



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 of the Private Housing (Tenancies)(Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/21/1168

Re: Property at 3 Robertson Court, Armadale, West Lothian, EH48 3LS (“the Property”)

Parties:

Mrs Lorraine Ford, 5 Breadalbane Place, Polmont, FK20 0RF (“the Applicant”)

Miss Katrine Boyle, Mr Gerard Boyle, 3 Robertson Court, Armadale, West Lothian, EH48 3LS (“the Respondent”)

Tribunal Members:

Gabrielle Miller (Legal Member) and Eileen Shand (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Applicant is entitled to an order for repossession of the Property.

Summary of Discussion

Background

1. An application was received by the Housing and Property Chamber dated 29th April 2021. The application was submitted under Rule 109 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the 2017 Regulations”). The application was based on the Respondent not adhering to ground 1 of the Private Housing (Tenancies) (Scotland) Act 2016.
2. A Case Management Discussion (“CMD”) was held on 30th August 2021 at 10am by teleconferencing. The Applicant was represented by Ms Catriona MacDonald, solicitor from Blackadder & McMonagle Solicitors. The Applicant

was not present. The First Named Respondent, Mr Gerard Boyle, was represented by Miss Trudy Gill, solicitor from Shelter Scotland. She appeared with consent of the Second Named Respondent. Neither Respondents were present. Ms Gill told the Tribunal that she was only instructed the week prior to the CMD. She had only just been able to get the paperwork. She required further time to allow her to fully peruse the paperwork and to get full instructions from the First Named Respondent. She was not able to speak fully to the Second Named Respondent due to her being unwell. Miss Gill hoped to be able to clarify the position if she was representing both Respondents or not. Ms MacDonald did not object to the CMD being continued on that basis. The Tribunal was satisfied that the CMD should be continued to a new date to allow for the First Named Respondent to fully instruct Miss Gill. The Tribunal issued a direction which was to be complied with prior to the next CMD. Ms Gill had emailed a submission prior to the CMD which included medical evidence pertaining to the Respondents.

3. On 12th October 2021 the Respondents solicitor lodged a submission stating the application was incompetent and should be dismissed. This was on the basis that the tenancy was not a Private Residential Tenancy (“PRT”). It was unclear that there had ever been an AT5 in which case it was an assured tenancy or was a short assured tenancy protected under the saving provisions within section 32 of the Housing (Scotland) Act 1988 (“the 1988 Act) and that the Applicant does not have title.
4. On 20th October 2021 the Applicant’s solicitor lodged a submission stating the motion to dismiss should be refused on the basis that the correct procedure was followed and that the document signed in October 2018 was a Private Residential Tenancy as the savings provisions could not be met.
5. A CMD was held on 25th October 2021 at 10am by teleconferencing. The Applicant was represented by Ms Catriona MacDonald, solicitor from Blackadder & McMonagle Solicitors. The Applicant was not present. The Applicant’s son and daughter in law, Mr Gavin Ford and Mrs Helen Ford, were present but did not participate in the hearing. The Respondents were represented by Miss Trudy Gill, solicitor from Shelter Scotland. The Respondents were not present. Ms Gill informed the Tribunal that she needed more time for instructions as she had been on annual leave. Ms Gill stated that there was no evidence that an AT5 had been signed with the first lease in 2010. She had tried to obtain a copy of the lease from Housing Benefit but it did not have a copy of the AT5. Her clients did not remember signing it. She motioned that the tenancy was in fact an assured tenancy which cannot be ended by the creation of a PRT. Should the AT5 be accepted then her position was that the Applicant was acting only in her power as Executrix meaning that she was doing so for the late landlord thus allowing the saving provisions to potentially apply. Both positions noted that the PRT was not created and the application was incompetent. Ms McDonald told the Tribunal that the Respondents were fully aware that the late landlord had died and that they were contracting with the Applicant as a new landlord thus entering into a new tenancy agreement. As it is not possible to enter into a new assured tenancy agreement post 1st December 2017, this tenancy agreement was a PRT. It is accepted that the

Applicant had erroneously given a Short Assured Tenancy agreement when it should have been a PRT. She noted that under schedule 5 that the saving provisions cannot continue a Short Assured Tenancy agreement where there is a change such as a new landlord. Thus the application is competent. The Tribunal noted the divergence in opinions and that Ms Gill required more time, the Tribunal considered the request for more time to be in the interests of justice. The Tribunal continued matters to a full hearing. The hearing was to address the following questions:-

