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/18/0296

Re: Property at 179 Inveraray Avenue, Glenrothes, Fife, KY7 4QS ("the Property")

Parties:

Ms Gillian Stewart, 5 Queen Street, Cupar, Fife, KY15 7HP ("the Applicant")

Ms Erin Innes, 179 Inveraray Avenue, Glenrothes, Fife, KY7 4QS ("the Respondent")

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Tony Cain (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Application is refused.

1. The Hearing took place at Kirkcaldy on 11 June 2018. Present were the Applicant Gillian Stewart with Mr McCunn as supporter and the solicitor for the Applicant Mrs McLaughlin from McLaughlin & Co Solicitors. The Respondent was not present. The tribunal was satisfied that the Respondent had received notification of the hearing by letter dated 9 April 2018 to her address.
2. The application for an order for repossession in terms of Rule 65 had been made on 30 January 2018 and was accompanied by a copy of the tenancy agreement starting 14 December 2012, which listed the Applicant and a Robert Stewart as Landlords, copy form AT6 dated 10 January 2018 with Execution of Service by Sheriff Officers confirming service on the Respondent on 11 January 2018, copy S 11 Notice, copy Notice to quit dated 21 September 2017 from FDL Lawyers and Estate Agents, copy form AT5 dated 14 December 2011, a bundle of bank statements, and a letter from the Applicant to the Respondent dated 24 November 2017.

3. On 3 April 2018 a Case Management Discussion had taken place where issues regarding the entitlement of the Applicant to make the application in her sole name and issues regarding the case evidence had been raised. A Note had been prepared and is referred to for its terms and held to be incorporated herein.
4. The Respondent has not made any representations regarding the application, the Note on the Case Management Discussion and has not lodged a defence.
5. A review request of the Case Management Note had been made by the Applicant's solicitors on 11 April 2018, which also produced a letter from Mr Robert Stewart, the second landlord named on the tenancy agreement, that he had no interest in the proceedings.
6. The Review request had been dealt with by the tribunal in a note on the review request refusing the request for items 1, 2 and 3 and allowing the request for item 4. These are referred to for their terms and held to be incorporated herein. Unfortunately it had not been possible to accommodate the request for an earlier hearing date due to pressure of business.
7. At the hearing the solicitor for the Applicant confirmed that the application is made in terms of Rule 65 and that the application relies solely on the service of the form AT6 on the Respondent. She confirmed that the process under which the application is made is S 18 (6) of the Housing (Scotland) Act 1988 and that the application does not rely on any Notice to Quit served on the Respondent to bring the tenancy to an end.
8. The Applicant gave evidence that no rental payments had been received since December 2016 and that in addition to that there were significant further historic rent arrears. She also gave evidence that she had tried to support the tenant in obtaining housing benefit and that the tenant had been seeking advice from the CAB in 2016 but that the tenant had not engaged with her in discussing the arrears since the application had been lodged and rarely answers the door. The tenant is not interested in leaving the premises and is still living at the property. The Applicant stated that it is not possible for her to support that level of arrears. She also states she is unable to make legal submissions as she is not familiar with the law. She explained that various Notices to Quit had been served on the tenant but not followed through and that the tenant now thinks nothing will happen if a Notice is served on her.
9. The note on the refusal of the review request had set out the issues identified with regard to S 18 (6) (b) of the Housing (Scotland) Act 1988 and referred to the decisions of Royal Bank of Scotland Plc v Boyle, 1999 Hous.L.R. 63 and Eastmoor LLP v Bulman 2014 G.W.D.26-529 as issues which required to be addressed at the hearing.
10. The Solicitor for the Applicant referred the tribunal to these decisions and to clauses 33 and 34 of the Rental Agreement and made representations that the action was undefended, that the tenant in the case had had ample warning that due to rent arrears the Applicant would take action for recovery of possession of the premises due to the notices to quit served previously and the AT6 form served and that the tenancy agreement met the requirements in S 18 (6) (b).

Findings in Fact:

1. The property is let on a Short Assured Tenancy, which commenced on 14 December 2012.

2. The agreed rent is £495 to be paid in advance with the due date on the 14th of the month.
3. The rent arrears relevant to the application as at May 2018 are £10,875 as per the schedule of arrears produced and as per the bank statements produced showing part payment of rent from October 2016 to December 2016 and no further payments from 2 December 2016.
4. Form AT6 was served on the Respondent on 11 January 2018 stating as the grounds of repossession grounds 8, 11 , 12 and 13.
5. No valid Notice to Quit is being relied on in these proceedings and the tenancy is as at the date of the hearing a contractual assured tenancy.
6. Clause 33 of the Rental Agreement states that notice may be served "where the tenant has broken or not performed any of his obligations under this Agreement"
7. Clause 34 of the Rental Agreement states that "if at any time rent (or any part of it) is unpaid for 14 days after becoming due ...or if any terms of this Agreement are not implemented or any of the prohibitions or conditions thereof are contravened, or if any of the circumstances mentioned in Grounds 8,11 or 12to 16 inclusive of Schedule 5 of the Housing (Scotland) Act 1988 shall arise, then the Landlord shall be entitled (in addition to any other right) to terminate the tenancy forthwith, provided that he gives the Tenant at least twenty eight days notice in writing of his intention to do so. "
8. The Rental Agreement contains no further explanation of the grounds referred to.

