Housing and Property Chamber
First-tier Tribunal for Scotland

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/20/0975

Re: Property at 115/4 West Saville Terrace, Edinburgh, EH9 3DN ("the Property")

Parties:

Mrs Denice Ford, 54 Henderson Row, Edinburgh, EH3 5BJ ("the Applicant")

Mr Mark Calvert, 115/4 West Saville Terrace, Edinburgh, EH9 3DN ("the Respondent")

Tribunal Members:

Karen Kirk (Legal Member) and Ann Moore (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") granted an order against the Respondent for possession of the Property under section 18 of the Housing (Scotland) Act 1988 and further the Tribunal superseded extract for a period of 8 weeks.

This Hearing concerned an Application for an Order for Possession under Section 18(1) of the Housing (Scotland) Act 1988. The hearing took place by teleconference due to the covid-19 pandemic.

1. **Attendance and Representation**

The Applicant was present with her solicitor Douglas Harvey, Thorley Stephenson Solicitors. The Applicant's representative John Love was also in attendance.

The Respondent was present. His representative, Andrew Wilson, CHIA, was also present.

2. **Preliminary Matters**

There were no preliminary matters raised by either party or the Tribunal.

3. Evidence Summary

The Applicant

The Applicant confirmed that she currently lived with her husband although they are now separated. She said she sought possession of the property to live in it but originally it was to sell it. She had nowhere else to go. She had lodged an Affidavit providing the detail on her circumstances which were described as untenable.

She said she started to have communications about recovering the property to the tenant in 2018. She said a NTQ was issued 4th Sept 2018. The rent increase paperwork was served with this notice she said. She realised afterwards that the rent increase was not going to be successful. It was the landlords association who had she said advised her to do it as the rent for the property did not reflect the going rate. However she said that once all of it was submitted and the amount would have jumped from £495 to £800 it was too far a jump in hindsight she said. She said she did not do a rent increase as it was clear it was not an option and did not go forward with it and withdrew the rent increase notice. The Applicant said her letter of 5th September 2018 with the NTQ was to end the contractual agreement in place so they could go forward with the potential rent increase.

The Applicant said at the time of her email of 7th January 2019 she had had a lot of stress with the tenant as her son being diagnosed with MS her initial thoughts were to sell the property to get new treatment she thought was available. She then said the stress broke down the marriage completely and she then needed the property herself.

The Applicant said further that there was no communication after the NTQ was delivered by sheriff officers in September 2018 and nothing after that was communicated. She said on that basis she would dispute that the NTQ was withdrawn. The notice she said has not been withdrawn it still stands to this day. She said she served another NTQ as that was what the landlord association, phone service told her. She said she couldn't recall why but she was sure they would have told her the reason for that.

In June 2019 there was a second notice to quit issued by the Applicant and she said she had joined the landlord association and they recommended she did it with their paperwork. The Applicant took their advisement and sent it out then she did the same regarding the notice sent by her solicitors in October 2019. The Applicant also said the Landlord Association assisted her with the Notice to Quit in 2018. She said further the advice was that she needed another NTQ.

The Respondent

The Respondent said that in 2018 he was told there would be an increase in rent. He received the Notice he said and then got advice about it. He went around in circles and went to the housing department at Edinburgh Council he said and they advised him to challenge the rent increase. He said that's when he got in touch with his current advisers. He said he applied to the Tribunal for a rent review to check that the rent increase was ok. He said then that the Applicant withdrew the increase as a result of that application. He said his rent increase challenge was based on Edinburgh City Council advice. When the increase in rent was withdrawn he said he thought he would be given a new contractual tenancy. He said he was unsure of his understanding and that was that and did not know what was happening. He said the applicant agreed she was withdrawing the rent increase but he needed a new tenancy agreement and one was not received.

The Applicant said he then received the second NTQ and took it to his new advisers. He was advised the new one was not valid and advised that he would be making himself intentionally homeless if he acted upon this. He then received an AT6 in October 2019 and took it to his advisers who said it had no effect due to the contractual tenancy

He said when he first received the initial NTQ he was in shock. He said he didn't know if the NTQ had been withdrawn after that. He spoke of going around in circles trying to get advice. He said he was told if he left he would be intentionally homeless and he needed legal advice and that's when his housing adviser told him to challenge the rent increase.

