



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section under Section 18 of the Housing (Scotland) Act 1988 (“the Act”) and Rule 66 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017

Chamber Ref: FTS/HPC/EV/22/0670

Re: Property at 17 School Brae, New Pitsligo, Aberdeenshire, AB43 6LQ (“the Property”)

Parties:

Mr James Stewart, East View Cottage, Caravan, Cantley, Keith, AB55 6LJ (“the Applicant”)

Miss Nicola Edith Cowie and Mr Kristien Harrott, 17 School Brae, New Pitsligo, Aberdeenshire, AB43 6LQ (“the Respondent”)

Tribunal Members:

Martin McAllister (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for possession of the Property be made in favour of the Applicant.

Background

- 1. This was a Hearing held on 23rd August to consider the application made by the Applicant dated 7th March 2022 for an order of repossession of the Property in terms of Rule 66 of the Tribunal Rules. It took place by teleconference. The case FTS/HPC/CV/22/0705 was also dealt with.**
- 2. A case management discussion had been held on 13th July 2022.**
- 3. The Applicant and Respondent are parties to an assured tenancy agreement in respect of the Property which commenced on 16th August 2014 and is ongoing.**

4. **The Applicant was present and was represented by Mr Jeffrey Livingstone of Landlord Agents Ltd. The Respondents were present. Evidence was heard from the Applicant, the Respondents and Mrs Tracy Willerton.**

The Application

5. **The application is dated 7th March 2022 and seeks an order of possession under Section 18 of the 1988 Act. It states that the Applicant wishes recovery of possession so that he can live in the Property. It states that the Applicant is currently living in a caravan which is exacerbating his ill health.**
6. **The tribunal had a copy of the AT6 Form which had been served on the Respondents on 24th November 2021 and which contained the provision that proceedings would not be raised against the Respondents until 28th February 2022.**

7. The Law

Housing (Scotland) Act 1988

Section 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.

(3C) Where this subsection applies, in considering for the purposes of subsection (4) (as applied in accordance with the modification made by paragraph 3(2)(b) of schedule 1 of the Coronavirus (Scotland) Act 2020) whether it is reasonable to make an order for possession against the tenant, the First-tier Tribunal is to consider the extent to which the landlord has complied with pre-action requirements before raising the proceedings for possession.

(4) If the First-tier Tribunal is satisfied that any of the grounds in Part I or 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.

(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.

(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.

Ground 1, Part I, Schedule 5

Not later than the beginning of the tenancy the landlord (or, where there are joint landlords, any of them) gave notice in writing to the tenant that possession might be recovered on this Ground or the First-tier Tribunal is of the opinion that it is reasonable to dispense with the requirement of notice and (in either case)—

(a) at any time before the beginning of the tenancy, the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them occupied the house as his only or principal home; or

(b) the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them requires the house as his or his spouse's or civil partner's only or principal home, and neither the landlord (or, in the case of joint landlords, any one of them) nor any other person who, as landlord, derived title from the landlord who gave the notice mentioned above acquired the landlord's interest in the tenancy for value.

Applicant's Position

8. Mr Livingstone set out the Applicant's position.

9. Mr Livingstone said that the Applicant wanted to live in the Property as his ordinary or principal home. He conceded that, the Applicant had not given specific notice to the Respondents at any time prior to commencement of the tenancy that he may seek possession of the Property to live in it. He said that no AT5 form had been served on the Respondents.

10. Mr Livingstone said that paragraph 26 of the tenancy agreement gave some notification to the Respondents:

“The Sheriff may, in certain circumstances, be asked to make an order for possession of the Subjects of Let (that is put an end to the tenancy) not only on any one or more of the Grounds referred to in Condition 19, but also on one or more than one of the following Grounds set out in Schedule 5 of the said act: Grounds 1,6,7,9 and 10.”

11. Mr Livingstone said that he would be relying on that provision of the tenancy agreement or alternatively seeking the tribunal to exercise discretion and, in terms of Ground 1 of Part I of schedule 5 of the Act: “that it is reasonable to dispense with the requirement of notice.”

12. Mr Livingstone accepted that, if the tribunal did dispense with the requirement of notice, it would require then to determine whether or not it was reasonable to grant an order of possession and that what had once been a mandatory ground was now discretionary as a consequence of amendments to the Act.

