Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under section 33 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/19/0604

Re: Flat 1/2, 90 Cartside Street, Glasgow, G42 9TQ ("the property")

Parties:

Mrs Margaret Chudzynski, 15 The Loaning, Giffnock ("the applicant")

Mrs Louise Ness, Flat 1/2, 90 Cartside Street, Glasgow, G42 9TQ ("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 that the requirements of section 33 of the Act were not met, and refuses the application.

Background

1. On 1 August 2015, the applicant let the property to the respondent, under an assured tenancy. The parties entered into a written tenancy agreement.

2. By an application received by the Tribunal on 22 February 2019, the applicant sought an order for recovery of possession under section 33 of the Housing (Scotland) Act 1988 ("the Act").

3. On 13 March, notice of acceptance was granted by a legal member. A Case Management Discussion ("CMD") was fixed.

The CMD

4. The CMD took place at 2pm at Room 109, the Tribunals Centre, York Street, Glasgow. The applicant appeared personally, with her husband, Richard Chudzynski. They were assisted by Angela Armstrong, a Housing Advice Officer, of East Renfrewshire CAB, 216 Main Street, Barrhead. The respondent did not appear, and was not represented. She had not made any representations to the Tribunal, in advance of the CMD.

5. Under rule 17(4) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, the First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision. The applicant asked the Tribunal to grant an order for recovery of possession, under section 33 of the Act.

6. The Tribunal asked to be addressed on three issues which were apparent from the papers.

7. Firstly, the applicant has been unable to find a copy of the AT5 that required to be served on the respondent, before the creation of the tenancy, in order for it to be treated as a short assured tenancy, under section 32 of the 1988 Act. Instead, the applicant has produced a document signed by the respondent, dated 1 August 2015, (headed "The Agency Agreement"), which states:

> I accept the tenancy constituted by this offer is a Short Assured Tenancy in terms of section 32 of the Housing (Scotland) Act 1988 and that I…have received notice to this effect…

On that matter, Ms Armstrong asked the Tribunal to accept, on a balance of probabilities, that the AT5 was served on the respondent, in the correct form.

8. Secondly, an issue arises from the terms of the tenancy agreement relevant to the duration of the tenancy, when read with the notice to quit. Clause 2 of the "Rental Agreement" is headed "Rent and Period of Lease", besides which appear, handwritten: "£550.00 6 months". Next appears the following:

> 2.1 The lease lasts for SIX months and starts on the…

After those words, the following is handwritten:

> 01-08-15 ENDS 28-02-16.

9. The period from 1 August to 28 February is just under seven months, not six months. This raises an issue of whether the parties intended that the lease was for a

period of six months, ending on say, 31 January 2016, or whether they intended that it was for the longer period indicated by the handwritten dates. If they intended that the tenancy ended on 31 January 2016, then it would relocate on 31 January and 31 July every year since then. In that case, there is a problem with the notice to quit, which calls upon the tenant to leave on 28 February 2019.

10. On that matter, Mr Chudzynski indicated that he had completed the rental agreement. He had miscalculated the end date. Rather than the last day of February, he ought to have stated the last day of January, as he and the applicant intended that the lease should be for six months, and no more, with the first day (1 August) and the last, wholly included. However, the applicant and Ms Armstrong accepted that this meant that the date stated in the notice to quit (28 February 2019) was not an ish of the tenancy.

11. The third issue is that, as noted above, this application was received by the Tribunal on 22 February, six days before 28 February, the date stated in the notice to quit, which is also the date stated in the notice given to the tenant under section 33(1)(d) of the Act.

12. On that matter, Ms Armstrong said that the application was made by her colleague at the CAB. She could not give a reason as to why the application was made before the date stated in the notices, other than an eagerness to progress the applicant's case.

Findings in fact, and in fact and law; reasons for decision

13. The Tribunal considered that, given the non-participation of the respondent in the proceedings, and the issues raised during the course of the CMD, that for the purposes of rules 17(4) and 18(1)(a), it was able to make sufficient findings to determine the case without a hearing being fixed; and to do so would not be contrary to the interests of the parties.