Legal basis of Order for Recovery of Possession

In terms of S 18 (6) of the Housing (Scotland) Act 1988 the sheriff shall not make an order for recovery of possession of a house which is for the time being let on a assured tenancy, not being a statutory assured tenancy, unless ..... (b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.

The requirement of S 18 (6) (b) had been addressed in the decisions of Royal Bank of Scotland Plc v Boyle, 1999 Hous.L.R. 63 and Eastmoor LLP v Bulman 2014 G.W.D.26-529

The Court in Royal Bank of Scotland Plc v Boyle, 1999 Hous.L.R. 63 had held that the grounds for recovery of possession in Sch 5 must be set out in the tenancy agreement in making provision for the termination of the tenancy. "Incorporation of Sch.5 by reference was not necessarily sufficient or appropriate ". In Eastmoor LLP v Bulman 2014 G.W.D.26-529 Sheriff Jamieson held that the clause in that lease had been poorly drafted "(1) in that it mentioned but did not specify what the grounds were , and it also wrongly assigned to E the right to forthwith put the lease to and end if those grounds occurred, because the lease could only be brought to an end within the contractual period on an order for possession granted by the sheriff under s 18 of the 1988 Act (2) There was no attempt to summarise the essential ingredients of any of the grounds 8,11 and 12 in the tenancy agreement; since a tenancy agreement could only be brought to an end prior to its ish on certain permitted conventional grounds, the parties had to contract in such a way that the contract itself sets out those grounds, it was insufficient for the tenancy agreement merely to refer to the number of the ground, best practice was to refer to its number

and terms *ad longum* and if the ground was summarised, that summary had to contain the essential ingredients of that ground. (3) In any event clause 1 g further did not comply with S 18 (6) where it misleadingly referred to E's entitlement to forthwith put and end to the lease; the reference to the numbers was meaningless to B without having recourse to Sch 5 of the 1988 Act and it suggested that E and not the court could put an end to the lease." And observed "that the onus remained on the landlord to contract with the tenant in such a way that the ground of possession accurately and unambiguously formed part of the terms of the tenancy".

Legal Submission:

The Solicitor for the Applicant submitted that in this case the Rental Agreement in clauses 33 and 34 contained the "essential ingredients" required in the above cases because it advised the tenant that if the obligations under the Agreement were not adhered to, the tenancy could be brought to an end, that it stated if rent is not paid the landlord can take action and that, although this was not the wording of Ground 8, it advises the tenant that if there are arrears the tenancy can be terminated. The tenant had been repeatedly served with Notices to Quit and was aware that action would be taken. She argued that the aim of the legislation was to ensure the tenant was aware how the lease can be brought to an end and was given fair notice. In this case the tenant was well aware of this and of her substantial arrears. The landlord had tried to support the tenant in obtaining housing benefit. This was an undefended action. The tenant had sought legal advice from CAB in the past and done nothing to defend the action this time. The case law mentioned "essential ingredients" and these were present in the Rental Agreement.

Reasons for Decision:

The tribunal considered the case on the basis of the evidence and the legal submissions of the Applicant's solicitor. The tribunal is not satisfied that the Rental Agreement gives the required information in terms of S 18 (6) (b) of the Housing (Scotland) Act 1988 and that it contains the "essential ingredients" of these grounds, which would, in terms of the caselaw, be expected in order to allow an order for possession to be granted if a contractual assured tenancy is in place.
Clause 33 refers to the landlord being able to serve a notice to quit "where the tenant has broken or not performed any of his obligations under this Agreement". It does not specify the specific circumstances of Ground 8, Ground 11 or Ground 12, all of which contain specific requirements as to when such arrears have to exist and it does not refer to an option for recovery of possession in the event that no Notice to Quit has been served. In this case the application is not made on the basis that a valid Notice to Quit has been served and the reference to the landlord's right to servce a Notice to Quit if certain Grounds of Sch 5 are met is irrelevant as this is not the basis for the application. Clause 34 wrongly states that the landlord is entitled to terminate the tenancy forthwith, provided 28 days notice is given, if rent is unpaid 14 days of becoming due and if the circumstances in Grounds 8,11 or 12 to 16 inclusive of Schedule 5 of the Housing (Scotland) Act 1988 shall arise but neither sets out the text of those grounds not gives any description of what these grounds contain. The tribunal considered that the comments by Sheriff Jamieson in Eastmoor LLP v Bulman 2014 G.W.D.26-529 were relevant to this case as, as per that decision, the

grounds were not quoted in full or summarised and the Irritancy provisions in Clause 34 were worded in a way to suggest that the landlord rather than the sheriff or the tribunal can bring the lease to an end. The tribunal considers that whilst the action is undefended, the requirement to adhere to the legal requirements for an action for possession in S 18 (6) (b) of the Housing (Scotland) Act 1988 cannot be ignored by the tribunal and if the Rental Agreement does not make the necessary provisions to advise the tenant in the contract of the grounds on which such possession can be sought, then the application cannot succeed. The tribunal considers unanimously that the wording of the Rental Agreement does not summarise the grounds in Schedule 5 and gives essentially no indication of what these grounds are. In all the circumstances the tribunal thus refuses the application.

Decision: The Tribunal refuses the order for reposession,

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 Hennig-McFatridge

11 June 2018

Legal Member/Chair **Date**