The Respondent said he did not receive any confirmation that the first one was withdrawn but given the 2nd Notice to Quit he thought it was. He wasn't sure the position but understood that if he had left he would be making himself intentionally homeless. He said he thought it was a contractual tenancy without a rent increase and he was confused. The Respondent said further he had a contractual tenancy and the applicant withdrew it so that it continues without the rent increase. The Respondent when the applicant gave him another Notice to Quit was advised it was not legal and he said this was driving him insane. He said there was a rolling tenancy without a rent increase and the 2nd NTQ was not a legal NTQ he was told and that he would be making himself intentionally homeless if he left.

4. **Submissions**

For the Applicant
The solicitor for the Applicant submitted that he sought an order for repossession on Ground 1 schedule 5 of the 1988 Act. He said the Applicant requires possession of the property referring to the evidence that her marriage had broken down irretrievably and required possession of her only property to live in. He submitted her current position was untenable.

In regards the first NTQ his submission was that this was validly served in 2018 and that both parties evidence was that it was not withdrawn and as such the contractual tenancy became a statutory assured tenancy in April 2019. His submission further was that it was not relevant that a second NTQ was served as the tenancy in his submission was already a statutory assured tenancy. He referred to his written submissions of 7th July 2020 which he adopted in full in which the AT6 was served with an error but that in terms of Section 19(1)(b) of the Act it was reasonable to dispense with the need for service. His submission was that the applicant cannot apply for homelessness help as she owns the property and asked for an order for eviction to be granted. He submitted that the coronavirus Act came into force after the application was made and submitted that it does not apply.

For the Respondent

The Respondent's representative submitted it was a very difficult situation on both sides and that it was quite clear there was no real fault in both sides seemingly trying to do what was correct in law. His submissions was that the 1st NTQ in the Applicant's submission was that it was valid and that was it. His submission was however that the lease was an agreement between two parties and what they understood it was and that the Respondent was confused. He submitted further that the Respondent understood there was a contractual tenancy and that the Applicant's understanding was that a second NTQ was needed to bring the contractual tenancy to an end. Accordingly his submission was that both parties thought the second NTQ was necessary and that previous proceedings were withdrawn and as such a new NTQ was needed. He referred to and adopted in full his written representations.

The submission further for the Respondent was that his own intentions were for security and if he was to be made to leave his home he would need clear notice of this. On the second NTQ the submission was that help was not available due to it not being valid and then the AT6 being faulty due to the wrong notice the same insecurity for the Respondent continued. The submission was that at no point could the Respondent receive help was from City of Edinburgh and that his only notice of proceedings was when he received the Tribunal proceeding notice in August 2020.

The submission was that the NTQ of 7th Sept 2018 was not valid because the 2nd notice shows the understanding of both that another was needed and even if the Tribunal was minded to accept the first NTQ the submission was that ground 1 was not available as it was not notified to Respondent prior to the tenancy starting. The submission further was that it was not reasonable to dispense with the requirement of the notice as the second AT6 still didn't give sufficient notice and was not valid because this meant the first real notice of eviction was in August 2020. He referred to the provisions of the coronavirus Act 2020 to seek to have the postponement of 6 months of any dates for eviction.

5. **Findings in Fact**

- A valid Notice to Quit was served on 4th September 2018.
- A Rent Increase Notice had been served alongside the Notice to Quit.
- The Respondent on advice lodged an Application with the Tribunal to challenge the Rent Increase Notice.
- The Applicant on consideration of the Tribunal Application withdrew her rent increase Notice.
- No steps were taken to enter into a new contractual tenancy or to confirm matters after the rent increase withdrawal
- In Jan 2019 the Applicant wrote to the Respondent confirming she was to take steps to recover the property.
- The Notice to Quit ended the contractual tenancy on 2nd April 2019.
- On 2nd April 2020 the tenancy became a Statutory Assured tenancy.
- An order for Possession was sought by the Applicant in June 2019.
- A new Notice to Quit and AT6 on 21st June 2019 was issued by the Applicant and were invalid.
- This Notice to Quit on 21st June 2019 were not necessary as the tenancy was a statutory assured tenancy from 2nd April 2019.
- A further AT6 was served on the Respondent in November 2019 which specified the wrong notice period and was invalid.
- The Tribunal considered that to dispense with the requirement for notice having regard to Section 19(1)(b) of the Act was reasonable and just and equitable in the circumstances.