- a. Was a Short Assured Tenancy agreement entered into in 2010?
- b. If so what was the evidence that an AT5 was signed or what evidence was there that it was not signed?
- c. If the tenancy was an assured tenancy what effect did the subsequent signing of new leases have upon that? Did that terminate the lease each time? Did each new lease have any legal significance or consequence?
- d. Did the signing of the lease in October 2018 terminate the tenancy and allow a PRT to be created?
- e. If it was a Short Assured Tenancy then can the savings provision under section 32 of the 1988 Act be applied?
- f. If it was a Short Assured Tenancy was the Applicant entering the agreement as a new landlord and so a new party causing the savings provisions to be void?
- g. Given that the Applicant had registered as landlord prior to signing the lease could she be held out as anything other than a new landlord?
- h. Did the Applicant have title to sign the lease in October 2018 given that title for the Property was transferred legally to her in October 2021? Did she require to have the title transferred prior to signing a new lease with the Respondents?
- i. Was the Applicant signing as herself or as her role as Executor Dative when she signed the lease in October 2017 given that she did not hold herself out as Executor Dative on the lease.

This list of questions was not exhaustive list and did not narrow the scope of questioning for the Tribunal.

6. The Tribunal issued a direction which was to be complied with by close of business on 2nd December 2021 to allow both parties to give instructions to their solicitors regarding the submissions contents.
7. On 20th October 2021, the Applicant's solicitor emailed with an inventory and submission. This included the tenancy agreement dated 1st October 2018, Confirmation of Executor dated 20th April 2018 and acknowledgment from Registers of Scotland regarding the Property dated 12th October 2021.
8. On 24th November 2021, the Respondents solicitor wrote advising that she was withdrawing from acting for the Respondents.

Hearing

9. A hearing was held on 16th December 2021 at 10am by teleconferencing. The Applicant was represented by Ms Catriona MacDonald, solicitor from Blackadder & McMonagle Solicitors. The Applicant was present. The Applicant's son and daughter in law, Mr Gavin Ford and Mrs Helen Ford, were present but did not participate in the hearing. The Respondents were both present with the First Named Respondent, Mr Gerard Boyle, appearing for both Respondents with the consent of the Second Named Respondent, Miss Katrine Boyle. Ms Boyle came on the teleconference to confirm this to the Tribunal.
10. At the start of the Tribunal both parties indicated that they had not had the opportunity to discuss any potential agreement and were minded to do so whilst recognising that the Tribunal had not come to a view. The Tribunal adjourned to allow the parties to enter into discussions. After the adjournment Mr Boyle indicated that he and his sister both needed a break and that he would like to speak to the local council to confirm what he had discussed with Ms MacDonald. Ms MacDonald stated that the Applicant wished to confirm his status once he had an order for eviction and that it would action a requirement for the Respondents to be rehoused. In the spirit of negotiation the Tribunal allowed this further adjournment. On recommencing the hearing Mr Boyle stated that he had been able to speak with Shelter Scotland briefly who had confirmed what had been said to him by Ms MacDonald, namely that he would be given a higher priority if an order for eviction had been granted. Mr Boyle stated that he had considered the offer not to enforce the Order until 28th February 2022 but considered this insufficient time for him to be able to obtain a new property. He was aware that if the order is sent out in normal process then the Applicant would be able to remove the Respondents from the Property on or around the end of January.
11. The Tribunal considered that there were three main issues –
 - a. If the tenancy was a PRT from the signing of the lease in October 2018 meaning that the application was competent;
 - b. Was it the intention of the Applicant to sell the Property?; and
 - c. Was it reasonable to grant an order?
12. The Tribunal heard from Mr Boyle regarding if the tenancy was a PRT or a Short Assured Tenancy. Mr Boyles position was that it was either an assured tenancy or a Short Assured Tenancy. He told the Tribunal that he considered this for the following reasons –
 - a. He considered that a tenancy agreement can only be done if both parties agree that the change is to be made. He confirmed that he had signed the lease in 2018. He did not know what he was signing and said that clearly the Applicant did not know what she was signing either. Further that it had not been clear as the tenancy had been changed a few times with leases signed each year. The Applicant's son had acted on her behalf dealing with the lease.
 - b. Mr Boyle stated that he accepted that the tenancy agreement was either an assured tenancy or a short assured tenancy. He was not able to confirm if he did or did not sign an AT5;

- c. Mr Boyle considered that any change needed to be agreed by the tenant and landlord in writing;
- d. While he accepted that new tenancies from 1st December 2017 were PRTs he considered that his own circumstance meant that the Short Assured Tenancy had continued;
- e. He considered that he has either a short assured tenancy or an assured tenancy as his tenancy was created after 2nd January 1989;
- f. On the basis that it is a short assured tenancy or an assured tenancy then it should continue until terminated by the correct procedure;
- g. Though not directly specified by name, Mr Boyle stated that tacit relocation should be in play in that the tenancy would renew itself without the requirement of a new lease;
- h. As a short assured tenancy or an assured tenancy it can only be terminated with a Notice to Quit; and
- i. When a landlord dies the tenancy should continue on the same terms without the tenants being affected.