14. On the first issue, the Tribunal was prepared to accept, on a balance of probabilities that a valid AT5 was served on the respondent given: (1) the terms of the notice signed by the respondent, quoted above; and (2) the respondent has not, in these proceedings, disputed the contention that she occupies under a short assured tenancy. It accordingly finds in fact that an AT5 in the correct form was served on the respondent before the creation of the tenancy. It further finds in fact and law that the parties' tenancy is a short assured tenancy, under section 32 of the Act.

15. On the second issue, the Tribunal accepted the applicant's position as to the correct interpretation of the duration of the lease. The entry "28-02-18" was an error. The tenancy is clearly stated to be for a period of six months, and it is apparent from

the other papers that it commenced on 1 August 2015. Therefore, Mr Chudzynski intended to enter the last day of January 2016. Accordingly, the Tribunal finds, in fact and law: that "28-02-16" is an error; that the agreement should be interpreted as expressing a duration of six months from 1 August 2015 to 31 January 2016 inclusive; and the ish of the tenancy falls on 31 January and 31 July each year.

16. Accordingly the date stated in the notice to quit is incorrect. The Tribunal considered whether it was possible to conclude that the notice to quit would nevertheless have had the effect of preventing tacit relocation, given that the date stated on the notice (28 February) was later than the correct date (31 January), and therefore the error did not prejudice the tenant. The possibility of such a conclusion is apparent from the decision of the Inner House in *McDonald v O'Donnell* 2008 SC 89. However, it did not find it necessary to determine that question, given its view of the third issue.

17. As regards the third issue, the Tribunal considers the application cannot be granted, because proceedings were initiated before the date (28 February 2019) stated in the statutory notice, under section 33(1)(d).

18. Essentially the same issue was before the Court of Appeal, in *Lower Street Properties v Jones* (1996) 28 HLR 877. In that case, the landlords sought an order for possession of a house let on an assured shorthold tenancy, the equivalent, under the English legislation (the Housing Act 1988) of a short assured tenancy. The landlord had raised proceedings one day before the expiry of the statutory notice. The Court held that it was implicit, in the notice, and the legislation, that the landlord could not initiate proceedings until after the date stated in the statutory notice. Commenting on the argument that it was permissible to raise the proceedings before the notice expired, Lord Justice Kennedy said:

> I have considerable misgivings about such a course of action. In the first place, from the point of view of the tenant, I regard it as objectionable that having been given a period in which to leave, legal proceedings to obtain possession should be instituted against him or her before that period has expired...Of course, he might at first not discover that proceedings had been commenced, but if he did discover before the date specified in the notice he might ask the court to set the proceedings aside as an abuse of process and if he were to do that an application might well succeed. Secondly, from the point of view of the court, it is I believe highly undesirable to add to overburdened lists contingent litigation.

19. The Tribunal observes that the section 33(1)(d) notice served in this case states:

> I...hereby give you notice that I require possession of the property...and I require possession as at 28-2-19. The tenancy will reach its termination date as at that date and I NOW GIVE YOU NOTICE THAT YOU ARE REQURED TO REMOVE FROM THE PROPERTY ON OR BEFORE 28-2-19.

20. In the view of the Tribunal, it is also implicit in section 33(1) and (2) of the Scottish Act that Parliament, having required the landlord to serve notice stating that he "requires possession", and that a period of two months should be given to the tenant in respect of such a notice, intended that proceedings for possession under section 33 should not be raised until after the notice had expired. Having given notice to the tenant in the terms above stated, it is objectionable that eviction proceedings have been instituted against her before the date stated in the notice.

Decision

21. For these reasons, the Tribunal has decided that the requirements of section 33 of the 1988 Act are not met, and the application should be refused.

22. This decision was communicated to the applicant, Mr Chudzynski, and Mr Armstrong, after a short adjournment in which the Tribunal deliberated.

23. Whilst it is not for the Tribunal to advise parties, it would not disagree with Ms Armstrong's suggestion that, in light of this decision, the prudent course for the applicant would be to serve a further notice to quit and section 33(1)(d) notice, to take effect on 31 July, with a view to raising further proceedings, on or after 1 August 2019.

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

Legal Member

02/05/19.

Date.