



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 33 of the Housing (Scotland) Act 1998.

Chamber Ref: FTS/HPC/EV/22/2677

Re: Property at 1A Warwickhill Place, Kilmarnock, KA1 2LR (“the Property”)

Parties:

Mr Robin Mclean, C/O Murphy Scoular, 22/24 John Finnie Street, Kilmarnock, KA1 1DD (“the Applicant”)

Mr James Brierley, 1A Warwickhill Place, Kilmarnock, KA1 2LR (“the Respondent”)

Tribunal Members:

Karen Kirk (Legal Member) and Helen Barclay (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) refused the Application for an order for Repossession under Section 33 of the Housing (Scotland) Act 1998.

This hearing was a Case Management Discussion (hereinafter referred to as a “CMD”) fixed in terms of Rule 66 and concerned an Application for an Order for Repossession under Section 33 of the Housing (Scotland) Act 1998. The purpose of the hearing being to explore how the parties dispute may be efficiently resolved. The CMD took place by teleconference and parties were aware of advised of the Rules concerning the hearing.

1. Attendance and Representation

The Applicant was not present but was represented by Miss Kara Ross, Murphy Scoular, 22/24 John Finnie Street, Kilmarnock, KA1 1DD.

The Respondent was present.

2. Background

- a) The application called first before the Tribunal on 9th February 2003 and was continued to a further CMD. The Tribunal required to see a copy of the AT5 signed by the Respondent as an incomplete AT5 had been lodged. The Tribunal also noted that the Respondent had sought advice and had been unable to secure same. The Tribunal also wished to give the Applicant's representative an opportunity to address the Tribunal on Section 32 of the Housing (Scotland) Act 1988 and the term of the tenancy which requires to be 6 months in terms of the Act.
- b) The Tribunal raised the matter with the Applicant's representative that in terms of section 32 of the Housing (Scotland) Act 1988 a short assured tenancy is an assured tenancy which is for a term of not less than six months and it may be the tenancy was for one day less. The term of the tenancy is stated as 4th August 2011 to 3rd February. The Applicant's representative stated the tenancy was from midnight on the 4th August 2011 to midnight on the 3rd February 2012. The Tribunal wished to give the Applicant's representative further opportunity to consider this preliminary matter.
- c) At this Case Management Discussion both parties had also set out their position despite the preliminary matters requiring determination. The Applicant's representative said that an order for repossession was sought. She said this property is the only property let by the Applicant and there had been a change in his personal and financial circumstances which meant he had to sell the property. The Applicant had agreed to sell the property to the local authority but this fell through as they were not able to purchase same with a sitting tenant. The Applicant's representative said the agents had contacted landlords and different agents to see if anyone was interested in purchasing the property with a tenant. This was not successful and there had be no other options for the Respondent in the local area.
- d) The Respondent said that he is a carer for his 87 year old stepdad who lives 50 yards away from him. The Respondent said he considered his tenancy was long term and that was his understanding. He ensures he has what he needs and visits him. The Respondent said that all his other relatives live in England and Holland. His mother died 2 years ago. The Respondent said the property had never been advertised. and he had looked into an interest only mortgage The rent was put up and the rent was always paid. The Respondent said he is retired and he had a major operation in 2015 due to an infection in his bowel and bladder requiring a stoma for 2 years. He had arthritis in his knees and neck. The Respondent has been on the local authority housing list for 19 years .

3. Preliminary Matters on 20th April 2023

- a) Since the last CMD the Applicant's representative had lodged a completed signed AT5 with the Tribunal. The Respondent confirmed he had seen and it and it was his signature. He thought he had another copy which he signed

on the 4th August 2011. He accepted whilst he didn't understand the significance of same that it was signed before the commencement of the tenancy. The Tribunal confirmed they were now satisfied that a valid AT5 had been served before commencement of the tenancy

- b) On the matter of section 32 of the Housing (Scotland) Act 1988 the Applicant's representative said that she did not have anything further to add. She said the term was midnight on the 4th August 2011 to midnight on the 3rd February 2012. She herself had signed the tenancy and the Respondent got his keys sometime on the 4th August 2011. The Respondent agreed with this. He said he did not move in on the 4th August 2011 but it was not long after that he moved into the property.

There were no other preliminary matters discussed.

4. Case Management Discussion on 20th April 2023

The Respondent updated the Tribunal since the last CMD and said he had been given offers of accommodation from the Local Authority and was considering one offer which had been kept on hold.

5. Findings in Fact and Law.

1. This Application is dated 3rd August 2022 and brought in terms of Rule 66 with the Applicant seeking an Order for Repossession under Section 33 of the Housing (Scotland) Act 1998.
2. The Applicant seeks to recover the tenancy on the basis that same is a Short Assured Tenancy and that the Short Assured Tenancy has reached its finish in terms of Section 33 of the Housing (Scotland) Act 1988.
3. The Applicant is the heritable propriety of the property at 1A Warwickhill Place, Kilmarnock.
4. The Applicant and the Respondent entered into a Tenancy for the property on 4th August 2011.
5. The term of the Tenancy was midnight on the 4th August 2011 to midnight on the 3rd February 2012.
6. The term of the tenancy was a term which was less than 6 months.
7. An AT5 was served before commencement of the Tenancy in compliance with Section 32(1)(b) and Section 32 (2) of the Housing (Scotland) Act 1988.
8. The Tenancy is not a Short Assured Tenancy in terms of Housing (Scotland) Act 1988 in terms of Section 32(1)(a) because the term of the tenancy was less than 6 months.

6. Reasons for Decision

The Tribunal was satisfied that the Applicant was the heritable proprietor of the Property. The Tribunal was satisfied that there was a Tenancy between parties and that on the evidence provided it was appropriate having regard to the overriding objective of the Tribunal to make a determination at the CMD. The material facts were in agreement. Both parties were in agreement to the fact that an AT5 notice was served before commencement of the tenancy. Both parties were in agreement the term of the tenancy was midnight from the 4th August 2011 to midnight on the 3rd February 2012. The Applicant's representative had been consistent with this and had been the agent involved in signing the tenancy at commencement. The Respondent said he moved in shortly after the 4th August 2011 but not on that date.

The Tribunal found in fact and in law that tenancy was for a term less than 6 months. The term of the tenancy was 6 months less a day and no circumstances relevant to the case negated the fact that the term of the tenancy was for a period of less than 6 months. The tenancy whilst an assured tenancy was not in fact a Short Assured tenancy, could not be repossessed in terms of Section 33 and accordingly the application was refused on this basis.

The Tribunal had regard to *Stalker on Evictions in Scotland, second edition page 248 and page 249*. The Tribunal also had regard to the case of *McCabe v Wilson 2006 Hous LR 86* but noted in that case there had been a clear agreement of parties to include the whole of the first day of a tenancy which had purported to be less than 6 months by one day. The Sheriff was clear in this case that in the absence of any agreement to the contrary that then the general rule which entails the first day of the period being excluded would apply. The Tribunal noted the Applicant's representative was consistent over both hearings that she considered the term to be from midnight on the 4th August 2011 to midnight on the 3rd February 2012 and on that basis the Tribunal applied the general rule of scots law that fractions of a day are excluded and the whole of the first day of a term period is excluded and the whole of the last day included. The term here would commence at midnight on the 4th August 2011 and end on midnight on the 3rd February 2012 (*civilis computatio Stair Memorial Encyclopedia, Vol 22 para 819*).

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.

K Kirk

20/04/2023

Legal Member/Chair

Date