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/19/3093

Re: Property at 50 Westend Drive, Bellshill, Lanarkshire, ML4 3AS ("the Property")

Parties:

Mr David Gemmell, 41 Kenilworth Crescent, Bellshill, Lanarkshire, ML4 3EQ ("the Applicant")

Mrs Jessica Walker, 50 Westend Drive, Bellshill, Lanarkshire, ML4 3AS ("the Respondent")

Tribunal Members:

Neil Kinnear (Legal Member) and Gordon Laurie (Ordinary Member)

Decision (in absence of the Respondent)

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

Background

This is an application dated 30th September 2019 brought in terms of Rule 65 (Application for order for possession in relation to assured tenancies) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant provided with his application copies of a written rent schedule agreement, notice to quit, section 19 notice (form AT6), section 11 notice, a rent arrears statement, and executions of service.

The form AT6 intimated to the tenant that the Applicant intended to raise proceedings for possession of the house on ground 8 of Schedule 5 to the *Housing (Scotland) Act 1988*.

The Respondent had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 6th September 2019, and the Tribunal was provided with the execution of service.

There is a substantial procedural history in this matter, which the Tribunal does not need to fully narrate for the purposes of this decision. Both parties have produced a substantial amount of material regarding the history of matters between them.

The parties had entered into a verbal tenancy agreement, which they had never reduced to writing. That agreement had a start date for the lease of 1st July 2015, with agreed monthly payments of £450.00 for 12 months.

A Case Management Discussion was held on 15th January 2020 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Applicant appeared, and was not represented. The Applicant's wife, Mrs Agnes Gemmell attended with the Applicant as a supporter. The Respondent did not appear, and was not represented.

Two previous dates for Case Management Discussions had been postponed at the request of the Respondent for various reasons, which postponement requests were opposed by the Applicant.

The Tribunal issued directions to the parties after considering the extensive material provided to it by both parties and set a hearing.

The Tribunal noted at the Case Management Discussion that there appeared to be dispute concerning the validity of the legal process utilised in bringing this application.

Hearing

A Hearing was held on 20th February 2020 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Applicant again appeared, and was not represented. The Applicant's wife, Mrs Agnes Gemmell again attended with the Applicant as a supporter. The Respondent again did not appear, and was not represented.

The Respondent had e-mailed the Tribunal the day before the Hearing indicating that she was unwell, and would not be attending. She did not seek a postponement, and indicated to the Tribunal that she longer opposed the granting of the order sought by the Applicant, but wished thirty one days to move out of the Property.

Rule 29 (Hearing case in the absence of a party) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides that if a party does not appear at a hearing, the Tribunal may proceed with application upon the representations of any party present and all the material before it, if satisfied that the requirements of giving notice of a hearing have been complied with.

The Tribunal was so satisfied, and proceeded with the application in the absence of the Respondent upon the Applicant's representations and all the material before it, including that provided by the Respondent.

The Applicant had provided an updated rent arrears statement in response to the Tribunal's earlier direction of 15th January 2020, which disclosed arrears of rent currently totalling £8,100.00. That statement had been intimated timeously on the Respondent by the Tribunal.

The Applicant confirmed that the parties had entered into a verbal tenancy agreement, which they had never reduced to writing. That agreement had a start date for the lease of 1st July 2015, and ran for an initial term of one year. Monthly rental payments of £450.00 were agreed, and that the agreement might continue at the end of the initial term for further periods of one year.

The Applicant served a notice to quit dated 30th July 2019, which was sent by recorded delivery letter on that same day. The notice to quit advised the Respondents to quit the Property by 30th September 2019.

A form AT6 dated 30th July 2019, and indicating that proceedings would not be raised before 30th September 2019, was sent with the notice to quit.

Statement of Reasons

Section 18(6) of the *Housing (Scotland) Act 1988* as amended (hereinafter referred to as "the Act") provides:

"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.

(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][18] '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."

The provisions of this section relevant to the issues raised in this application are that the Tribunal may only make an order for possession on one or more of the grounds set out in Schedule 5 to the Act, and 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 the terms of the tenancy make provision for it to be brought to an end on the ground in question.

The 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.

The effect of these provisions is that the Tribunal may only make an order for possession on the grounds sought in this application if either the terms of the tenancy make provision for it to be brought to an end on the ground in question, or if the contractual tenancy has been terminated (by a valid notice to quit) and a statutory assured tenancy has arisen.

As the lease is for a period of no more than one year, it may be validly constituted verbally and without a written agreement (see *Stair Memorial Encyclopedia, Landlord and Tenant (Reissue)* at paragraphs 27).

The lease commenced on 1st July 2015, and was for an initial term of one year. As neither party served notice terminating the lease, the agreement continued upon the legal presumption of *tacit relocation* for further periods of the same duration as the original lease agreement provided for. That period is one year.

