) the landlord intends to raise proceedings for possession of the house on one or more of the grounds specified in the notice; and
(b)those proceedings will not be raised earlier than the expiry of the period of two weeks or two months (whichever is appropriate under subsection (4) below) from the date of service of the notice.

(4)The minimum period to be specified in a notice as mentioned in subsection (3)(b) above is—
(a)two months if the notice specifies any of Grounds 1, 2, 5, 6, 7, 9 and 17 in Schedule 5 to this Act (whether with or without other grounds); and
(b) in any other case, two weeks.
(5)The First-tier Tribunal may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on Ground 8 in Schedule 5 to this Act.
(6)Where a notice under this section relating to a contractual tenancy—
(a) is served during the tenancy; or
(b)is served after the tenancy has been terminated but relates(in whole or in part) to events occurring during the tenancy,

the notice shall have effect notwithstanding that the tenant becomes or has become tenant under a statutory assured tenancy arising on the termination of the contractual tenancy.

(7)A notice under this section shall cease to have effect 6 months after the date on or after which the proceedings for possession to which it relates could have been raised.

The following questions arose in the context of this application:

1. Did the AT6 Notice fulfil the requirements of S 19 (3) (b) and (4) (b) of the Act?

The Applicant's Representative argued that sufficient time had been given to meet the requirements in terms of S 19 (4) (b) and thus the correct date had been entered in terms of S 19 (3) b) of the Act.

The Notice, as per the track and trace information for the relevant recorded delivery item was served on 16 February 2019. In terms of the calculation of time periods from a specific date this excludes the date of service of 16 February 2019. Thus the 14 day period stated in S 19 (4) (b) expires on 2 March 2019. S 19 (3) (b) specifies that proceedings will "not be raised earlier than the expiry of the period of two weeks.. from the date of service of the notice". The expiry of the two week period falls thus on midnight of 2 March 2019 and proceedings can not be raised until 3 March 2019. However, the AT6 document states as the relevant date 2 March 2019.

I do not consider that the date entered into Part 4 of the AT6 document is correct and find that the period is one day short. I consider that the AT6 document was thus not valid.

2. Can the Tribunal dispense with the requirement in terms of S 19 (1) (b) of the Act?

In terms of S 19 (5) of the Act this is not possible "if the landlord seeks to recover possession on Ground 8 in Schedule 5". This ground is stated in the application and in the AT6 document by the Applicant.

I did not consider that the requirement could be dispensed with in terms of the legislation for the application as it was made. However, as the application also contained reference to Ground 11 I consider that this would not prevent the application being considered on that ground alone.

[redacted]

3. Had the tenancy been terminated by the Notice to Quit or did S 18 (6) apply?

The Applicant's representative argued that the Notice to Quit was a valid Notice to Quit. However, in terms of the tenancy agreement a Notice to Quit to end the contractual tenancy had to give a notice period of 2 calendar months to the ish of the tenancy. The Notice to Quit served on the Respondents only gave 14 days notice period. Although Clause 2 refers to the landlord "serving a notice to quit due to breach of this agreement or a ground as per S 18 of the Housing (Scotland) Act 1988" and there is a reference to an irritancy clause in the additional 2 page document lodged, this then makes further reference to a Clause 9.1, which is clearly not a Clause in the tenancy agreement. It is not possible from the documentation lodged to ascertain what this refers to and what information would have been given to the Respondents regarding this. In any event, it was not evidenced that the Applicant relied on an irritancy clause. There was no indication in the Notice to Quit as to why this was issued other than to state as the end date 2 March 2019, which would be an ish date. The Applicant's Representative could not provide any information on what specific basis the document was issued and referred to this being allowed in terms of Ground 8 of Schedule 5 of the Housing (Scotland) Act 1988. This did not shed further light on the relevance of the 14 day notice period or the relevant date. On balance I consider that the Notice to Quit content indicates that the intention was to terminate the tenancy to an ish date. No other reason was stated. The tenancy agreement did not provide for the option to serve a valid Notice to Quit with a 14 day notice period to an ish on the tenant.
I consider that the Notice to Quit as it was submitted did not validly terminate the contractual tenancy and that thus at the time the Tribunal considered the application the tenancy remained a contractual assured tenancy and was not a statutory assured tenancy.