13. Ms MacDonald referred to her submission. Her position remained that regardless of the circumstances leading up to it, a new tenancy had been created that could not be a Short Assured Tenancy and be subject to the savings provisions. As such the tenancy was a PRT and the notices were served appropriately and the action remains competent.

14. Reasonableness was considered next. Mr Boyle raised several points as to why he and his sister should not be evicted. These were-

- a. Housing issues. He and his sister have sought to be rehoused since 2012 when their mother passed away. They had been offered a house in 2013 but the offer had been withdrawn from the council. He did not know why. There had been nothing forthcoming since from his local council. He did give them the section 11 notice. When his solicitor from Shelter had been representing them she had contacted the local council without success. It transpired that the case worker dealing with his case had left. He has also been informed that he had the maximum medical points. He has been focused on dealing with his sister's health and his health and has not pursued discussions with his local council during the time that the action has been raised. Mr Boyle considered that he would need more time to allow the local council to allocate a house. Mr Boyle confirmed that he and his sister were willing to move should they be offered an appropriate property from the local council;
- b. Type of house. Mr Boyle noted that due to his sister's health condition and his health conditions special modifications and considerations need to be made before they can move into a new property. This includes specialist paint being applied to all walls with at least 2 coats being applied; and
- c. Health issues. Mr Boyle detailed to the Tribunal that he and his sister have significant chronic and enduring health issues. This limits all aspect of their daily living and mobility. It has caused them to be very isolated over the last 17 years. This has only been heightened during the Covid pandemic. Mr Boyle stated that he had only left his house twice in the last 17 years. This included when they moved house in 2010. A letter

from their GP dated 15th December 2020 was submitted to the Tribunal by the Respondents solicitor prior to her withdrawing from acting. This detailed many of the Respondents health conditions. The Tribunal does not consider it appropriate to detail them and their consequences within this decision.

15. Ms MacDonald noted that the Applicant was not unsympathetic to the Respondents position but that it remains reasonable for the Order to be granted. The Applicant has title to the Property and has served the notice appropriately and also a Section 11 notice to the local authority. The Applicant is looking to sell the Property which has been demonstrated by the letter from estate agents Allan & Harris, dated 2nd July 2021, who stated that enquires have been made but the Property needs to be empty in order to sell it. She said that the Applicant's husband died in 2017. He had been the landlord. The Applicant is not able to grieve while still owning the Property. She does not wish to continue being a landlord. While the Applicant remained sympathetic to the Respondents position they have had 18 months nearly since the Notice to Leave was served. It is the Applicant's position that this should be sufficient notice. The Applicant has no other option. Ms MacDonald did have discussions with Ms Gill prior to her withdrawing. She was of the understanding that Shelter Scotland were providing legal advice but also homeless advice and support.
16. Mr Boyle wanted to say on behalf of him and his sister that they had been very sorry and upset at Mr Ford's passing. He noted that this situation was not good for either party and considered that the local council had contributed to difficulties for both parties by failing to assess them for a property.
17. Mr Boyle indicated that he wished to make a proposal to the Applicant regarding enforcement of the Order. He proposed that it not be enforced until the end of April 2022 to allow his sister and him to find alternative accommodation with the local authority. Ms MacDonald said that the Applicant had already made a proposal of the end of February 2022 at the last adjournment and that proposal was refused. The Tribunal allowed further discussions while they deliberated and would hear from parties prior to giving their decision. On returning from the deliberations, Ms MacDonald said that the Applicant had offered to extend the time that the Order would not be enforced until 13th March 2022. Mr Boyle stated that would not be enough time. The Tribunal reminded Mr Boyle that an order for eviction would mean that the Order could be enforced at the end of January 2022. Mr Boyle still wished to proceed and hear the Tribunal's decision. The Tribunal informed both parties that it considered that the application was competent and that it was reasonable to grant an order for eviction.
18. Both parties were given the opportunity to address any issues not discussed. Neither had any further comments.

Findings in fact

19. The Applicant's late husband, Mr Hiram Ford, was the landlord when the Respondents entered into the first lease for the Property in October 2010.