That being so, the *ish* date would appear to have fallen on 1st July 2016, and in the event of *tacit relocation* operating, falling on the 1st July each year thereafter.

The notice to quit required to end the lease on a date which is an *ish* of the lease, but the date specified of 30th September 2019 was not an *ish* of the lease (see *Rennie & Ors. – Leases* S.U.L.I. (1st Ed.) paragraphs 22-46 to 22-49, *Gloag & Henderson – The Law of Scotland* (14th Ed.) paragraph 35-25 and 35-26, and section 38 of the *Sheriff Courts (Scotland) Act 1907*). Upon that basis, the notice to quit is invalid.

A further defect in the notice to quit which renders it invalid, is that it fails to include the prescribed information set out in paragraph 2 of Schedule 1 to the *Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988* as amended. The notice to quit is invalid on that basis also (see *Rennie & Ors. – Leases* S.U.L.I. (1st Ed.) paragraphs 22-47).

For these reasons, the lease has not been terminated by a valid notice to quit, remains in force, and a statutory assured tenancy has not arisen.

The remaining question is whether the Tribunal was entitled to make an order for possession in this application, upon the basis that the terms of the lease agreement are deemed by the Tribunal in relation to ground 8 of Schedule 5 of the Act to "make provision for it to be brought to an end on the ground in question" in terms of section 18(6)(b) of the Act.

That question was considered previously in the Sheriff Court in the cases of *Royal Bank of Scotland v Boyle* 1999 Hous LR 63 and *Eastmoor LLP v Bulman* [2014] 6

WLUK 135, which held that a lease may only be brought to an end prior to its *ish* if there is a statutory or conventional irritancy, and that section 18(6) of the *Housing (Scotland) Act 1988* is in effect a provision *anent* conventional irritancies the purpose of which is to restrict the conventional irritancies to the grounds set out in section 18(6)(a). For that reason, the tenancy agreement must provide for it to be brought to an end on the ground in question, being a ground in schedule 5 to the 1988 Act specified in section 18(6)(a).

In paragraph 12-13 of *Royal Bank of Scotland v Boyle*, the then Sheriff Principal Wheatley noted:

"I think it is important that the connection between the tenancy agreement and the schedule is reasonably precise and complete. In addition, it appears to have been the intention of the statute that in these agreements the tenant in particular has taken the additional step of binding himself into a contractual arrangement which provides that he can lose possession on certain grounds before that possession can be granted to the landlord. I am therefore unable to accept the closely argued submissions of the agent for the landlord that a more general indication in the tenancy agreement as to what might happen should rent arrears arise is sufficient to satisfy the terms of s 18(6)(b)."

Interestingly, in the Editor's Note to the case, the editor comments:

"The standard practice among housing associations and many other assured tenancy landlords is to repeat the terms of Sched 5 verbatim in the tenancy agreement. Since the agreements are a common style held on a word processor, this creates no real difficulty for the landlord and ensures that there can be no doubt that any ground which might come to be relied upon is actually part of the lease. Given the widespread nature of this practice it is unlikely that there will be many cases which will test the extent to which something less than full repetition will suffice.".

In paragraph 30 of *Eastmoor LLP v Bulman* [2014] 6 WLUK 135, Sheriff Jamieson noted:

"Since therefore a tenancy agreement may only be "brought to an end" prior to its ish on certain permitted conventional grounds, I am of the view, as with the sheriff principal in the Royal Bank case, that the parties must contract in such a way that the contract itself sets out the grounds for bringing to an end the lease prior to determination of its ish. It is not sufficient for the tenancy agreement merely to refer to the number of the ground in schedule 5 . Best practice is to refer to its number and terms *ad longum* ; if the ground is summarised, the summary must contain the "essential ingredients" of the ground in question.".

The Tribunal agrees with the comments of both the Sheriff Principal and the Sheriff, for the reasons that they fully explain.

As the lease agreement in this application was verbal, and there is no evidence that the parties discussed or agreed a term for bringing to an end the lease prior to determination of its ish, the contract clearly does not set out the grounds for bringing

to an end the lease prior to determination of its ish, and section 18(6)(b) of the Act cannot apply.

For these reasons, the Tribunal did not consider that the terms of the tenancy agreement were sufficient to provide for it to be brought to an end on the ground in question, being a ground in schedule 5 to the Act specified in section 18(6)(a), in terms of section 18(6)(b) of the Act.

In those circumstances, the Tribunal was not entitled to make an order for possession, and dismissed the application.

Decision

For the above reasons, the Tribunal dismissed the application and refused the order sought.

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.

N Kinnear

Legal Member/Chair

20/02/20

Date