Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/20/0175

Re: 1 Edmond Terrace, Croftamie, Stirlingshire, G63 0ER ("the Property")

Parties:

Mr Marshall Thomson, Blue Bay House, Ellenabeich, Easdale, By Oban PA34 4RF ("the applicant")

Mr Kevin Bruce, 1 Edmond Terrace, Croftamie, Stirlingshire, G63 0ER ("the respondent")

Tribunal Member:

Adrian Stalker (Legal Member)

Decision (in absence of the respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal') determined:

(1) That ground 8 of schedule 5 to the Housing (Scotland) Act 1988 ("the Act") is established;

(2) That grounds 11 and 12 are also established, and it is reasonable to grant an order;

therefore the Tribunal granted an order for possession of the Property in favour of the applicant, under section 18(3) and (4) of the Act.

Background

1. This is an application under rule 65 of the schedule to First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules"). The applicant seeks an order under section 18(3) and (4) of the Housing (Scotland) Act 1988, on grounds 8, 11 and 12 of schedule 5 to the Act. The parties entered into a

written tenancy agreement on 2 August 2017. The agreed rent was £420 per month, payable monthly in advance.

2. The application to the Tribunal was dated 16 January 2020. It was submitted on the applicant's behalf by his agents, Messrs DM Mackinnon, Oban. It was accompanied by various documents:

- a letter of authorisation from the applicant
- a copy Short Assured Tenancy Agreement dated 2 August 2017
- a copy form AT5 addressed to the respondent dated 2 August 2017
- a copy notice to quit addressed to the respondent dated 15 October 2019
- a copy AT6 addressed to the respondent
- a notice to the local authority, given under section 19A of the 1988 Act.

3. On 11 February 2020, notice of acceptance was granted by a legal member. A Case Management Discussion ("CMD") was fixed for 25 March 2020, at the Glasgow Tribunals Centre. However, due to the restrictions imposed as a result of the Coronavirus Pandemic, this was postponed. Another hearing was fixed, by teleconference call, at 10am, on 10 July 2020. This was intimated by letter to both parties.

The CMD

4. The CMD duly took place, by teleconference call, on 10 July 2020. Miss Gaughan, solicitor, of Complete Clarity Solicitors, local agents for Messrs DM Mackinnon, appeared on behalf of the applicant.

5. As at 10:10am, neither the respondent, nor any person appearing on his behalf, had entered the teleconference. Accordingly, the respondent did not appear, and was not represented, at the CMD. The Tribunal member had sight of a Royal Mail track and trace record which showed that a letter, intimating the date and time of the CMD to the respondent, had been signed for by "Bruce", on 12 June. The respondent has not, at any time, played any active role in the proceedings relating to this application. He made no representations to the Tribunal, in advance of either of the scheduled CMDs. Miss Gaughan advised the Tribunal that the respondent has not engaged with the applicant for some time.

6. Under rule 17(4) of the Rules, the First-tier Tribunal may do anything at a CMD which it may do at a hearing, including: hearing the case in the absence of one of the parties (rule 29), and making a decision. In the circumstances, the Tribunal was satisfied, under rule 29, that it was appropriate to proceed with the hearing, in the respondent's absence. Miss Gaughan asked the Tribunal to grant an order for recovery of possession, under section 18(3) and (4) of the Act.

Notice to Quit

7. It was accepted by Miss Gaughan that there is an issue, in this case, as to validity of the applicant's notice to quit, dated 15 October 2019.

8. The first clause of the tenancy agreement states:

> The tenancy shall be for the period from 2 Aug 17 to 2 Feb 2018. Thereafter the tenancy shall continue on a 2 monthly basis with 2 months' notice required by either Landlord or Tenant to terminate the tenancy.

9. This means that, following the initial period, the tenancy relocated on the second day of the even numbered months of the year, being February, April, June, etc.

10. However, the notice to quit of 15 October states, in bold, that the respondent is being given notice to quit on 2 January 2020. That is not an ish of the tenancy. Accordingly, if the intention was to terminate the tenancy at the next ish, after the expiry of the notice period of 2 months in terms of the above clause, then notice ought to have taken effect on 2 February, rather than 2 January.

11. Where, in a case of this type, the notice to quit appears to be invalid, the Tribunal then considers whether a decree could nevertheless be granted under section 18(6) of the 1988 Act, as that provision was interpreted by Sheriff Principal Wheatley in *Royal Bank of Scotland v Boyle* 1999 HousLR 43 and 63. Section 18(6) allows the Tribunal to grant an order for possession on certain grounds (including grounds 8, 11 and 12), even though the parties' contractual tenancy is still ongoing, provided that "the terms of the tenancy make provision for it to be brought to an end on the ground in question." Sheriff Principal Wheatley held that this required that: "the essential ingredients of the ground in question must be referred to in the tenancy agreement".