20. Mr Ford and the Respondents signed a new lease each year.
21. In 2017 Mr Ford died and the Applicant subsequently became the owner of the Property. As Mr Ford died intestate and there was a change in solicitor it was not until October 2021 that confirmation was issued.
22. In October 2018 the Applicant and the Respondent signed a new lease headed as a Short Assured Tenancy agreement. This was in fact a Private Residential Tenancy agreement.
23. A Notice to Leave was issued on 22nd July 2020 based on ground 1.
24. The Applicant intends to sell the Property.

Reasons for decision

25. The Tribunal noted the considerable amount of information that Mr Boyle had provided since his solicitor had withdrawn agency and the information submitted by Ms MacDonald. The Tribunal was grateful to both parties for providing this.
26. The Tribunal was satisfied that the Applicant had title to enter into the lease with the Respondents.
27. The Tribunal first considered whether a PRT had been created when the new lease was signed in October 2018. The Tribunal was mindful that under section 3 of the Private Housing (Tenancies)(Scotland) Act 2016 that there is no requirement for a PRT to be in writing. This meant that it was possible for the lease in October 2018 to be a PRT even though it was headed a Short Assured Tenancy. The Tribunal then considered if in fact a Short Assured Tenancy could be continued under the savings provision in Regulation 6 of The Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No. 3, Amendment, Saving Provision and Revocation) Regulations 2017. The savings provision requires that the three criteria are met in order for the savings provision to be relevant. These are that the Short Assured Tenancy must come into being at the ish of an existing tenancy, that it must be substantially the same property and that it must be the same landlord and tenant. The Tribunal accepts that the first two criteria are met but found the test to fail on the third criteria. This is namely because Mr Ford had died and the landlord had changed to the Applicant. Prior to this the Applicant had not been held out as landlord in any way. This was a clear change. We did not accept Mr Boyle's point regarding tacit relocation as that is when a lease continues without the need for a new tenancy. This is what would have happened had the Respondents not entered into a new tenancy agreement and as such created a new tenancy in October 2018. The same applies for the principles of succession. The Respondents had freely and willingly entered into a new tenancy with the Applicant. They had signed it accordingly. While all parties were ignorant of it being a PRT it was not ever the design of the tenancy to be a continuation but a new tenancy. The Respondents were aware of that point. The Tribunal did not consider that the points applied by Mr Boyle were applicable in terms of the law detailed above.

On this basis we accepted the Applicant's position that a new PRT had been created by the signing of the new lease in October 2018. As such the notices were served in the correct legal process and the application was competent.

28. Issue was raised as to if this was an assured tenancy or short assured tenancy. Ms MacDonald referred to her submission and that the letting agent had confirmed to her that standard procedure was to issue an AT5 with a tenancy agreement. It is unknown why this has not been recorded with the tenancy. Mr Boyle confirmed that he was not able to rebut that an AT5 had been signed. Neither he nor his sister was able to remember what had happened at the signing of the first tenancy in 2010. Given that there was no evidence to dispute it and the Respondents did not know if they had signed and AT5 the Tribunal was satisfied on the balance of probabilities that an AT5 was signed.
29. It was accepted by both parties that the Applicant intended to sell the Property. The Tribunal found no cause to dispute this and found this ground established.
30. The Tribunal found that it was reasonable to grant an order for eviction. The Tribunal noted the Respondents position regarding their health issues and rehousing requirements. However, Mr Boyle gave evidence that he would be willing to move if an appropriate property was available. This was a clear indication to the Tribunal that there was volition to move in spite of the ongoing health conditions that he and his sister have. The Tribunal did not consider this to be a reasonable ground to refuse the granting of an order. In terms of the Respondents housing issues the Tribunal did not consider this to be a reasonable ground to refuse the granting of an order. Mr Boyle gave evidence he had not sought to find out what having homeless priority would do for his search for a house. He had only contacted Shelter Scotland once again when the Tribunal allowed him an adjournment to do so and get advice on his status. This advice was that he will be given a much higher priority than he has currently as there is a duty to rehouse him once an order has been granted. In addition to this Mr Boyle raised the special requirements that needs to be met to move into a property. Mr Boyle gave evidence that this was something that he and his sister could pay to be done to a property. It was not prohibiting him from moving. On balance, it was reasonable to grant an order for eviction.

Decision

31. The Tribunal found that the application was competent and that ground 1 has been established. It is reasonable for the Tribunal to grant an order in favour of the Applicant. The Applicant is entitled to an Order of for recovery of possession. The decision was unanimous.

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.

Gabrielle Miller

16th December 2021

Legal Member

Date