Respondents' Position

13. Mr Harrott said that the Respondent's position was that they did not accept that the Applicant's intention was to live in the Property. He said that the Applicant had told the Respondents that he wanted to put other tenants in the Property or to sell it. He said that the reason the Applicant wanted the Respondents to vacate the Property was to avoid doing necessary repairs which had been reported to him. He said that the Applicant has other properties which he could move into.

Reasonableness

14. The tribunal considered that it effectively had two matters to determine with regard to reasonableness. The first was whether or not it is reasonable to dispense with the requirement of notice required in terms

of Ground 1 and the second, if such a requirement is dispensed with, if it is reasonable to grant the order of possession.

15. The tribunal determined that it required to consider evidence and could not deal with the dispensation of notice as a preliminary matter but rather arrive at a determination on reasonableness once it had heard evidence led by the parties.

16. Documents before the tribunal:

16.1 Undated lease between the parties for the Property.

16.2 Title Sheet for ABN62988 (the Property).

16.3 Form AT6 dated 24th November 2021.

16.4 Notice to Quit dated 24th November 2021.

16.5 Royal Mail evidence of delivery of documents on the Respondents dated 25th November 2021.

16.6 Letter from Santander dated 28th August 2019 giving consent to let the Property.

16.7 Council Tax notices from Aberdeenshire Council from 2005 to 2008.

16.8 Copy of notice to the local authority in terms of Section 11 of the Homelessness etc. (Scotland) Act 2003.

Evidence

17. Mr Stewart said that he had bought the Property in 2005 and had lived there until shortly before he granted the tenancy to the Respondents.

18. Mr Stewart said that he had two other properties which he let out but the leases in connection with those had been set up by letting agents. He said he had limited experience of being a landlord. He said that he set up the tenancy for the Property and did not know that he had to serve a notice on the Respondents indicating that the Property had been occupied by him and that he may, at one point, want to recover it to live in. He said that he was not sure if he ever told them that he may want to live there in the future.

19. Mr Stewart said that he was sure that the Respondents were aware that the Property had been his home and he had met them three times at the property before commencement of their tenancy. He said that, at the time he entered into the tenancy contract for the Property, he had been looking to buy somewhere and had no intention of returning to live in

the Property. He said that he purchased another property called Denhead Cottage in Fyvie, shortly after the tenancy commenced but did not immediately move into it because it needed extensive refurbishment and had been uninhabitable. He moved in with his brother. He said that he worked on it for over a year.

20. Mr Stewart said that he sold Denhead Cottage in 2018 and that he bought a plot of land the same year with the intention of carrying out a residential development. He said that some preliminary work has been done and that, although the planning permission has expired, he is confident of getting it reinstated because work on the site has commenced.
21. Mr Stewart said that he decided to move back to the Property just prior to service of the Notice to Quit. He said that he is living in a caravan which is sited on the plot of land. He said that the condition of the caravan is poor, it has no mains electricity or sewage disposal and that water is taken from a borehole.
22. Mr Stewart said that “things got away from him financially” and that he was “caught in a trap.” He said that his health is not good and that he is now unable to work or to do work on the building plot himself which had been his intention. He said that he has no money to develop the plot. He said that his health is getting worse and that matters are not helped by staying in a caravan.
23. Mr Stewart said that his intention is to move back to the Property and then sell the plot which he cannot do until he is no longer living in a caravan which is sited on it.
24. Mr Stewart said that his other two properties have tenants in them and provide him with an income. He could not take steps to sell them as this would deny him income on which he depends and he had never lived in either property. He said that he had not explored avenues for assistance such as housing provided by the Council. He said that he did not think such an approach would be successful given that he owns properties and that he also felt that he could not afford to pay rent. He also did not think that he would have an entitlement to state benefits because of the income he has from the rental properties.
25. Mr Stewart said that, having looked at various options, he had come to the view that the only thing he could do was move back to the Property.

