Housing and Property Chamber
First-tier Tribunal for Scotland

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/18/1799

Re: Property at 8 Corran Gardens, Broughty Ferry, Dundee, DD5 3EH ("the Property")

Parties:

Mr Ian McRobbie, 1 Keillor Croft, Kellas, Dundee, DD5 3NT ("the Applicant")
Mrs Avril McRobbie, 1 Keillor Croft, Kellas, Dundee, DD5 3NT ("the Appliant")

Ms Susan Scullion, 8 Corran Gardens, Broughty Ferry, Dundee, DD5 3EH ("the Respondent")

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the order should be granted.

Background:

On 12 July 2018 the Applicants made an application to the Tribunal for Possession on Termination of a Short Assured Tenancy in terms of S 33 of The Housing (Scotland) Act 1988. By the time of the CMD the Applicants had lodged with the application the Short Assured Tenancy Agreement dated as well as the Notice to Quit dated 2 May 2018 and S 33 Notice dated 2 May 2018 and the tracked recorded delivery confirmation of service of these on the Respondent on 3 May 2018 as well as photographs of the state of the property, a letter of complaint received from a neighbour and an email dated 17 August 2018 which refers to rent arrears and alleges significant costs to reinstate the property. The bundle also contained the S 11 Notice to the Local Authority under the Homelessness etc (Scotland) Act 2003. The Appellants had explained that the AT5 notice had been lost when they applied for a mortgage but that clause 19 of the tenancy agreement confirmed it had been issued.

The Tribunal had accepted the application and put it to a Case Management Discussion (CMD) on 22 October 2018.

The application and CMD date was intimated to the Respondent by Sheriff Officers on 4 October 2018 together with the information that any representations should reach the Tribunal by 17 October 2018. The Appliant Mr McRobbie, the Respondent Ms Scullion and her solicitor Ms Menzies from Dundee North Law Centre attended the CMD.

The intimation to the parties included the information that the Tribunal may do anything at a Case Management Discussion which it may do at a hearing, including making a decision on the application.

The Respondent had been given the 14 days notice required in Rule 24 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (the Rules). No representations were received from the Respondent prior to the CMD and the Tribunal had not received prior intimation in terms of Rule 10 of the Rules that the Respondent was to be represented.

However, a signed Mandate was provided by Ms Menzies and the Respondent was in attendance confirming their authority to act on her behalf. The Respondent's representative lodged a letter dated 17 October 2018 at the hearing, which was also given to the Applicant. She explained that this had been emailed to the Tribunal on 17 October 2018. After an brief adjournment it was established that whilst it had been emailed on the day, the email had not contained the case reference and thus the case work team had not identified the email as relevant to this case and had not forwarded the content to the Applicants or the legal member. During the adjournment the document was copied to the Applicant in attendance.

The Hearing:

1. **The Applicant Mr McRobbie stated that the tenancy for the property is a Short Assured Tenancy . He referred the Tribunal to the documentation lodged with the application showing that a Notice to Quit and a Notice in terms of S 33 (1) d of the Housing (Scotland) Act 1988 (the Act) had been served on the Respondent by recorded delivery on 3 May 2018 with notice to the ish of 10 July 2018, giving in fact more than the required 2 months notice in terms of S 33 of the Act. He moved for an order for recovery of possession of the property.**

2. **The letter from Dundee North Law Centre from Ms Menzies confirmed the position that the facts of the case were not in dispute and that there is no substantive defence offered to the ground of eviction. It is accepted that the tenancy is a Short Assured Tenancy and that the notices appear to be in order.**

3. However, the letter sets out a request to the tribunal to delay implementation of the order due to the problems of the Respondent in finding appropriate accommodation due to family situation. The letter is referred to for its terms and held to be incorporated herein. A request is made to either fix a further CMD to allow time for the Respondent to submit further information regarding the difficulties of re-housing and timescales or to delay implementation of any eviction order granted.

4. The bundle included a copied page from McPhail page 1070 item 30.11 which states "The rules of court on extracting decree do not affect the sheriff's common law power to supersede extract" and a copy of the case Webster v Lord Advocate Outer House, 1984 SLT 13. However the written submissions also recognise that there is little case law available on this common law power.

