



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017

Chamber Ref: FTS/HPC/EV/19/0803

Re: 9 Lochinch Gardens, Cove, Aberdeen, AB12 3RG (“the property”)

Parties:

Mr Lamidi Oloye and Mrs Omolade Oloye, 10 Spring Avenue, Hampton Vale, Peterborough, Cambridgeshire, PH7 8HW

(“the applicants”)

Mrs Bukola Thomas, 9 Lochinch Gardens, Cove, Aberdeen, AB12 3RG

(“the respondent”)

Tribunal Member:

Adrian Stalker (Legal Member)

Decision:

The Tribunal finds that the parties impliedly renounced the contractual tenancy between them, on or about March 2019, and grants an order for possession under section 18(3) of the Housing (Scotland) Act 1988, on ground 8 of schedule 5 to that Act.

Background

1. This is an application under rule 65 of the schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Procedure Rules”). The applicants and respondent are respectively the landlords and tenant in a lease of the property, dated 17 and 19 July 2017.

2. In their application to the Tribunal, dated 12 March 2019, the applicants sought an order for recovery of possession under section 18(3) and (4) of the Housing

(Scotland) Act 1988, on the rent arrears grounds in schedule 5 of the Act (grounds 8, 11 and 12). Attached to the application were copies of the parties' lease, the AT6 served under section 19 of the Act, a notice to quit, a sheriff officers' certificate of service of the notice to quit and AT6, a notice to the local authority under section 11 of the Homelessness etc (Scotland) Act 2003, and a schedule of rent arrears.

3. At the same time, an application was made under rule 70 of the Procedure Rules for an order for payment in respect of the rent arrears. This is application FTS/HPC/CV/19/0804.

4. By letter dated 21 March to the applicants' agents, Messrs Aberdein Considine, the Tribunal Clerk raised an issue as to the validity of the Notice to Quit. This is described below. By letter dated 3 April, the applicants' agents responded, arguing that the notice was valid, and referring to certain authorities.

5. On 16 April 2019, a legal member of the Tribunal, having powers delegated from the Chamber President, accepted the application for determination. Application FTS/HPC/CV/19/0804 had already been accepted for determination on 20 March. A Case Management Discussion ("CMD") was fixed for 18 June 2019, in respect of both applications. In advance of that hearing the legal member assigned to the case raised a further issue regarding the notice to quit (which is again described below). This was intimated to the applicants' agents, and they again responded by letter, dated 1 April, arguing that the notice was valid, and referring to certain authorities.

6. It was necessary for the CMD fixed for 18 June to be postponed, because sheriff officers had been unable to effect service on the respondent of notification of date and time of the CMD, because she was apparently no longer resident at the property. A further CMD was fixed for 25 July.

CMD

7. The CMD took place at 10am on 25 July 2019 at the Credo Centre, 14-20 John Street, Aberdeen. The applicants were not present, but were represented by their solicitor, Ms Carly Stewart, of Messrs Aberdein Considine. The respondent was not present or represented. She had not lodged any written representations, and had had no contact with the Tribunal. The date and time of the Tribunal hearing had been intimated to her, by means of service by advertisement, in terms of rule 6A of the Procedure Rules. A certificate of service was produced to the Tribunal by Iain MacLean, Team Leader, Scottish Courts and Tribunals Service, confirming that service was carried out on the Chamber website between 12 June and 25 July 2019.

8. At the CMD, the Tribunal decided, in respect of application FTS/HPC/CV/19/0804, to make a payment order in the sum of £11,000, being the rent arrears due by the respondent to the applicants, as at the date of the CMD. A separate decision has

been issued in relation to that application, to which reference is made.

9. As the monthly rent under the tenancy is £1,100, the sum of £11,000 is equivalent to 10 months' rent. Accordingly, there is a mandatory ground for eviction, being ground 8 of schedule 5. The AT6 and section 11 notice were in order, and evidence of service was produced. Accordingly, the legal member indicated that the only obstacle faced by the application was the question of the validity of the notice to quit.

The issues with the notice to quit

10. In the parties' lease, clause 1, which is headed "duration", states:

This lease shall commence on 1 August 2017...and endure until 31 July 2018 when the tenant shall remove from the Property...provided that two month's written notice has been given by either party to the other, which failing this Lease shall continue on a month to month basis until terminated by either party giving the other two month's notice in writing...

11. The copy notice to quit attached to the application is dated 11 January 2019. It advises the respondent that the parties' tenancy is to be terminated with effect from 11 March. The sheriff officers' certificate of service of the notice to quit indicates that it was served upon the respondent on 11 January.

12. This raises two issues with the notice to quit:

- (a) Given that, after 31 July 2018, the tenancy was running "on a month to month basis", and therefore renewing on the last day of every month, were the applicants entitled to terminate the tenancy on the 11th of the month?
- (b) If service of the notice is effected at some point during the course of 11 January, and bears to take effect on 11 March, has "two months' notice" been given?

