



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) Act 2014.

Chamber Ref: FTS/HPC/EV/18/3376

Re: Property at 30 Primrose Avenue, Maxwell Gait, Newton Mearns, G77 6FS (“the Property”)

Parties:

**Mr Tony Maciver, The Holdings, Wardlaw Road, Kirkhill, Inverness, IV5 7ND;
Mrs Karen Maciver, The Holdings, Wardlaw Road, Kirkhill, Inverness, IV5 7ND
 (“the Applicants”)**

**Mr Naheem Javed, 30 Primrose Avenue, Maxwell Gait, Newton Mearns, G77
6FS (“the Respondent”)**

Tribunal Members:

Rory Cowan (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an Order for Possession for the Property in favour of the Applicants should be granted.

- Background

By application received by the Tribunal on 12 December 2018 (the Application), the Applicants sought an order for possession relative to the Property in terms of Rule 66 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (the Rules). The Tribunal fixed a Case Management Discussion (CMD) for 11 March 2019 and this was intimated on the parties.

In advance of the CMD the Applicants lodged various documents including a lease and form AT5 dated 1 July 2013, a Notice to Quit and section 33 notice dated 30 August 2018. A copy of a recorded delivery receipt dated 30 August 2018 was also lodged along with the relevant notice of proceedings to the local authority.

On behalf of the Respondent, a written response was lodged along with the following documents:

- 1) Formal letters of missives dated 27 January 2014, 4 March 2014, 17 March 2014, 17 March 2014 and 18 March 2014 (the Missives).
 - 2) Letters dated 21 March 2017, 6 April 2017, 10 April 2017, 8 May 2017 and 9 May 2017 between MacDonald Henderson Solicitors and the Respondent.
- Case Management Discussion

The Application called by way of a CMD on 11 March 2019. The Applicants were represented by a Mr Hankinson and the Respondent was represented by a Mr O'Donnell. At the outset, Mr O'Donnell sought to amend the response to the Application in that the date of 27 November 2017 where it appears in the last line of the first paragraph should be deleted and substituted with "30 August 2018". There was no objection to this and the response was amended accordingly.

The parties respective representatives confirmed that there was no dispute as to the following points:

- 1) That the tenancy created by the tenancy agreement dated 1 July 2013 and the AT5 of the same date was a Short-assured tenancy in terms of section 32 of the Housing (Scotland) Act 1988.
- 2) That, there was no dispute as to the effect or validity of the NTQ and section 33 notices in that they would, should the Respondent's occupation of the property be under the tenancy created by the tenancy agreement dated 1 July 2013, have the effect of complying with the requirements of section 33 of the Housing (Scotland) Act 1988 and entitle the Applicants to possession of the Property.

Mr O'Donnell was asked to confirm his position and the basis he sought to resist the Application. The position advanced which expanded upon the terms of the written response was that:

- 1) Whilst it was accepted that the Respondent initially occupied the Property under the terms of the tenancy agreement dated 1 July 2013 (the Tenancy) and that this tenancy was a short-assured tenancy, by concluding missives for the sale and purchase of the Property to the respondent and one other (a Nadeem Javed) the Tenancy had been "superseded" and that the Respondents occupation of the Property ceased to be on the basis as a "tenant".
- 2) The new occupancy right created by the Missives was not one of a "tenant" but of a "putative purchaser" and that remedies in the event of default by the Respondent (and the other purchaser) were governed by clause 15 of the Formal letter of 4 March 2014 and "common law".
- 3) Mr O'Donnell pointed to "the conduct of the parties" in that payments were made every month to cover "continuing mortgage obligations".
- 4) Mr O'Donnell also pointed to correspondence issued by MacDonald Henderson on behalf of the Applicants, in particular the letter of 9 May 2017 as evidence of the parties reliance on the Missives as the basis for occupation

rather than the Tenancy, although he did not seek to suggest any further rights of occupation deriving from personal bar.

- 5) Mr O'Donnell further indicated that evidence may be required from the Respondent in relation to the "payments made" by him to the Applicants and whether his occupation was under the terms of the Tenancy or the Missives.

In response Mr Hankinson stated as follows:

- 1) That nothing suggested by the Respondent's representative amount to a "relevant defence" to the Application.
- 2) That the Missives and the Tenancy were distinct from one and another.
- 3) That, nothing in the Missives created a new or different right of occupation of the Property in favour of the Respondent or anyone else.
- 4) That the Tenancy therefore remained in force.
- 5) That as the Tenancy was short-assured tenancy and that the Applicants had complied with the requirements of section 33 of the Housing (Scotland) Act 1988, they were entitled to an order for possession of the Property.
- 6) That there was no requirement for any evidence as the question of the interpretation of the Missives and their import was a matter of law and that evidence of payments made by the Respondent would not be in dispute and was not material to the issue between the parties.

