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/20/1867

Re: Property at 11 Cheviot Crescent, Lindsayfield, East Kilbride, G75 9GG ("the Property")

Parties:

Mrs Catriona Smith, Mossblown Farm, Ayr, KA6 5BA ("the Applicant")

Mrs Yvonne Quinn, 11 Cheviot Crescent, Lindsayfield, East Kilbride, G75 9GG ("the Respondent")

Tribunal Members:

Lesley Ward (Legal Member) and Mary Lyden (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") dismissed the application.

1. This was a hearing in connection with an application in terms of rule 66 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, 'the rules' and s 33 of the Housing (Scotland) Act 1988, 'the Act', for an eviction order on the expiry of a short assured tenancy agreement.

2. The applicant was represented by Ms Jackie Jobson solicitor. The respondent did not attend and was not represented. The tribunal had sent a recorded delivery letter to the respondent on 12 January 2021 giving her notice of the hearing. This had been signed for on 13 January 2021. The tribunal was satisfied that the respondent had received notice in terms of rule 24 and proceeded with the hearing in terms of rule 29.

3. The tribunal had before it the following copy documents:

(1) Application dated 1 September 2020.
(2) Tenancy agreement.
(3) AT5.
(4) Notice to quit.
(5) S33 notice.
(6) S11 notice on local authority.
(7) Second Inventory of productions for applicant with post office receipt dated 12 February 2020.
(8) Third Inventory of productions for applicant with email from David Bryce to Alistair Sloan dated 12 October 2020.
(9) Land certificate.
(10) Email to the tribunal chamber from applicant's solicitor dated 3 November 2020.

4. The tribunal held a case management discussion 'CMD' on 6 January 2021 in connection with this application. At that time, the applicant was represented by Mr Sloan solicitor. There were 2 preliminary matters identified:

- The tribunal required to be satisfied that a short assured tenancy agreement has been constituted. The tribunal noted that the tenancy agreement lodged was undated. It formed part of a bundle of documents which appear to have been signed by the parties on 31 July 2015. It was unclear to the tribunal on the face of the documents lodged, whether the AT5 had been signed before the tenancy agreement.

- The tribunal noted that there had been correspondence at the sifting stage about the method of service of the notice to quit and s33 notice. It was Mr Sloan's position that service could be effected by first class post and the list contained in s54 of the Act was not exhaustive. He had made reference to the judgment of Sheriff Jamieson in the case of Bank of Scotland plc-v-Stevenson in his email of 3 November 2020 in support his argument. It was his position that all he needed to prove was that the documents were sent to the respondent by first class post.

5. The tribunal fixed a hearing at the CMD to enable evidence to be led on the two preliminary issues.

Oral and Written Evidence.

6. Ms Jobson led Mr David Bryce from Your Move Letting Agency as a witness. Ms Jobson had also lodged a 4th inventory of productions on 12 February 2021 with the following copy documents:
   - Tenancy Information Pack Schedule Acknowledgement Form
   - Letter confirming Your Move Process from Michelle Keenan Team Leader, Your Move.

7. The tribunal allowed this further inventory to be lodged although late. This was on the basis that Ms Jobson had, for some unknown reason, not received the CMD note from the tribunal.

8. In relation to the first preliminary point, the tribunal was satisfied that the AT5 form had been signed before the tenancy agreement and that a short assured tenancy had therefor been constituted.

9. In relation to the second preliminary matter, the tribunal heard oral evidence from Mr David Bryce. Mr Bryce is the Senior Licence Coordinator for Your Move. Mr Bryce is responsible for dealing with termination of tenancy matters.

10. It was Mr Bryce's evidence that the normal practice for the agency is to send out notices by both first class post and recorded delivery. The notice to quit and s33 notice were both sent to the respondent on 12 February 2020. It was his evidence that this is his usual practice in terms of the Removal Terms (Scotland) Act 1886 and the Recorded Delivery Service Act 1962. It was Mr Bryce's evidence that, as long as he could establish documents had been posted, it was not necessary to show that they had been received. It was his evidence that the respondent had failed to collect the recorded delivery letter at the post office and the letter was not therefore signed for. It was his evidence that it was not necessary to follow this up with a further notice, for example, by hand delivery of the notices.

Submissions

11. Ms Jobson invited the tribunal to make the eviction order on the basis that a short assured tenancy has been constituted and the notice to quit and s33 notice had been served. It was her submission that the notice to quit had been served in accordance with the Removal Terms (Scotland) Act 1886 and the Recorded Delivery Service Act 1962, and the s33 notice had been served in accordance with s54 of the Act. She also stated that s7 of the Interpretation Act means that service is presumed to have been effected.

