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/19/1879

Re: Property at 2 Elizabeth Wynd, Hamilton, Lanarkshire, ML3 7AF ("the Property")

Parties:

D Paterson Properties Limited, Block 6 Unit 30 Stirling Road, Chapelhall Industrial Estate, Chapelhall, Lanarkshire, ML6 8QH ("the Applicant")

Mr William Watt, Mrs Mary Watt, 2 Elizabeth Wynd, Hamilton, Lanarkshire, ML3 7AF ("the Respondents")

Tribunal Members:

Neil Kinnear (Legal Member)

Decision (in absence of the Respondents)

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

Background

This is an application received by the Tribunal on 18th June 2019 brought in terms of Rule 65 (Application for order for possession in relation to assured tenancies) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant provided with its application copies of the short assured tenancy agreement, form AT5, notice to quit, section 19 notice (form AT6), section 11 notice, rent arrears statement and execution of service.

The tenancy agreement and form AT5 had been correctly and validly prepared in terms of the provisions of the *Housing (Scotland) Act 1988*, and the procedures set out in that Act had been correctly followed and applied.

The form AT6 intimated to the tenant that the Applicant intended to raise proceedings for possession of the house on grounds 8, 11 and 12 of Schedule 5 to the *Housing (Scotland) Act 1988.*

The Respondents had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 12th July 2019, and the Tribunal was provided with the executions of service.

Case Management Discussion

A Case Management Discussion was held on 15th August 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Applicant appeared, and was represented by Mr Kane, solicitor. The Respondents did not appear, nor were they represented. The Respondents have not responded to this application at any stage either in writing or by any other form of communication.

The Tribunal had noted prior to the Case Management Discussion that there appeared to be a question about the validity of the notice to quit, and had e-mailed the Applicant's representative in advance to alert him that the Tribunal would invite him to make submissions on that matter.

The short assured tenancy agreement narrates that it is for a "Term of from 1/4/08 and including to 30/9/08". It makes no further provision regarding tacit relocation.

Clause 10 of the short assured tenancy agreement is in the following terms:

"**NOTICE OF TERMINATION BY LANDLORD**
After the initial six-month period has elapsed the Landlord may terminate this Agreement upon giving to the tenant notice in writing as per the schedule below without prejudice to the rights or remedies of either party against the other in respect of any antecedent claim or breach of covenant.

Grounds of Re-possession	**Notice Period**
Recovery by Landlord – no fault of tenant	2 months
Recovery by Landlords creditor	2 months
Alternative accommodation provided	2 months
Expiry of Notice to Quit	2 weeks
Persistent delays in paying rent	2 weeks
Rent overdue	2 weeks
Obligation on Tenant not performed	2 weeks
Neglect of or damage caused to property	2 weeks
Conduct of Tenant	2 weeks
Damage caused to furniture	2 weeks"

The Applicant served a notice to quit dated 10th April 2019, which was delivered by recorded delivery post on 11th April 2019. The notice to quit advised the Respondents to quit the Property by 24th May 2019.

A valid form AT6 also dated 10th April, and indicating that proceedings would not be raised before 24th May 2019, was served with the notice to quit.

The Tribunal was of the view that the date of 24th May 2019 referred to in the notice to quit is not an *ish* of the lease agreement, and was for that reason concerned as to whether the notice to quit was valid.

This issue was of importance if a notice to quit was required in this matter, as if the notice to quit was invalid, then the Tribunal would not be entitled to grant an order for possession.

The Tribunal invited Mr Kane to address it on these issues, with particular reference to *Royal Bank of Scotland v Boyle* 1999 Hous LR 63, *Eastmoor LLP v Bulman* [2014] 6 WLUK 135, *Rennie & Ors. – Leases* S.U.L.I. (1st Ed.) paragraphs 22-46 to 22-49, *Gloag & Henderson – The Law of Scotland* (14th Ed.) paragraph 35-25 and 35-26, section 18(6) of the *Housing (Scotland) Act 1988* and section 38 of the *Sheriff Courts (Scotland) Act 1907*.

Mr Kane initially sought to argue that the notice to quit was valid, and that it did not need to specify an *ish* date. After considering the authorities further, he conceded that the notice to quit did require to specify an *ish* of the lease, and that it did not do so.

