



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 33 of the Housing (Scotland) Act 1988.

Chamber Ref: FTS/HPC/EV/18/1316

Re: 80, Bardrainney Avenue, Port Glasgow, PA14 6HA ("the Property")

Parties:

The Church of Scotland General Trustees (SCO14574) 121 George Street, Edinburgh, EH2 4YR ("the Applicant")

Susan Killean, Solicitor, The Church of Scotland, 121 George Street, Edinburgh, EH2 4YN ('The Applicants' Representative')

William Pickett and Donna Pickett residing together at 80 Bardrainney Avenue, Port Glasgow, PA14 6HA ("the Respondents")

Helen McHugh, Solicitor, Brown & Co Legal LLP, Solicitors 9 Sir Michael Street, Greenock, PA15 1PQ ('The Respondents' Representative')

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

Tribunal Members: Jacqui Taylor (Legal Member) and Gordon Laurie (Ordinary Member).

1. Background

The Applicant applied to the Tribunal for eviction/ possession of the Property under section 33 of the Housing (Scotland) Act 1988, in terms of Rule 66 of the Procedure Rules. The application was received by the Tribunal Administration on 29th May 2018. The application states that the Short Assured Tenancy was past the initial period and was continuing in terms of clause 1 of the tenancy agreement. Notice to Quit and section 33 Notice served and the Tenant has not removed.

2. Documents lodged with the Tribunal.

The Documents lodged with the Tribunal were:-

- Two Tenancy Agreements signed by the Tenants and dated 22nd July 2014 and 25th July 2014. A copy of the Tenancy Agreement dated 22nd July 2014 was submitted with the application.
- Forms AT5
- Notice to Quit dated 7th March 2018 giving the Tenant formal notice to quit the Property on or before 22nd May 2018.
- Section 33 Notice to the Tenant advising them of the Landlords' requirement to possess the Property at the Termination of the Short Assured Tenancy.
- Proof of delivery slip in respect of the Recorded delivery of the Notice to Quit and Section 33 Notice showing that the Tenants signed for the letter on 9th March 2018.
- Section 11 Notice addressed to Inverclyde Council and emailed to Homelessness.Services@inverclyde.gov.uk.

3. Case Management Discussion ('CMD').

A CMD had previously taken place on 2nd August 2018.

The CMD Note concluded that it was agreed by all parties that the matters in dispute were as follows:

- a. Is the Tenancy Agreement in force the one put forward by the Applicants or the one put forward by the Respondents.
- b. In the event that the one in force is the one put forward by the Respondents, how should following clause contained therein be interpreted:
"Term: A term of 12 months commencing 22nd July 2014 and ending 22nd July 2015 and on a rolling basis thereafter until a new lease is signed or two month's notice is given by either party on the same date as the rent is due"

The chairperson of the CMD issued a Direction dated 2nd August 2018 which directed the Respondent to provide the principal Tenancy Agreement which they say is the correct one no later than 14 days prior to the hearing set for 25th September 2018.

4. Hearing

This case called for a Hearing at 10am on 25th September 2018 at the Glasgow Tribunals Centre, Room 110, 20 York Street, Glasgow, G2 8GT.

The Applicants were not present but their representative, Solicitor Susan Killean of the Church of Scotland Legal Department, was present.

The Respondents were present and were represented by their solicitor Helen McHugh of Brown & Co Legal LLP, Solicitors.

The parties had been served with notice of the hearing by letter dated 14th September 2018 sent by recorded delivery post.

The Applicant had lodged in evidence the two original leases. The first lease had been printed on blank paper, it had been signed by the Tenants and was dated 22nd July 2014. The Tenants' signatures had not been witnessed. The lease had not been signed by the Landlords. The second lease had been printed on Lind Letting headed paper and was dated 25th July 2014. It had been signed by Barry Lind, as the Landlords' agent, in the presence of the witness K Sidebotham and it had been signed by the Tenants in the presence of the same witness K Sidebotham.

5. The Tribunal identified with the Applicants' representative and the Respondents' representative the following agreed facts:

5.1 The Respondents are Tenants of the Property 80 Bardrainey Avenue, Port Glasgow, PA14 6HA.

5.2 There are two leases of the Property, being the two leases produced by the Applicants dated 22nd and 25th July 2014. Both leases are Short assured Tenancies.

5.3 The Applicants had properly served the Tenants with the form AT5 prior to commencement of the leases. The form AT5 was dated 15th July 2014.

6. Evidence of the Witnesses.

In relation to the matters in dispute the Applicants' representative Susan Killean had intimated to the Tribunal that two witnesses had been cited to give evidence to the Tribunal namely Barry Lind and Kate Sidebotham, both of Lind letting Limited, Bridge of Weir.