Reasons for the Decision

It was relevant to the Tribunal at the Case Management Discussion on 13th September that evidence was heard around the circumstances surrounding the rent increase and subsequent Application to the Tribunal (AT4). The Applicant's position was that the NTQ had not been withdrawn but the Respondent refuted this at the CMD. In evidence the Applicant was clear that she had not withdrawn the Notice to Quit but had withdrawn her intention to increase the Rent. She said she had taken the advice of the Landlords Association to submit a rent Increase Notice and to subsequently serve a new NTQ and AT6 on 21st June 2020.

The Respondent was confused quite rightly in some respects given the various invalid notices served but the Tribunal noted that he considered the tenancy would continue at the same rent as before when the rent increase was withdrawn. He did not specifically point to any evidence written or otherwise that the Notice to Quit was then to be withdrawn also. Instead he referred quite rightly to the confusion thereafter when the Applicant sent him the email on January 2019 and then a subsequent Notice to Quit, AT6 and then a further AT6. However whilst the actions of the Applicant brought about confusion the Tribunal's view was that they could not invalidate a clear and valid Notice to Quit served on 7th September 2018. Reference is made to Stalker, Evictions in Scotland, page 47 third Edition stating that the term Notice to Quit has a technical meaning in Scots law denoting the notice which is given by either the landlord or the tenant to avoid tacit relocation and terminate the tenancy at the next ish. The Notice is given to one party to bring about an end to the contract

if valid. The tribunal was advised both parties were in agreement the Notice to Quit on 9th September 2018 was valid. This in the Tribunal's determination brought about an end to the contractual tenancy on 2nd April 2020 and the tenancy became a statutory assured tenancy. This provided the Respondent rights of which he had in terms of Section 16 but as a statutory assured tenancy.

In respect of those rights the Applicant served an AT6 in November 2020 which did not give the correct notice and was therefore invalid, again this was the accepted position of both parties. The Applicant then lodged this Application. The Applicant's position on the absence of a valid notice in terms of Section 19 was that the Tribunal could dispense with the notice if reasonable. The Tribunal carefully considered the terms of Section 19 1(b) of the Act and its application to the individual circumstances of the case. Reference is made to Stalker, Evictions in Scotland, 3rd Edition at page 77 and the equivalent provision in the Housing act 1988 when notice can be dispensed with if it is just and equitable to do so. The test of reasonableness must be applied to the individual circumstances and reference is made to the persuasive authority of Knowsley Housing Trust v Revell (2003) HLR 958 on this point.

At page 77 Stalker also suggests that the Landlord can probably rely on Section 19(1)(b) when he has served notice but failed to do so in the prescribed form and he refers to the authority of North British Housing authority v Sheridan (2000) L&TR 115, (2000) 32 HLR and to which the Applicants solicitor refers to in his written representations. In these circumstances the AT6 was in the prescribed form but did not provide the correct notice and was short by a few days. The Respondent had notice and in this case was aware by letter of January 2019 which he recalled that the Applicant sought recovery of possession and further by the invalid Notice to Quit in June 2019 prior to the AT6 in November 2019. Although the Tribunal accepts the various communications by the Applicant in error caused confusion they provided a form of communication or notice nevertheless when compared to the prejudice suffered by the Applicant. The Applicant provided oral evidence and Affidavit evidence that she was living with her husband but was separated and had nowhere else to go other than to recover the property. In all the circumstances it was reasonable to dispense with notice.

The Respondent's representative referred to the terms of the Coronavirus Act given the difficulties for the Respondent in securing alternative accommodation in this pandemic era. Whilst the terms do not apply to an application before the commencement of the Act the fact of the matter is that the Respondent will need to seek alternative accommodation in the difficult time of a global pandemic. In balancing the rights of both parties especially when both were genuine and at no fault it seemed on the issue of the notice the Tribunal determined that an Order would be granted but would be superseded for 8 weeks to allow the Respondent further time to make arrangements given the pandemic and to allow the balance and application of the overriding objective to the Decision.

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.

K Kirk

26th October 2020

Legal Member/Chair **Date**