4. Did the tenancy agreement provide the information as required in S 18 (6) (b) of the Act?

In terms of S 18 (6) of the Housing (Scotland) Act 1988 the First-tier Tribunal shall not make an order for recovery of possession of a house which is for the time being let on a assured tenancy, not being a statutory assured tenancy, unless ..... (b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.

In this case the Applicant's Representative argued that the unsigned and undated 2 page document lodged with the application should be considered sufficient to provide the information required in terms of S 18 (6) (b) of the Act.

The requirement of S 18 (6) (b) had been addressed in the decisions of Royal Bank of Scotland Plc v Boyle, 1999 Hous.L.R. 63 and Eastmoor LLP v Bulman 2014 G.W.D.26-529

The Sheriff Principal in Royal Bank of Scotland Plc v Boyle, 1999 Hous.L.R. 63 held "that the essential ingredients of those conditions must be referred to in the tenancy agreement", that the grounds for recovery of possession in Sch 5 must be set out in the tenancy agreement in making provision for the termination of the tenancy.

"Incorporation of Sch.5 by reference was not necessarily sufficient or appropriate " and stated: "The purpose of S 18 (6) (b) is therefore to operate only where the parties have bound themselves to an agreement which is to the effect that Sched 5 contains the only grounds on which the landlord can irritate a short assured tenancy at times other than at the determination of the ish. The landlord can only employ those grounds to get rid of the tenant, and the tenant is subject to lose possession of the house only on the same grounds. In view of the significance of these issues to both parties I think it is important that the connection between the tenancy agreement and the schedule is reasonably precise and complete".
In Eastmoor LLP v Bulman 2014 G.W.D.26-529 Sheriff Jamieson held that the clause in that lease had been poorly drafted "(1) in that it mentioned but did not specify what the grounds were , and it also wrongly assigned to the Pursuer the right to forthwith put the lease to and end if those grounds occurred, because the lease could only be brought to an end within the contractual period on an order for possession granted by the sheriff under s 18 of the 1988 Act (2) There was no attempt to summarise the essential ingredients of any of the grounds 8,11 and 12 in the tenancy agreement; since a tenancy agreement could only be brought to an end prior to its ish on certain permitted conventional grounds, the parties had to contract in such a way that the contract itself sets out those grounds, it was insufficient for the tenancy agreement merely to refer to the number of the ground, best practice was to refer to its number and terms *ad longum* and if the ground was summarised, that summary had to contain the essential ingredients of that ground. (3) In any event clause 1 g further did not comply with S 18 (6) where it misleadingly referred to E's entitlement to forthwith put and end to the lease; the reference to the numbers was meaningless to B without having recourse to Sch 5 of the 1988 Act and it suggested that E and not the court could put an end to the lease." And observed "that the onus remained on the landlord to contract with the tenant in such a way that the ground of possession accurately and unambiguously formed part of the terms of the tenancy".

The tenancy agreement did not state the Grounds in Schedule 5 of the Act in full. It did not summarise the grounds. The only reference is in Clause 1 (d) to "The landlord/landlords agents serving a Notice to Quit due to breach of this agreement or a ground as per S18 of the Housing (Scotland) Act 1988: Schedule 5 Parts I and II".

The Appellant's Representative argued that the tenant information pack contained the lodged 2 pages and thus this was sufficient to advise the tenants of the grounds. However, it is not clear from the documentation lodged in what context these 2 pages appear and when they were provided or accepted by the tenants at the time. The pages clearly are not a part of the tenancy agreement and are not referred to in the tenancy agreement.

I do not consider that I can be satisfied on the basis of the documents lodged that, as stated in Eastmoor LLP v Bulman, "the ground of possession accurately and unambiguously formed part of the terms of the tenancy".
On the basis of the evidence available I am thus not satisfied that these satisfy the test of S 18 (6) (b) of the Housing (Scotland) Act 1988. Therefor the Tribunal in those circumstances cannot make an order. On that basis the application has to be refused.

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Decision

For the reasons stated above, the tribunal refuses the application for an order for possession.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

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24. 5. 19

Legal Member/Chair **Date**