He also argued that the application having been accepted in terms of Rule 9 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended by a legal member of the Tribunal with delegated powers of the Chamber President, another legal member of the Tribunal would not be entitled to "over-rule" that acceptance "decision", and was bound to grant an order in circumstances where the application had previously been accepted without query of its merits or prospects of success.

Mr Kane went on to make submissions inviting the Tribunal to accept that the terms of clause 10 of the lease, though insufficient for the purposes of grounds 8 and 12, were sufficient in setting out ground 11 of Schedule 5 to the *Housing (Scotland) Act 1988* and consequently no notice to quit was required in order for the Applicant to be entitled to rely on it for the purposes of seeking an order for possession.

For these reasons, Mr Kane invited the Tribunal to grant the order for possession sought in this application.

Statement of Reasons

Sections 18(6) of the *Housing (Scotland) Act 1988* as amended (hereinafter referred to as "the Act") provides:

"18.— Orders for possession.

(1) The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.

(2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3) If the First-tier Tribunal is satisfied that any of the grounds in Part I of Schedule 5 to this Act is established then, subject to subsections (3A) and (6) below, the Tribunal shall make an order for possession.

(3A) If the First-tier Tribunal is satisfied—

(a) that Ground 8 in Part I of Schedule 5 to this Act is established; and

(b) that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit,

the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4) If the First-tier Tribunal is satisfied that any of the grounds in Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit.

(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

(6) The First-tier Tribunal shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless—

(a) the ground for possession is Ground 2 or Ground 8 in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9, Ground 10, Ground 15 or Ground 17; and

(b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.

(6A) Nothing in subsection (6) above affects the [First-tier Tribunal][18] 's power to make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.

(7) Subject to the preceding provisions of this section, the First-tier Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

(8) In subsections (3A) and (4A) above—

(a) *"relevant housing benefit"* means—

(i) any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or

(ii) any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;

(aa) *"relevant universal credit"* means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;

(b) references to delay or failure in the payment of relevant housing benefit or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant."

The provisions of this section relevant to the issues raised in this application are that the Tribunal may only make an order for possession on one or more of the grounds set out in Schedule 5 to the Act, and shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless the terms of the tenancy make provision for it to be brought to an end on the ground in question.

The Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

The effect of these provisions is that the Tribunal may only make an order for possession on the grounds sought in this application if either the terms of the tenancy make provision for it to be brought to an end on the ground in question, or if the contractual tenancy has been terminated (by a valid notice to quit) and a statutory assured tenancy has arisen.

Ultimately, Mr Kane conceded (rightly, in the Tribunal's opinion) that the notice to quit required to end the lease on a date which is an *ish* of the lease, and that the date given of 24th May 2019 was not an *ish* of the lease (see *Rennie & Ors. – Leases* S.U.L.I. (1st Ed.) paragraphs 22-46 to 22-49, *Gloag & Henderson – The Law of Scotland* (14th Ed.) paragraph 35-25 and 35-26, and section 38 of the *Sheriff Courts (Scotland) Act 1907*).

That being so, the lease has not been terminated, remains in force, and a statutory assured tenancy has not arisen.

The remaining question is whether the Tribunal was entitled to make an order for possession in this application, upon the basis that the terms of clause 10 of the lease agreement are deemed by the Tribunal in relation to ground 11 of Schedule 5 of the Act to "make provision for it to be brought to an end on the ground in question" in terms of section 18(6)(b) of the Act.

That question was considered previously in the Sheriff Court in the cases of *Royal Bank of Scotland v Boyle* 1999 Hous LR 63 and *Eastmoor LLP v Bulman* [2014] 6 WLUK 135, which held that a lease may only be brought to an end prior to its *ish* if there is a statutory or conventional irritancy, and that section 18(6) of the *Housing (Scotland) Act 1988* is in effect a provision *anent* conventional irritancies the purpose of which is to restrict the conventional irritancies to the grounds set out in section 18(6)(a). For that reason, the tenancy agreement must provide for it to be brought to an end on the ground in question, being a ground in schedule 5 to the 1988 Act specified in section 18(6)(a).

