



Decision (incorporating reasons) of the First-tier Tribunal for Scotland (Housing and Property Chamber) under section 33 of the Housing (Scotland) Act 1988, as amended (“1988 Act”)

Chamber Ref: FTS/HPC/EV/17/0479

**Re: 99 Moira Terrace, Craigentiny, Edinburgh EH7 6SJ
 (“the Property”)**

Parties:

Seonaid Lindsay A Turnbull, 69 Buchan Street, Hamilton ML3 8JY
Fiona Ruth A Berrie, 16 Dublin Street Lane South, Edinburgh EH1 3PX
Gordon Niall Berrie, 16 Dublin Street Lane South, Edinburgh EH1 3PX
Andrew Berrie, 27 Apartment, 64 Bloomsbury House, Guildhall Road, Northampton NN1 1AG
Catriona Mairi J McKay, 41 Pittville Street, Edinburgh EH15 2BX
Donald Niall Forbes McKay, Tigh Na Allt, Powmill Farm Steadings, Rumbling Bridge, Kinross KY13 0QG
Alice Jane McKay, 21 Kingsway, Snetterton Heath, Gloucester GL2 2HE
Sophie Louise McKay, Tigh Na Allt, Powmill Farm Steadings, Rumbling Bridge, Kinross KY13 0QG
(together **“the Applicants”**)

Mrs Elizabeth Young, 99 Moira Terrace, Craigentiny, Edinburgh EH7 6SJ
(**“the Respondent”**)

Tribunal Member:

Pamela Woodman (Legal Member)

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

Background

1. The Applicants (through their representatives, TC Young Solicitors (**“the Applicants’ Representatives”**)) made an application to the Tribunal under section 33 of the 1988 Act and in accordance with the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (**“HPC Rules”**) which are set out in the schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended,

("2017 Regulations"). More specifically, the application was made in terms of rule 66 (*Application for order for possession upon termination of a short assured tenancy*) of the HPC Rules.

2. The order sought from the Tribunal was an order for possession of the Property.
3. The application form submitted on behalf of the Applicants by the Applicants' Representatives and dated 11 December 2017 was accompanied by copies of the following:
 - a. Lease between (1) East Lothian Property Management Limited on behalf of Mrs Seonaid Turnbull, Mrs Fiona Berrie, Mr Gordon Berrie, Mr Andrew Berrie, Mrs Catriona McKay, Mr Niall McKay, Miss Alice McKay and Miss Sophie McKay and (2) Mrs Elizabeth Young, dated 19 and 20 July 2016 ("**the Lease**");
 - b. Form AT5 issued by Lucilla Mackenzie (stated to be agent for the landlord) dated 19 July 2016, with acknowledgement by the Respondent dated 20 July 2016;
 - c. Notice to quit addressed to the Respondent at the Property and issued by the Applicants' Representatives on behalf of "your landlords" dated 21 September 2017 ("**Notice to Quit**");
 - d. Section 33 notice addressed to the Respondent at the Property and issued by the Applicants' Representatives on behalf of the Applicants dated 21 September 2017 ("**Section 33 Notice**");
 - e. Certificate of intimation from Kenneth Hutt, Sheriff Officer of Scott & Co stating that a notice to quit dated 21 September 2017 and notice under section 33 were served on the Respondent on 27 September 2017; and
 - f. Section 11 "notice by landlord of proceedings for possession", noting (incorrectly) that the legislation under which the proceedings were being notified was section 56(1) of the Private Housing (Tenancies) (Scotland) Act 2016, together with the e-mail from the Applicants' Representatives to the local authority on 11 December 2017.
4. The Applicants' Representatives, on behalf of the Applicants, provided a copy of an updated section 11 "notice by landlord of proceedings for possession" ("**Section 11 Notice**"), noting (correctly) that the legislation under which the proceedings were being notified was section 19A(1) of the 1988 Act, together with a copy of the e-mail from the Applicants' Representatives to the local authority on 15 December 2017.
5. A notice of acceptance of the application was issued by the Tribunal dated 18 December 2017 under rule 9 of the HPC Rules ("**Notice of Acceptance**"), which confirmed that the application paperwork had been received by the Tribunal between 13 and 18 December 2017, that no further documents or information were required before the application could be accepted for determination by the

Tribunal and that the Chamber President did not consider that there were grounds for rejection of the application in terms of rule 8 of the HPC Rules.