- Findings in Fact

The tribunal makes the following findings in fact:

- 1) That the Applicants are the heritable proprietors of the Property.
- 2) That the Applicants and the Respondent entered into a tenancy agreement for the Property on 1 July 2013.
- 3) That the tenancy thereby created was a short-assured tenancy.
- 4) That by Formal letters of missives dated 27 January 2014, 4 March 2014, 17 March 2014, 17 March 2014 and 18 March 2014 the Applicants and the Respondent and a Nadeem Javed contracted for the sale and purchase of the Property.
- 5) That the Missives were subsequently rescinded and that the transaction provided for in the Missives was not completed.
- 6) That the concluding of the Missives for the sale and purchase of the Property did not renounce the Tenancy Agreement dated 1 July 2013.
- 7) That the tenancy continued after the initial term on a month to month basis.
- 8) That the Notice to Quit and section 33 notice dated 30 August 2018 had the effect of terminating any contractual tenancy as at 2 November 2018, stopping the operation of Tacit relocation and giving the required notice to the Respondent under section 33(1)(d) of the Housing (Scotland) Act 1988.
- 9) That the Applicants have therefore complied with the requirements of section 33 of the Housing (Scotland) Act 1988.
- 10) That the Applicants are entitled to an order for possession for the Property.

- Reasons for Decision

As indicated, the Application was framed on the basis that the Applicants were entitled to possession on the basis that a short-assured tenancy had reached its end and the Applicants were therefore entitled to possession of the Property. The terms of the original tenancy agreement and that it was a short-assured tenancy and that the validity of the notices served were not in dispute.

The only issue for the Tribunal to decide was the basis of the Respondent's occupation of the Property and whether that was by way of the Tenancy or through operation of the Missives themselves. In short, the tribunal had to decide whether the tenancy created by the tenancy agreement dated 1 July 2013 was still extant or whether, to quote the Respondent's representative, it had been "superseded". In this context, it was clarified that Mr O'Donnell meant that the original short-assured tenancy had been renounced by the execution and conclusion of the Missives. As indicated above, the suggestion was that the conclusion of the Missives changed the nature of the Respondents' occupancy from one of a tenant to some other form of occupancy right described as being associated with a "putative purchaser". It is not clear what type of occupancy right was being claimed by this other than it was not a tenancy under the Housing (Scotland) Act 1988 (the 1988 Act). The inference being that some other right, short of a lease, was being claimed. Again, as the claimed right of occupancy was not under the 1988 Act, whilst not explicitly stated by Mr O'Donnell, the logical inference would be that recovery under section 33 could not be granted and possibly that this Tribunal would not have jurisdiction to hear such an application for possession.

Mr O'Donnell pointed to the terms of the Missives, particularly formal letter dated 4 March 2014 and clauses 2, 3 and 15 and the terms of subsequent correspondence between solicitors and the Respondent to support his contention that the Missives created such an occupancy right. The focus of his submissions was that the Missives do not provide for the Tenancy to continue in the event that the Missives were terminated as a result of the Respondent's breach therefore the Missives must continue to regulate possession of the Property.

The Tribunal's view is that this is the incorrect approach. The correct approach would be to consider whether the concluding of the Missives either expressly or by implication renounced the original tenancy agreement dated 1 July 2013.

Mr O'Donnell's suggestion that the provisions in clauses 2 and 3 of the formal letter of 4 March 2013 and subsequent correspondence assisted with this was erroneous. These clauses in turn refer to capital payments towards the purchase price (as well as an unusual provision regarding the rent payable until settlement) and the Date of Entry on settlement of the purchase of the Property.

Looking at the terms of the Missives, it is clear that the purpose of the Missives was to provide for a contract for the sale and purchase of the Property. Other provisions within the Missives were merely ancillary to that purpose. The stating of a rent figure within the Missives is not inconsistent with the Tenancy continuing and, at best, it simply varies the rent to be paid under it. It is the Tribunal's view that there is nothing in the Missives that either expressly or impliedly renounces the original tenancy

agreement dated 1 July 2017. It is accepted that, had the purchase completed then the effect of that would be to bring an end to the Tenancy in that the Respondent could not be both the landlord and tenant for the Property (that would be *confusio*). The Tribunal also took the view that hearing evidence of payments made and what the Respondent's view of whether his occupation of the Property was under the Missives or otherwise would not assist with the determination of the issue. Mr O'Donnell made the Respondent's position on that quite clear and the issue could be determined by looking at the terms of the Missives themselves. There was therefore no material dispute as to the underlying facts and the matter could be disposed of based on submissions and the documents lodged by the parties.

It follows that, if the Tenancy was not renounced, it is a matter of agreement between the parties that the lease between the parties was a short-assured tenancy and the Applicants had complied with the requirements of section 33 of the 1988 Act. As such, the Applicants are entitled to an order for possession.

- Decision

An Order for Possession was granted.

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.

Rory Cowan

Legal Member/Chair

Date 11 March 2019