Kate Sidebotham gave her evidence first. She explained that they had previously leased the Property to different tenants on behalf of the Applicants and when the previous tenants had vacated the Property Lind Letting advertised the Property as being available for lease. William and Donna Pickett viewed the Property and telephoned her office to advise that they wished to take up the tenancy. They completed an application form which they returned to the office and they also provided their ID. She explained that usually the lease is signed when the tenants take entry to the Property. However on this occasion William Pickett had contacted their office to ask for the lease before they moved in as he wanted to apply for Housing Benefit. Consequently she prepared the lease by printing the lease document on Lind Letting note paper and signed it to indicate that she was witnessing the signatures of the tenants, even although the tenants had not signed the lease. She then sent the lease to William and Donna Pickett. The lease that she sent to them is the lease dated 25th July 2014.

After the lease had been sent to William and Donna Pickett the Church of Scotland requested that their own lease template should be used for the lease. Consequently a fresh lease was prepared and taken to the handover meeting on 22nd July 2014 by Barry Lind, her colleague. William and Donna Pickett signed the fresh lease at the handover meeting. That fresh lease is the lease dated 22nd July 2014.

Barry Lind returned to the office following the handover meeting with the tenants and brought both leases to the office.

She explained that the original lease was dated 25th July 2014 as this was the original date of entry, albeit that the date of entry was subsequently brought forward to 22nd July 2014.

She acknowledged that the lease that was dated 22nd July 2014 had not in fact been signed by Lind Letting, on behalf of the Landlords or by the Landlords themselves. She thought that Barry Lind had signed the lease.

Barry Lind then gave his evidence to the Tribunal.

He explained that Lind Letting had been in business for approximately 11 years. In connection with the lease of 80 Bardrainey Avenue, Port Glasgow he confirmed that his company were instructed by the elders of Bardrainey Church to lease the Property. He recalled meeting William and Donna Pickett at the property on 22nd July 2014. The church had asked that they use the church's lease template and accordingly he took the fresh lease with him to the handover meeting with the tenants. As far as he could recall William and Donna Pickett signed the church's preferred lease at the handover meeting. They also signed the other lease which had been printed on Lind Letting headed paper. Following his handover of the Property to the tenants he left with both signed leases.

7. Submissions by the parties' representatives.

After the two witnesses had given their evidence the parties' representatives made their submissions.

7.1 Susan Killean made her submissions to the Tribunal in the following terms:

1. Both leases have been signed.
2. It was the intention of the Church of Scotland that their style lease should be used for the lease of the Property to William and Donna Pickett.
3. Whilst the wording of the clause setting out details of the term of the leases and the notice to be given is different in both leases it is her position that notwithstanding these differences the Notice to Quit and section 33 notice which has been served on the Tenants validly terminates both leases.
4. In connection with the lease dated 25th July 2014 the lease states:
'Term: A term of 12 months commencing 22nd July 2014 and ending 22nd July 2015 and on a rolling basis thereafter until a new lease is signed or 2 month's notice is given by either party on the same date the rent is due.'

She explained that tacit relocation does not apply to this lease. The Law Commission have published a paper on tacit relocation and in all cases tacit relocation applies where the lease is silent as to what happens after the lease has expired. As the lease dated 25th July 2014 contains a provision for continuation this means that tacit relocation does not apply. In her view 'rolling basis' means that the lease continues on until terminated. The lease dated 25th July 2014 contains a provision that notice may be given at any rent due date. The lease does not state that notice may only be given at the lease date.

She accepted that the lease dated 22nd July 2014 had not been signed by or on behalf of the Trustees of the Church of Scotland, as landlords. She explained that she could sign the lease now. She also submitted that taking entry to the Property cured any defect in execution.

She advised that she did not have a copy of the letter Lind Letting would have sent to the Respondents when they sent them a copy of the lease after the handover meeting. She restated her contention that regardless of which lease is the valid lease notice had been properly served and the tenancy should be terminated.

7.2 Helen McHugh made her submissions to the Tribunal in the following terms:

1. If the lease dated 22nd July 2014 is the valid lease she accepts that the Notice to Quit and section 33 notices have been validly served.

2. However it is her contention that the lease in force is the lease printed on Lind Letting paper and dated 25th July 2014. It had been signed by or on behalf of both parties and it is this lease that William and Donna Pickett had a copy of. Her clients had only had sight of the other lease (the church style lease dated 22nd July 2014) when they received a copy of the eviction application and also during previous sheriff court proceedings in December 2017. However, following questioning by the Tribunal, she agreed that the church style lease had in fact been signed by the Respondents.

In her view the Term clause of the lease dated 25th July 2014 means that the lease continues on a rolling basis for a further year after 22nd July 2015 and yearly thereafter and the two months' notice required would interrupt the 12 month renewal taking place. It is only possible to end the lease on 22nd July in any particular year. The Notice to Quit served by the applicants was invalid as it purported to end the lease on 22nd May 2018. In her view to validly terminate the lease dated 25th July 2014 notice to quit must be given by 22nd May to stop the lease continuing for a further year. The Notice to Quit served by the applicants was invalid as it does not tie in with the ish date.

8. Decision

The Tribunal considered the documents submitted and the parties oral and written representations.

8.1 In relation to the matters in dispute the Tribunal determined as follows:-

a. Is the Tenancy Agreement in force the one put forward by the Applicants or the one put forward by the Respondents.