13. As described above, the applicants' agents had submitted letters setting out their arguments as to the validity of these notices. At the CMD, Mrs Stewart adopted the submissions made in those letters, and referred to certain highlighted passages in the attached authorities.

14. The Tribunal was not persuaded by the submissions made by Mrs Stewart. It concludes that the notice of 11 January did not have the effect of terminating the lease under the part of clause 1 quoted above. It is not necessary to describe the reasons for that conclusion in detail, given that the Tribunal also decided, on other grounds, that the contract has been terminated by the parties.

15. However, in brief, the Tribunal considers that the correct interpretation of the quoted part of clause 1 of the lease is that, after 31 July 2018, the tenancy runs from month to month, renewing on the last day of the month, and that two months' notice is required to terminate it, on the last day of any given month. Therefore, in the case of a notice served on 11 January, the earliest date of termination would be 31st March. The applicants' notice accordingly called upon the respondent to leave, twenty days sooner than the date on which they were entitled to require the respondent to quit. For that reason alone, the notice is invalid.

16. The cases relied upon by Mrs Stewart do not avail the applicants in this regard. In *McDonald v O'Donnell* 2008 SC 189, the Inner House found a notice to quit to be valid, notwithstanding the fact that it called upon the tenant to leave, on a date which was not an ish of the tenancy. However, one of principal reasons for that decision was that the date stated in the notice was later than the correct date. Here, the date stated in the notice was twenty days too early.

17. In *Kirk Care Housing Associaton v Clugston* 2000 HousLR 106, a decision of Sheriff Croan at Kilmarnock, the court was not persuaded to regard a notice to quit as invalid, notwithstanding that it took effect on 3 October, in relation to a tenancy which relocated on the first day of each month. There were several complex issues in this case. Sheriff Croan does not explain the reasons for his conclusion on the particular question of the validity of the notice to quit; he simply stated that he was not with the defender's solicitor. For that reason, the Tribunal does not regard this case as displacing the authorities to the effect that the date on the notice must coincide with the ish: *Earl of March v Dowie* (1754) Mor 13843; *Macdonald v Cameron* (1916) 32 Sh Ct Rep 261; *Anderson v Scott* 1939 SLT (Sh Ct) 28; *James Grant & Co Ltd v Moran* 1948 SLT (Sh Ct) 8; *Hamilton District Council v Macguire* 1983 SLT (Sh Ct) 76; *Urquhart v Hamilton* 1996 GWD 37-2171.

Non-occupation by the tenant

18. As already indicated, sheriff officers were unable to serve notice of the date of the first CMD on the respondent, because she was apparently no longer resident at the property.

19. Mrs Stewart was able to advise the Tribunal of the following circumstances:

- In February, following service of the notice to quit, the respondent telephoned Mrs Stewart, leaving a voicemail, in which she asked for "another month to get out."
- Also around that time, the respondent contacted the applicants asking for a reference, to enable her to take up another tenancy in England. The applicants declined to provide the reference, as it would have entailed stating that the respondent had no rent arrears.

- The applicants have recently carried out inspections of the property, in which they found that the respondents' belongings have been removed, apart from several polythene bags full of clothes, which are near the front door. Mail for the respondent has piled up behind the front door.
- Photographs of the internal state of the property, during the course of those inspections, were shown to the Tribunal. The bags look as they may have been destined for disposal, say at a clothes bank or charity shop.
- When the Sheriff Officers attended the property in early June, there was no sign of the property being occupied.

20. The Tribunal also notes that the respondent has played no part in the Tribunal proceedings, and has not responded to intimation of the application, or the Tribunal hearing. She has also not paid the rent for some time, as described in the Tribunal's decision in relation to application FTS/HPC/CV/19/0804.

Decision

21. In the foregoing circumstances, the Tribunal found in fact, on a balance of probabilities, that the respondent abandoned the property on or about 11 March, when the applicant's notice purported to take effect.

22. The Tribunal also finds, in fact and law, that the parties by their actions have impliedly agreed to renounce the lease. The respondent has failed to pay the rent for some time, and has abandoned the property. The applicants give their notice in January, and have made the current application with a view to securing an order to recover possession. Had the respondent remained in occupation, the Tribunal would have been inclined to regard the parties' lease as still being in operation, because the notice to quit would not have been valid to enable the applicants, unilaterally, to terminate the lease. However, the notice, together with the respondent's abandonment of the subjects, and failure to attend to her rental obligation, amount, in the view of the Tribunal, to a tacit consensus between the parties that the tenancy should end.

23. It follows that the parties' tenancy contract was terminated in around March 2019, notwithstanding the difficulties with the notice to quit.

24. As there is a mandatory ground for possession, being ground 8 of schedule 5 to the 1988 Act, the Tribunal must accede to the applicants' request for an order for possession, under section 18(3) of the 1988 Act.

25. The Tribunal accordingly makes an order for possession of the property, in favour of the applicants, under section 18(3).

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.

A.Stalker

25 July 2019

Legal Member/Chair

Date