12. Clause eighth of the parties' tenancy agreement states, *inter alia*:

> Notice is further hereby given that the Landlord is entitled to terminate the Tenancy Agreement and seek to recover possession of the property under any of the following grounds of possession in schedule 5 of the Housing (Scotland) Act 1988:-
> (a) Rent is three months in arrears by tenant (Ground 8, Part 1);
> (b) Persistent delay in paying rent lawfully due by tenant (Ground 11, Part 2);
> (c) Rent lawfully due by tenant is in arrears (Ground 12, Part 2);
> …

13. Miss Gaughan accepted that the references to grounds 8, 11 and 12 in this clause do not meet the test articulated by Sheriff Principal Wheatley in *Royal Bank of Scotland v Boyle*. In the Tribunal's view, that concession was correctly made. In clause eighth,

the reference to ground 8 is lacks any indication that, in order to establish the ground, the rent must be in arrears by three months at the date of service of the AT6 and the date of the hearing. The reference to ground 12 suffers from essentially the same problem. The reference to ground 11 lacks the words “Whether or not any rent is in arrears on the date on which proceedings for possession are begun…” or anything similar. These, in the view of the Tribunal, are all essential ingredients of those grounds.

14. Instead, Miss Gaughan sought to rescue the applicant’s case by an alternative route.

15. The notice to quit of 15 October 2019 does not merely call upon the tenant to leave on 2 January 2020. It also states:

> You are therefore hereby given formal written Notice to Quit…on the basis of Grounds 8, 11 and 12 of part 1 of schedule 5 of the Housing (Scotland) Act 1988, in that:
> 1. You have failed to pay the rental of £2,490 due and therefore at least three months’ rent of £420 per month is in arrears (Ground 8);
> 2. You have persistently delayed paying rent (Ground 11);
> 3. Some rent is unpaid at the date of serving Notice that court proceeding will be instituted against you and at the start of the court proceedings in that the total rental due by you as at the date hereof amounts to £2,940 (Ground 12).

16. Accordingly, argued Miss Gaughan: read as a whole, the notice purports to terminate the tenancy on 2 January, not because that is an ish, but because the respondent is in arrears such as to engage grounds 8, 11 and 12. The question then becomes: “Is that something the applicant is entitled to do, given the terms of the tenancy contract?” That question must be answered in the affirmative, she said, given the terms of clause eighth of the tenancy. It expressly states that the applicant is entitled to terminate the tenancy agreement, under any of the grounds 8, 11 and 12 in schedule 5, in circumstances described in paragraphs (a), (b) and (c), all of which apply here. Therefore the notice to quit was effective to terminate the tenancy on 2 January.

17. In the Tribunal’s view, section 18 of the 1988 Act did not affect the common law as to irritancies. Parties may agree to include an irritancy clause in their lease, and the landlord may terminate the contract, under that clause. Such a clause may, or may not, be triggered by the same circumstances which are set out in the statutory grounds. At common law, in the case of a conventional irritancy, the landlord must take overt steps to exercise his option, and an irritancy clause does not dispense with the necessity for giving notice of intention to invoke it. Termination under a term of the parties’ contract, be it by irritancy or otherwise, requires the landlord to comply with

the stipulations of the relevant clause, including any rules as to the manner of giving notice.[1]

18. In this case, the landlord has taken such an overt step, by the notice of 15 October. There are no rules set out in clause eighth as to the manner in which notice is to be given. The notice complies with the requirements of section 112 of the Rent (Scotland) Act 1984. It gives the respondent more than two months' notice of termination.

19. It might be suggested that the notice ought expressly to refer to the provision in the agreement under which the right to terminate is being exercised. However, it would be clear, to anyone reading the notice along with the tenancy agreement, that the landlord was seeking to terminate under clause eighth.

20. For these reasons, the Tribunal was persuaded that Miss Gaughan's argument was correct. It accordingly determines that the notice of 15 October was effective to terminate the parties' agreement, as at 2 January 2020.

21. For the sake of completeness, the Tribunal was also satisfied that applicant's AT6, and the notice to quit, were served on 16 October 2019. The notice to quit states the AT6 was attached. The AT6 meets the requirements of section 19 of the Act. A Royal Mail track and trace record showed that the notices were signed for, by "Bruce", on 16 October 2019.

Whether the statutory grounds are established

22. Miss Gaughan advised the Tribunal that no payments of rent have been made since the notices were served last October. In advance of the CMD, a rent account had been produced, showing that the respondent had made no payments for over a year. The current arrears stand at £6,720.

23. In light of the documents produced, and in the absence of any representation by the respondent to the contrary, the Tribunal was satisfied that:

- Both at the date of the service of the notice under section 19 and at the date of the continued CMD, at least three months' rent lawfully due from the respondent is in arrears.
- The respondent has persistently delayed paying rent which has become lawfully due.
- Some rent lawfully due from the respondent was in arrears at the date when proceedings for possession were commenced.

[1] Paton and Cameron, *Landlord and Tenant*, p 228; *Waugh v More Nisbett* (1882) 19 SLR 427; *Life Association of Scotland Ltd v Black's Leisure Group plc* 1989 SC 166.

24. Accordingly grounds 8, 11 and 12 of schedule 5 of the Act are established. As regards grounds 11 and 12, the Tribunal considered that it was reasonable to grant the order, given: (a) the high level of arrears; (b) the fact no payments have been made for over a year.

Decision

25. The Tribunal accordingly granted an order for possession under section 18(3) and (4) 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.

Legal Member

Date: 10 July 2020