The lease dated 22nd July 2014 had not been signed by the Landlords. Section 2 of the Requirements of Writing (Scotland) Act 1995 states that leases must simply be subscribed by the landlord and the tenant. Therefore the Tribunal determine that the lease dated 22nd July 2014 is not a valid lease and the lease which sets out the terms of the tenancy between the parties is the lease dated 25th July 2014.

The Tribunal accepts the evidence of Kate Sidebotham to the effect that she signed the lease dated 25th July 2014 before it had been subscribed by the Tenants. Section 3 (d) of the Requirements of Writing (Scotland) Act 1995 states if it is established that the person who signed the document, purporting to be the witness of that granter's subscription, did not witness such subscription there shall be no presumption that the

document has been subscribed by that grantor. However, the Tribunal accepts the evidence of Helen McHugh and the respondents that they had signed the lease dated 25th July 2014. The Tribunal also accepts the evidence of Barry Lind that he signed the lease dated 25th July 2014, as agent of the Landlords, at the handover meeting at the Property on 22nd July 2014.

b. In the event that the one in force is the one put forward by the Respondents, how should following clause contained therein be interpreted:

"Term: A term of 12 months commencing 22nd July 2014 and ending 22nd July 2015 and on a rolling basis thereafter until a new lease is signed or two month's notice is given by either party on the same date as the rent is due"

The Tribunal acknowledge that this clause is poorly drafted. However they determine that this clause, which is contained within the lease dated 25th July 2014, means that the lease continues from 22nd July in any particular year to 22nd July the following year and rolling from year to year thereafter until two months notice is given prior to the 22nd day of any particular month. This is the effect of the words 'on the same date as the rent is due'.

If this clause had been framed to mean that notice could only be served as at 22th July in any particular year the Term clause would have stated:

Term: A term of 12 months commencing 22nd July 2014 and ending 22nd July 2015 and on a rolling basis thereafter until a new lease is signed or two month's notice is given by either party on the ish or 22nd July in any particular year.

8.2 Following these determinations the Tribunal considered if the terms of section 66 of the Procedure Rules and section 33 of the Housing (Scotland) Act 1988 had been complied with.

8.2.1 Requirements of Section 66 of the Procedure Rules.

(a) The Tribunal confirmed that the application correctly detailed the requirements of section 66(a) of the Procedure Rules namely:-

- (i) the name, address and registration number of the Landlords.
- (ii) the name and address of the Landlord's representative.
- (iii) the name and address of the Tenant.

(b) The Tribunal confirmed that the application had been accompanied by the documents specified in Section 66(b) (ii) and (iii) of the Procedure Rules:

- (ii) The Notice that the tenancy is a short assured tenancy.
- (iii) The notice given to the tenant under section 33(1)(d) of the 1988 Act.

Section 66(i) provides that the application must be accompanied by a copy of the tenancy agreement (if available) or if this is not available as much information about the tenancy as the Landlord can give. The Applicant had provided a copy of the lease signed 22nd July 2014 with the application and subsequently provided the principal copies of both leases dated 22nd July and 25th July 2014. As this section qualifies the

requirement to produce the lease by stating 'if available' the fact that the lease dated 25th July 2014 was not produced at the time the application was submitted the Tribunal determine that this does not invalidate the application.

(c) The Tribunal confirmed that the application form had been correctly signed and dated by the Landlords' representatives as required by Section 66(c) of the Procedure Rules.

8.2.2 Requirements of Section 33 of the Housing (Scotland) Act 1988, as amended.

This section requires:-

- (a) That the Tribunal are satisfied that the Short Assured Tenancy has reached its finish.
- (b) That tacit relocation is not operating.
- (d) That the Landlord has given to the Tenants notice stating that he requires possession of the Property.

In terms of section 33(2) the period of notice is two months.

The Tribunal determine that Notice to Quit had been correctly served on the Respondents giving them the required 2 months notice prior to 22nd May 2018. The Notice to Quit was dated 7th March 2018 and had been received by the Respondents on 9th March 2018, consequently the lease had reached its ish.

The Tribunal determine that tacit relocation is not operating as the lease provides that it continues on a rolling basis.

The Tribunal accepts the evidence of the parties' representatives that there is no further contractual tenancy in existence beyond the two leases dated 22nd and 25th July 2014 and the lease dated 22nd July 2014 is invalid as it does not comply with the terms of Section 2 of the Requirements of Writing (Scotland) Act 1995, as already stated.

The Tribunal determine that the section 33 notice served on the Respondents was valid as it correctly gave them 2 months notice prior to 22nd May 2018. It was dated 7th March 2018 and had been received by the Respondents on 9th March 2018

Section 11 Homelessness etc (Scotland) Act 2003.

This section provides that where a landlord raises proceedings for possession of a dwellinghouse, the landlord must give notice of the raising of the proceedings to the local authority in whose area the dwellinghouse is situated.

The Tribunal determine that the required notice had been given to Inverclyde Council.

8.3 Final Determination.

The First-tier Tribunal for Scotland (Housing and Property Chamber) grant an order against the Respondents for eviction from the Property under section 33 of the Housing (Scotland) Act 1988.

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.

Jacqueline Taylor

Legal Member

1st October 2018