- 26. In response to questioning by Mr Harrott, Mr Stewart said that he had no tenants in the Property prior to the Respondents but that, at various times over the years, people had lived with him in it.**
- 27. Mr Stewart did not accept that he had said that he wanted to sell the Property.**
- 28. Miss Cowie said that she and Mr Harrott lived in the Property with their seven year old son who is happy at the village school. She said that she volunteers with the local Boys Brigade and has a job in a local shop. Mr Harrott is currently not able to work for reasons of physical impairment. She said that their seven year old son had only known living in New Pitsligo and was settled.**
- 29. Miss Cowie said that since the Respondents had received the Notice to Quit they had looked for alternative accommodation but had been unable to find anything. She said that, if they managed to get housing provided by the Council, it is likely to be in somewhere other than New Pitsligo which would probably mean that she would lose her job as it sometimes involved starting at 5.00 am. She said that she does have a car but the time and cost of travel from outside the village might be prohibitive. She said that she has a support network of friends in the village.**
- 30. Mr Harrott said that his mother had moved from England to be near him and that she lives in the village.**
- 31. Mr Harrott said that the Property has three bedrooms which is necessary because his ten year old daughter sometimes stays with them and he is hopeful of getting custody of her. He said that is difficult to find available properties in New Pitsligo which have three bedrooms.**
- 32. Mr Harrott said that he is of the view that the Applicant intends to sell the Property and that he wants to remove the Respondents from it because he is unwilling to carry out necessary repairs. Miss Cowie said that, at a meeting with the Applicant in November 2021, he had told her that he would rather sell the Property.**
- 33. Mrs Willerton said that she was present at the meeting with Miss Cowie in November 2021 and said that there had been some mention by Mr Stewart of him wanting to sell the Property.**

Submissions

- 34. Mr Livingstone asked the tribunal to accept that the Applicant had not attempted to mislead the Respondents at the commencement of the tenancy by not providing them with the required notice. He submitted that the tribunal should exercise its discretion in dispensing with the requirement to give notice.**
- 35. Mr Livingstone asked the tribunal to accept that it was reasonable that the Applicant recover possession of the Property. He submitted that it should accept the evidence of the Applicant about his personal circumstances and the reasons why he wants to return to live in the Property.**
- 36. Mr Harrott asked the tribunal to accept that the reason the Applicant wanted to return to live in the Property was that he is unwilling to carry out repairs.**
- 37. Mr Harrott said that the Respondents had only become aware that the Applicant had lived in the Property when they had been living there for some time and had learned this from neighbours.**

38. Findings in Fact

- 38.1 The Applicant and Respondent are parties to an assured tenancy which commenced on 16th August 2014 and which is continuing.**
- 38.2 The Applicant did not serve an AT5 form on the Respondents or give notice to them in writing prior to the beginning of the tenancy that he may seek to recover the Property under Ground 1, Part I, Schedule 5 of the Act.**
- 38.3 The Respondent served a Notice to Quit and an AT6 form on the Applicant dated 24th November 2021 which was delivered to the Respondents on 25th November 2021.**
- 38.4 The Applicant is the owner of the Property.**
- 38.5 The Applicant resided in the Property from 2005 to 2014.**
- 38.6 The Applicant requires the Property as his only or principal home.**
- 38.7 The Applicant served a notice on the local authority that he intended to raise proceedings for recovery of the Property.**

39. Findings in Fact and Law

- 39.1 Appropriate notice had been served on the Respondents by the Applicant that he intended to submit an application to the Tribunal for recovery of possession of the Property.**
- 39.2 The application to the Tribunal was timeous and was not submitted prior to the notice period in the Notice to Quit.**
- 39.3 It is reasonable to dispense with the requirement for the Applicant to have served notice in writing to the Respondents that possession of the Property might be recovered on the Ground contained in Ground 1, Part I of Schedule 5 of the Act**
- 39.4 It is reasonable for the Tribunal to make an order of possession of the Property.**

Reasons

- 40. The tribunal accepted the terms of the Notice to Quit and AT6 form and that they had been served on the Respondents on 25th November 2021. Copies of the relevant documents were before the tribunal.**
- 41. The tribunal accepted that the application had been submitted after the expiry of the notice period.**
- 42. The tribunal accepted the terms of the notice under Section 11 of the Homelessness etc. (Scotland) Act 2003 and that it had been appropriately served.**
- 43. Before considering the question of reasonableness, the tribunal required to consider the terms of Ground 1:**
- (a) at any time before the beginning of the tenancy, the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them occupied the house as his only or principal home; or
- (b) the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them requires the house as his or his spouse's or civil partner's only or principal home, and neither the landlord (or, in the case of joint landlords, any one of them) nor any other person who, as landlord, derived title from the landlord who gave the notice mentioned above acquired the landlord's interest in the tenancy for value.