5. The Respondent's solicitor argued that there is a common law power for the tribunal to delay enforcement of an order and that this was an exceptional case because of the Respondent's family situation. She has 7 children, one of them uses a wheelchair. The bundle contains an email from the Council which seems to indicate that they will struggle to accommodate the family and asking the solicitor to ask for a delay in removal until after Christmas. The Respondent's solicitor was seeking a delay of enforcement of the order for 3 months to allow for more time for the Council to rehouse the Respondent.

6. Mr McRobbie commented that the documents should be disregarded as they had not reached him or the legal member in time. He objected to any further delay in the matter and stated that as a landlord he now wished to sell the property due to changes in taxation and interest rates and pointed out that he had chosen the Respondent over other applicants to provide housing for her family precisely because she had a child who was using a wheelchair. He now faced rent arrears and significant damage to the property and would be concerned if this was suspended that he would be incurring significant expenses. There were now complaints from neighbours and he was worried about damage to the substance of the property. His understanding was that he followed the process set out in S 33 of the Housing (Scotland) Act 1988 precisely and thus should be entitled to his property back. It was his understanding that the Council will only act in rehousing the Respondent if she is evicted. He further stated that it should not be the responsibility of the private landlord to deal with problems of rehousing a tenant and that this should surely fall to the local authority.

7. The Applicants referred the Tribunal to S 33 (1) of the Housing (Scotland) Act 1988 and moved for an order.

8. If the tests of S 33 (1) of the Housing (Scotland) Act 1988 are met there is no discretion for the Tribunal and the order must be granted. All issues were discussed at the Case Management Discussion and the facts of the

case in terms of the test of S 33 of the Housing (Scotland) Act 1988 were clear.

Findings in Fact:

1. The Applicants and the Respondents entered into a Short Assured Tenancy on 10 August 2016 with an end date at 10 February 2017 with a continuation on a monthly basis (Clause 3).

2. Notice to Quit was served on the Respondents by Recorded Delivery on 3 May 2018 advising of the termination of the tenancy on the ish on 10 July 2018.

3. Notice in terms of S 33 (1) d of The Housing (Scotland) Act 1988 was served on the Respondents by Recorded Delivery on 3 May 2018 advising of the intention to repossess the premises on 10 July 2018.

4. Notice to the Local Authority was given in terms of S 11 of the Homelessness Etc (Scotland) Act 2003.

5. The Respondent had remained in the property at the date of the hearing.

6. The Respondent had previously been able to find private rented suitable accommodation and has been residing in private rented accommodation under this tenancy.

7. The Respondent had entered into the Short Assured Tenancy Agreement at a time when she knew that one of her children required wheelchair access.

Reasons for the Decision:

1. The Tribunal made the decision on the basis of the written evidence lodged by the Applicants and Respondent and the evidence given at the Case Management Discussion by the Applicant Mr McRobbie and the Respondent Ms Scallion. There was no dispute about the facts of the case regarding the test for an order.

2. In terms of S 33 (1) of the Housing (Scotland) Act 1988 an order for possession of the house under a Short Assured Tenancy shall be made if the Tribunal is satisfied that:
   1) The short assured tenancy has reached its ish
   2) That tacit relocation is not operating
   3) That no further contractual tenancy (whether a short assured tenancy or not) is for the time being in existence; and
   4) That the landlord has given to the tenant notice that he requires possession of the house.

3. In this case there was no dispute that the tenancy is a Short Assured Tenancy which had reached its original ish on 10 February 2017 and continued thereafter month to month. Notice to Quit with the required 40 days notice period was served on 3 May 2018 for the ish on 10 July 2018 and thus tacit relocation did not operate. The contractual tenancy had come to an end. The landlord had served on the Respondents a notice in terms of S 33 (1) d of the Housing (Scotland) Act 1988 with the required 2 months notice period on 3 May 2018 to 10 July 2018.

4. The Tribunal has no discretion in the matter. The conditions for an order for possession in terms of S 33 (1) of the Housing (Scotland) Act 1988 have been evidenced by the Applicants in the documentation lodged and are not disputed.

5. I have considered the documents from the Respondent's solicitor, which were received late due to the case reference not having been included on the email. I have allowed the documents to be received late because they were sent on 17 October 2018 and thus within the period given. Given the content of the documents I find that they acceptance of these did not prejudice the Applicants as the document confirmed that the tenancy was a Short Assured Tenancy and that there was no defence to the application.

6. However, I did not consider that the request for a further CMD or a delay in implementation of the order should be granted.