In paragraph 12-13 of *Royal Bank of Scotland v Boyle*, the then Sheriff Principal Wheatley noted:

"I think it is important that the connection between the tenancy agreement and the schedule is reasonably precise and complete. In addition, it appears to have been the intention of the statute that in these agreements the tenant in particular has taken the additional step of binding himself into a contractual arrangement which provides that he can lose possession on certain grounds before that possession can be granted to the landlord. I am therefore unable to accept the closely argued submissions of the agent for the landlord that a more general indication in the tenancy agreement as to what might happen should rent arrears arise is sufficient to satisfy the terms of s 18(6)(b)."

Interestingly, in the Editor's Note to the case, the editor comments:

"The standard practice among housing associations and many other assured tenancy landlords is to repeat the terms of Sched 5 verbatim in the tenancy agreement. Since the agreements are a common style held on a word processor, this creates no real difficulty for the landlord and ensures that there can be no doubt that any ground which might come to be relied upon is actually part of the lease. Given the widespread nature of this practice it is unlikely that there will be many cases which will test the extent to which something less than full repetition will suffice.".

In paragraph 30 of *Eastmoor LLP v Bulman* [2014] 6 WLUK 135, Sheriff Jamieson noted:

"Since therefore a tenancy agreement may only be "brought to an end" prior to its ish on certain permitted conventional grounds, I am of the view, as with the sheriff principal in the Royal Bank case, that the parties must contract in such a way that the contract itself sets out the grounds for bringing to an end the lease prior to determination of its ish. It is not sufficient for the tenancy agreement merely to refer to the number of the ground in schedule 5 . Best practice is to refer to its number and

terms *ad longum* ; if the ground is summarised, the summary must contain the "essential ingredients" of the ground in question.".

The Tribunal agrees with the comments of both the Sheriff Principal and the Sheriff, for the reasons that they fully explain. The Tribunal therefore has to consider whether the wording in clause 10 of the lease noted earlier, is a reasonably precise and complete repetition of the terms of the grounds (particularly ground 11) contained in Schedule 5 to the Act.
Best practice is to refer to the number and terms *ad longum* of the ground in Schedule 5. The lease agreement here does not do so. Indeed, not only does it not identify the number of any ground, but it does not even mention Schedule 5 or refer to the Act at all.

The Tribunal does not consider that the wording used in clause 10 of the lease is sufficient to be considered a reasonably precise and complete repetition of the terms of the grounds contained in Schedule 5 to the Act, particularly where it fails to make any mention of the Act, Schedule 5, or to identify the number of any ground. The Tribunal did not consider that the wording used in clause 10 was a sufficient summary of the ground in question.

For these reasons, the Tribunal did not consider that that the terms of the tenancy agreement contained in clause 10 were sufficient to provide for it to be brought to an end on the ground in question, being a ground in schedule 5 to the Act specified in section 18(6)(a), in terms of section 18(6)(b) of the Act.

In those circumstances, the Tribunal is not entitled to make an order for possession, and dismissed the application.

The remaining issue raised by Mr Kane relates to whether the Tribunal is entitled to reach that decision, upon the basis that another legal member of the Tribunal would not be entitled to "over-rule" the acceptance "decision" earlier made in terms of Rule 9 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended by a legal member of the Tribunal with delegated powers of the Chamber President, and was instead bound to grant an order in circumstances where the application had previously been accepted without query of its merits or prospects of success.

The Tribunal considered that it was entitled to reach its decision, and was not bound to grant an order for possession as a result of the previous acceptance of this application in terms of Rule 9.

Rule 9 provides that the Tribunal must notify parties of the acceptance of an application where Rule 8 does not apply. Rule 8 gives the Tribunal power to reject an application on certain specified grounds.

The fact that an application is not rejected in terms of Rule 8, and is accepted in terms of Rule 9, does not mean that the Tribunal is thereafter bound to grant any order sought in any such application. There would clearly be no purpose whatsoever in having any form of further procedure, let alone Case Management Discussions or Hearings, if that were the case.

The acceptance of an application by the Tribunal in terms of Rule 9 is a procedural step, and is not a Decision of the Tribunal in terms of Rule 26 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The acceptance of this application in terms of Rule 9 was not a "decision" of the Tribunal, and as a result could not be binding upon it in determining the ultimate outcome of the application.

Decision

For the above reasons, the Tribunal dismissed the application and refused the order sought.

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.

Neil Kinnear

Legal Member/Chair

15/08/19

Date