6. The Applicants' Representatives and the Respondent were each respectively sent a letter by the Tribunal dated 29 December 2017 confirming that the application had been received, intimating the date of the (originally scheduled) case management discussion of 31 January 2018 and noting that written representations from the Respondent must be received by 16 January 2018.
7. A certificate of intimation was provided from Christopher Andrew, Sheriff Officer of Walker Love, stating that the letter dated 29 December 2017 from the Tribunal to the Respondent was served on 3 January 2018.
8. A letter (sent via e-mail) was received by the Tribunal from Callum R. Young dated 16 January 2018, in which he stated that he was the son of the Respondent and requested that the (originally scheduled) case management discussion be postponed and that the period for submission of documents be extended.
9. Upon reviewing the timescales involved, the Legal Member issued a direction (with reasons) dated 25 January 2018 in the following terms:

"Direction

In terms of Rule 16, the First-tier Tribunal (on its own initiative) directs the Respondent, on or before (but no later than) Monday 12 February 2018, to submit to the First-tier Tribunal:

- a. written representations on which the Respondent intends to rely, including copies of any documents or authorities to be relied upon; and
- b. written evidence from the Western General Hospital of the Respondent's hospital appointment on Wednesday 31 January 2018.

Reason for direction

The First-tier Tribunal received a letter (via e-mail) from a Mr Callum Young on 16 January 2018. In that letter, Mr Young stated that he is the son of the Respondent and, on the Respondent's behalf, sought (a) an extension of time for the making of written submissions and (b) a rescheduling of the case management discussion set down for 14:00 on Wednesday 31 January 2018 because the Respondent has an appointment at the Western General Hospital at 15:15 on that day.

In considering this request (albeit not made by the Respondent or by a duly appointed representative of the Respondent), it came to the attention of the First-tier Tribunal that the day by which the Respondent had been directed to make written representations was not "at least 14 days after the day on which the notice" was given to the Respondent (as is required in terms of Rule 9(1)(b)). The notice from the First-tier Tribunal dated 29 December 2017 had

been served on the Respondent by sheriff officers on 3 January 2018. In that notice, the date for the making of written submissions by the Respondent was stated to be 16 January 2018. This was not “at least 14 days after” 3 January 2018. Accordingly, the First-tier Tribunal decided that it was just that a later date be specified by which the Respondent was required to submit written representations.”

10. A letter dated 25 January 2018 was received by the Tribunal from a Mr John McLellan (“**Councillor’s Letter**”) stating that he was Conservative councillor for the Craigentiny & Duddingston ward and that he was writing after being approached by Mr Callum Young.
11. The Tribunal received correspondence from the Respondent confirming details of her hospital appointment (as required in terms of the direction) and that she wanted her son, Mr Callum Young, to act as her representative. The Tribunal did not receive written representations from the Respondent or Mr Callum Young (“**the Respondent’s Representative**”).
12. The Applicants’ Representatives and the Respondent’s Representative were each respectively sent a letter by the Tribunal dated 13 February 2018, intimating (amongst other things) the date of the (rearranged) case management discussion of 28 February 2018.
13. The Applicants’ Representatives and the Respondent’s Representative confirmed that they had been provided with a printout from Registers Direct of Land Register Title Number MID168003 (“**Title Document**”) in respect of the Property.
14. The Legal Member noted that Mrs Fiona Ruth A Berrie and Mr Donald Niall Forbes McKay were narrated as part of the “landlord” in the Lease and other communications but were not noted as proprietors of the Property on the Title Document. Given that all those who were noted as proprietors on the Title Document were also noted as part of the “landlord” in the Lease and other communications, the Legal Member did not pursue this technical point with the parties.
15. A (rearranged) case management discussion (“**CMD**”) was scheduled for 10am on Wednesday 28 February 2018 in room D10 at George House, 126 George Street, Edinburgh EH2 4HH.
16. This decision arises out of the CMD.

Key relevant legal provisions

17. Section 33(1) of the 1988 Act is in the following terms:

“Without prejudice to any right of the landlord under a short assured tenancy to recover possession of the house let on the tenancy in accordance with sections 12 to 31 of this Act, the sheriff shall make an order for possession of the house if he is satisfied -

- (a) that the short assured tenancy has reached its end;
- (b) that tacit relocation is not operating;
- (c) that no further contractual tenancy (whether a short assured tenancy or not) is for the time being in existence; and
- (d) that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house”

18. With effect from 1 December 2017, the functions and jurisdiction of the sheriff on matters arising out of the 1988 Act (and various other civil matters) in relation to any “assured tenancy” (as defined in section 12 of the 1988 Act) were transferred to the Tribunal by virtue of section 16 of the Housing (Scotland) Act 2014.