7. I have considered the case produced. It refers to a case of interdict where Lord Stott had suspended the operation of the interdict by a period of six months. The quote from McPhail also indicates refers to a common law power of a Sheriff to supersede extract.

8. However, as I pointed out to the parties at the CMD, I also have to consider the nature of these proceedings and in particular S 20 of the Housing (Scotland) Act 1988.

9. S 20 (2) states "on the making of an order for possession of a house let on an assured tenancy or at any time before the execution of such an order, the sheriff, subject to subsection (6) below, may (a) sist or suspend execution of the order or, (b) postpone the date of possession. Subsection 6 states: " this section does not apply if the sheriff is satisfied that the landlord is entitled to possession of the house on the ground specified in section 33 (1) of this Act....."

10. The Housing (Scotland) Act 1988 gave the powers, which the Respondent's solicitor asked me to exercise, to sheriffs explicitly for proceedings of recovery of possession in S 20 of the Housing (Scotland) Act 1988 but not in circumstances where the possession is on the ground of S 33 (1) of the said Act.

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11. I consider that it is clear that the legislation explicitly provided that such powers should not be available in proceedings under S 33 relating to Short Assured Tenancies. I do not consider that in light of this a further unrelated such power can be assumed for specifically these proceedings. The legislation deals explicitly with the matter and makes it clear that for the specific type of tenancy, namely the Short Assured Tenancy, there is no further discretion for the decision maker. I do not consider that the case addresses a situation where there is an explicit provision dealing with the postponement of the enforcement of a decree and an explicit further provision that this does specifically not apply in certain prescribed other circumstance.

12. The legislation is clear that there is no other requirement than the requirements in S 33 for a private landlord to be able to insist on possession of his private property. The type of tenancy requires to be established with specific information in terms of a form AT5 to be given to tenants so they are aware of that particular risks to their tenancy. The Respondent entered into this tenancy agreement in the full knowledge that all that was required for her tenancy to be brought to an end was a Notice to Quit and S 33 notice with the relevant correct dates and notice periods.

13. The Applicant by law is entitled to an order for possession if they follow the correct procedure.

14. I consider that this indicates that the order should be enforceable as soon as the order is made and that the Act envisages that the landlord should then be able to enjoy the property they are entitled to repossess.

15. The landlord has a statutory right to obtain possession of the premises in terms of S 33 (1) and it was clearly envisaged by both parties that if the process is followed correctly the tenancy can be brought to an end without the landlord having to prove any further reasons for this. The property is the property of the landlord who has a right to deal with it as he or she sees fit once the tenancy comes to an end.

16. The Respondent was aware that in this type of tenancy the tenancy can be brought to an end by serving the correct notices and had agreed to enter into a Short Assured Tenancy having been provided with that information in the full knowledge of her family situation.

17. It the case of recovery of possession of a Short Assured Tenancy it was not envisaged that the private landlord should be at risk of delay to receive his property back if there is a problem with finding suitable alternative accommodation. There is a statutory requirement for the landlord to advise the local authority of the situation, which he has done. That is all that is required.

18. Given the statutory provisions regarding Short Assured Tenancies and the explicit legislative provision excluding further discretionary powers

for these tenancies in S 20 (6) of the Housing (Scotland) Act 1988 I do not consider that in this case the tribunal would be entitled to do anything but grant the order. I do not consider that a further CMD could be fixed as the statutory test for an order has been fully satisfied. To allow a further CMD at which evidence would be led on the particular problems of the Respondent regarding finding alternative accommodation would essentially place further hurdles for obtaining possession of the property on the landlord, which had been explicitly excluded in S 20 (6) of the said Act.

19. Furthermore, because the specific requirements of the Respondent regarding the type of tenancy she requires were known to her at the time she entered into the tenancy agreement, I consider that even if one were of the view that the tribunal would have powers to delay the enforcement of such an order, this would not be considered an exceptional case. The family is a large family and one family member uses a wheelchair. This was accepted by both parties. The Respondent had been able to access a private tenancy under these circumstances when she entered into this tenancy agreement. She did so in the full knowledge of the risks involved as she was aware the tenancy could be ended if the proper steps were followed. This is exactly what has now happened. I do not consider that the foreseeable consequence of entering into a Short Assured Tenancy in those circumstances would then be considered an exceptional situation in which I would exercise any discretionary powers.

Decision:

The Tribunal makes an order for possession of the Property under S 33 (1) 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.

P H-McFatridge

22.10.18

Legal Member **Date**