44. Mr Stewart said that he occupied the Property and it accepted his evidence in this regard. He was credible and no substantive challenge to this was presented by the Respondents. He had lived in it from his purchase in 2005 until he granted the tenancy to the Respondents in 2014. In accepting that the Applicant had lived in the Property, the tribunal was assisted by the Council Tax notices from 2005 to 2008 which were addressed to the Applicant at the Property.
45. The Title Sheet confirmed the Applicant's ownership of the Property.
46. The Applicant was convincing in his evidence that he requires the Property as his only home. He is currently living in a caravan which has limited services and his health is not good. He is unable to work. His two other rented properties provide an income and he has never lived in either of them.
47. The tribunal determined that the Applicant had established that both of the alternative requirements of Ground 1 had been met. It only required to be satisfied on one of them.
48. Having found the requirements of Ground 1 to have been met, the tribunal then considered the matter of reasonableness in the dispensing with the requirement of notice.
49. In considering this, the tribunal found assistance from an English case: *Boyle v Verrall* (1997) 29 HLR 436, [1997] 1EGLR 25. This was a case involving the failure to serve a notice in a shorthold assured tenancy. The landlord in the case did not serve a Section 20 notice which is comparable with an AT5 form in Scotland.
50. In the *Boyle v Verrall* case, the Court of Appeal stated that, in considering whether it was reasonable to dispense with the requirement of notice, it was necessary to look at all the circumstances and not just those surrounding the failure to serve the notice.
51. The Applicant had failed to serve notice on the Respondents. The tribunal did not consider that reference in the tenancy agreement to a ground to recover possession was sufficient notice unless it set out the ground *ad longum*. It did not do so but referred to "Grounds 1,6,7,9 and 10."
52. The tribunal accepted that the Applicant had been unaware of the requirement to serve an appropriate notice and that letting agents had

dealt with his other properties but nevertheless, as a landlord, he should have dealt appropriately with the necessary paperwork.

53. The tribunal considered the respective circumstances of both parties.
54. The tribunal found the Applicant to be credible in his evidence about his personal circumstances. It accepted that the Applicant was living in a caravan which was not connected to mains services and that, because of health issues and his financial situation, he required recovery of the Property.
55. The Respondents were credible in their evidence with regard to their life in New Pitsligo. Miss Cowie has a job in the village, their son is settled in the village school and Mr Harrott's mother lives in New Pitsligo. It also accepted that, if evicted from the Property, it may be difficult for them to get suitable housing in the village which would be able to meet their needs.
56. The tribunal made no finding with regard to whether or not the Applicant had, at one time mentioned selling the Property. It considered any evidence on the matter to be irrelevant if it made a finding that the requirements of Ground 1 were met.
57. The tribunal had to carry out a balancing act and determine whether or not the Applicant or the Respondents would suffer greater hardship by the tribunal granting, or refusing to grant decree and not to restrict its consideration to the circumstances surrounding the failure to give notice.
58. If the tribunal grants the decree for an order of possession, the Respondents would require to be housed and the local authority has an obligation in such circumstances although the tribunal accepted that such housing might not meet all their requirements.
59. The Applicant is living in a caravan which does not adequately meet his needs. Although his evidence was that he had not approached the local authority for assistance with housing, the tribunal accepted that it was unlikely that he would get help because of his ownership of properties and it also accepted that his financial position was such that he would have difficulty paying rent.
60. The tribunal determined that, taking all circumstances into account, it was reasonable to dispense with the Applicant's requirement to give

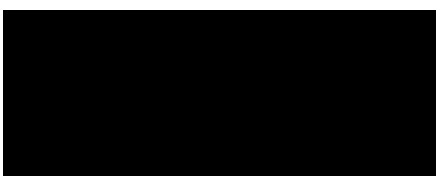
notice of the ground of possession not later than the beginning of the tenancy.

61. The tribunal determined that the same circumstances of the parties be considered in arriving at a decision as to whether or not it is reasonable to grant the order of possession and the same balancing act be carried out. It determined that it is reasonable to grant the order of possession.

62. The tribunal determined that the order of possession be postponed to 30th October to provide more time for the Respondents to arrange alternative housing.

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.



Martin J. McAllister
Legal Member
23rd August 2022