19. Rule 17(4) of the HPC Rules is in the following terms:

“The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision.”

The proceedings, namely the CMD on 28 February 2018

20. In addition to the Legal Member, the following persons participated in the CMD:

- a. Neil Matheson of the Applicants’ Representatives, representing the Applicants (“**Mr Matheson**”); and
- b. The Respondent’s Representative, representing the Respondent.

21. Neither the Applicants nor the Respondent were present at the CMD.

22. The Legal Member highlighted that, as was explained in the letter sent to each of the parties by the Tribunal dated 29 December 2017 notifying the parties of the (originally scheduled) case management discussion, the Tribunal may do anything at a case management discussion which it may do at a hearing.

23. The Respondent’s Representative explained that both he and his mother (the Respondent) had been suffering from medical conditions which had prevented them from providing written representations in response to the direction. The Respondent’s Representative stated that he had medical certificates to substantiate this but the Legal Member did not consider it necessary to see those in the circumstances of this case.

24. The Respondent’s Representative noted that, before the lease was entered into, the discussions with the letting agents had been for a 3 year term and that he had correspondence with them to evidence this. However, he confirmed that the Lease “technically” provided for a 1 year term and that the copy of the Lease provided with the application form was what had been signed and entered into. Therefore, the Legal Member did not consider that it was necessary to consider any such pre-contractual correspondence in the circumstances of this case.

25. The Respondent's Representative accepted that the Notice to Quit and Section 33 Notice appeared to be in the required terms and had been served on the Respondent.
26. The Respondent's Representative, therefore, accepted that the Applicants had served the necessary notices prior to seeking an order for possession and were entitled to possession of the Property.
27. However, the Respondent's Representative made various submissions with regard to delaying the eviction/repossession for a period of 3 months from the date of the CMD. In summary, the Respondent's Representative stated that the Respondent had various medical conditions, required a 3 bedroom house and received "priority" with regard to the allocation of property by the local authority, that the local authority had not been able to provide suitable temporary accommodation, that there were upcoming changes to the financial support which would be available to the Respondent, that the Respondent could not go down the private rented route and that the Respondent had been "bidding" for suitable permanent accommodation (for the last 1½ years - without success so far but was waiting to hear about 4 outstanding "bids"). He noted that, whilst the Property was a private rented property, it was a suitable normal house but that the Respondent had the use of certain equipment, including an adapted hoist in the bathroom and an adjustable height bed, which did not belong to the Respondent and which would require to be moved by the local authority. He said that there was a likely 3 month lead-in time for any such move. He also noted that the Respondent would lose the night carers which she currently had if she moved from the Property.
28. The Respondent's Representative did acknowledge that the lack of suitable accommodation available through the local authority was not the responsibility of the Applicants, as private landlords. He also acknowledged that there was no guarantee that suitable accommodation would become available within the 3 month period he suggested.
29. Another reason given by the Respondent's Representative for suggesting a 3 month period of "delay" in the order for possession was that the Respondent's Representative was sitting degree exams in May. The Legal Member did not consider that this had any relevance with regard to the date of possession in the circumstances of this case.
30. Mr Matheson advised that the Applicants' position was that they were not willing to agree to any delay in the removal of the Respondent from possession of the Property. He highlighted that the Notice to Quit and Section 33 Notice were served in September 2017 and that the Applicants intended to sell the Property as soon as possible. Mr Matheson confirmed that he did not wish to make any submissions with regard to the Councillor's Letter but noted that the local authority might take a different approach to the Respondent once an order for possession had been granted with a definite date by which the Respondent must remove from the Property.

31. It was agreed by Mr Matheson that the Respondent had continued to pay rent to the Applicants and that there were no rent arrears as at the date of the CMD.
32. Reference was made by both Mr Matheson and the Respondent's Representative to other ongoing matters between the Applicants and Respondent in relation to the Property, including a case with the Tribunal regarding access for inspections. The Legal Member did not explore these matters with the parties on the basis that they were not pertinent to the application currently before the Tribunal at this CMD.

Findings of fact

33. The Legal Member was satisfied, on the balance of probabilities and based on the documentation and information provided (in advance of the CMD and/or orally at the CMD), that:
- a. The application related to an "assured tenancy" (as defined in section 12 of the 1988 Act) and so the Tribunal had jurisdiction to hear the case.
 - b. The application related to a "short assured tenancy" and so section 33 of the 1988 Act and rule 66 of the HPC Rules would be applicable if the relevant requirements of each were met.
 - c. The tenancy constituted by the Lease was a short assured tenancy which had reached its end as a result of the timely service of the Notice to Quit. Accordingly, tacit relocation was not operating and no further contractual tenancy (whether a short assured tenancy or not) was for the time being in existence. As a result, the requirements of section 33(1)(a) to (c) of the 1988 Act had been met.
 - d. For the purposes of section 33(1)(d) of the 1988 Act, the Section 33 Notice amounted to the Applicants having given to the Respondent notice stating that the Applicants required possession of the house.
34. The Respondent had received the Notice to Quit and Section 33 Notice over 5 months prior to the CMD and had remained in occupation and possession of the Property for a period (as at the date of the CMD) of almost 3 months beyond the end (which occurred on 1 December 2017).
35. By virtue of the Section 11 Notice, the local authority had been informed that the Applicants would be seeking an order for possession of the Property which, if granted, would result in the Respondent requiring to remove from the Property. The Section 11 Notice was provided to the local authority on 15 December 2017, over 2½ months prior to the CMD.
36. In the Councillor's Letter, Mr McLellan indicated that he "would hope that the tribunal would agree that Mr Young and his mother should continue to reside at their current address until such times as a new home can be found for them". He had also noted that the Respondent's "specific needs mean[t] the availability of

suitable accommodation [was] limited in the extreme". The Legal Member did not agree with Mr McLellan's suggested course of action, not least because no legal basis was provided by him, it appeared to be unlimited as to time and it appeared to interfere with the Applicants' desired use of or dealings with the Property.

37. The Applicants had no legal duty, obligation or responsibility to ensure that the Respondent did not become homeless (unintentionally or otherwise).
38. The Respondent had entered into a "short assured tenancy" which, by its very nature, envisaged a "no-fault" ground for possession by the Applicants at its ish.

Reasons for decision

39. The application form and other documentation provided by the Applicants' Representatives on or prior to 18 December 2018 met the requirements of rule 66 of the HPC Rules.
40. The requirements for the grant of an order for possession as set out in section 33(1) of the 1988 Act had been met and, accordingly, the Tribunal was required to make an order for possession of the Property.
41. The overriding objective of the Tribunal (in terms of rule 2 of the HPC Rules) was to deal with proceedings justly. The Legal Member was aware that one element of dealing with proceedings justly was "avoiding delay, so far as compatible with the proper consideration of the issues". Accordingly, the Legal Member did not consider that a hearing was required in order to determine the application and that she had sufficient information before her to make a decision and grant an order.
42. Any order for possession granted by the Tribunal would not be released to the Applicants and so be capable of being executed until (at least) the period within which a party may seek permission to appeal had expired, being the period of 30 days beginning (in this particular case) with the date of the CMD.
43. Whilst the position of the Respondent might be very unfortunate in that she was potentially about to be made homeless, the Applicants were not responsible to ensure that this did not occur and, given that the tenancy was a "short assured tenancy" which had reached its ish, the Applicants were entitled to recover possession of the Property in the circumstances of this case.
44. However, having said that, the likelihood of a solution to the Respondent's housing situation being found by the local authority would be increased (but clearly not guaranteed) if there was a period of approximately 2 months within which such a solution could be found. The period of approximately 2 months should also make it clear to the local authority that the Respondent had been "threatened with homelessness" and that it was "likely that [s]he would become homeless within 2 months" for the purposes of section 24(4) of the Housing (Scotland) Act 1987.

45. Balancing the respective interests of the parties, the Legal Member considered that it was just and proportionate (in the circumstances of this particular case on its particular facts) that the order for possession should not be executable until after 12 noon on Friday 27 April 2018, which was approximately 2 months after the date of the CMD.

Decision

46. The Tribunal decided that an order be granted against the Respondent for possession of the Property under section 33 of the 1988 Act, which order was not to be executed prior to 12 noon on Friday 27 April 2018. However, the Legal Member noted that, if alternative accommodation was found by the Respondent prior to 27 April 2018, there was no requirement for the Respondent to remain in the Property until that date and an expectation that the Respondent would remove from the Property as soon as possible. In any event (whether or not alternative accommodation had been found), the Respondent was required to remove from the Property and return possession of the Property to the Applicants no later than 12 noon on Friday 27 April 2018.

47. The order referred to in paragraph 46 was intimated orally to the parties by the Legal Member during the CMD (after it resumed following adjournment).

48. Written reasons were not requested at the CMD, nor did the Legal Member undertake during the CMD to provide them. However, written reasons have been included within this decision.

Right of appeal

In terms of Section 46 of the Tribunals (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 of this CMD.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

P Woodman

Legal Member/Chair

28 February 2018

Date