12. It was Ms Jobson's submission that Mr Bryce was ''100 percent certain'' that the steps he had taken to serve the documents were all that were legally required. It was her position that if the tribunal did not grant the eviction, it was effectively stating that the method of service used by Your Move was invalid and this would have consequences for the whole of the letting agency industry.

13. It was Ms Jobson's submission that the tribunal could be satisfied that the respondent was receiving her mail. She had received the tribunal's letter of 12 January 2021 as she had signed for it. There was nothing to suggest

that she had not received the letter sent on 12 February 2020 by first class post. She stated that the applicant is keen to have the eviction order granted. It was her position that the respondent has failed to engage with the applicant unless it is in her interest to do so. She gave the example that the respondent has refused to allow the applicant access to the property for the gas inspection, but she did contact the applicant recently due to a problem with her water. The applicant has therefore not discussed the eviction proceedings with the respondent.

14. The tribunal noted that in addition to Ms Jobson's oral submissions, her colleague had also lodged a copy of the case of Bank of Scotland plc -v- Stevenson 2012 S.L.T. (Sh Ct) 155 as authority for the proposition that list of three modes or service in s54 of the Housing (Scotland) Act 1988 is permissive rather than exhaustive.

Reasons

15. The tribunal was satisfied on the balance of probability that a short assured tenancy has been constituted. The documents lodged by the applicant's solicitor on 12 February 2021 show that the lease was signed on 31 July 2015. They also appear to show that the AT5 was signed (on the same date) in advance of the lease.

16. The tribunal was satisfied that the notice to quit had been served. S112 of the Rent (Scotland) Act 1984 does not prescribe the mode of service for a notice to quit. The tribunal did not agree that the notice to quit had however been served in accordance with the Removal Terms (Scotland) Act 1886 and the Recorded Delivery Service Act 1962 as Mr Bryce contended. The tribunal noted that in Evictions in Scotland (2nd edition) by Adrian Stalker at page 495, he characterises these as 'enabling provisions' and that the common law still applies. In other words, for those Acts to apply, service of the notice to quit would have to be effected by recorded delivery. The tribunal is not satisfied that service of the notice to quit has been effected by recorded delivery because the respondent did not sign for or collect the recorded delivery envelope. At page 499 Stalker writes '*..s112(1) of the 1984 Act, the landlord need only give the notice to the tenant, which might be done in various ways, including delivery personally to the tenant, or leaving at his last known address , or by ordinary post. ''* The tribunal was satisfied that the notice to quit had been sent to the respondent by first class post on 12 February 2020. The tribunal was satisfied that first class post was an appropriate mode of service of the notice to quit. There was no evidence to suggest that the respondent had not received her first class post letter.

17. The remaining issue for the tribunal to determine was whether the s33 notice had been served. There were two aspects to this. Firstly, if a s33 notice is sent recorded delivery, does it have to have been received in order to for the notice to be 'served' in accordance with s54? Secondly, does s54 provide an exhaustive list of modes or service or can a s33 notice be served by first class post? In other words, is the list in s54 permissive?

18. s54 of the Act provides:

Notice under Part II.

A notice served under this Part of this Act on a person or notice so given to him may be served or given —

(a)by delivering it to him;

(b)by leaving it at his last known address; or

(c)by sending it by recorded delivery letter to him at that address.

19. In relation to the first question, the tribunal considered that the terms of s54 have to be read in conjunction with s7 of the Interpretation Act 1978 in determining the answer to this question. s7 provides:

References to service by post.

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

20. The tribunal considered that the words 'unless the contrary is proved' are important. The tribunal have heard clear oral evidence that the s33 notice sent by recorded delivery was not received by the respondent. The contrary has therefore been proved. The tribunal concluded that service of the s33 notice has not been effected.

21. In relation to the remaining leg of the applicant's case, the tribunal noted the applicant's written submissions regarding the decision of sheriff Jamieson in Bank of Scotland plc -v- Stevenson 2012 S.L.T. (Sh Ct) 155. That decision is however of little of assistance as it relates to an entirely different legal matter (a creditor seeking to enter into possession after

issuing a calling up notice) and the point the learned sheriff was making was that some statues use permissive language and some use imperative language. He notes at paragraph 69 ‘’*It is notorious that sometimes the use of the word ‘may’ in an enactment really means ‘shall: see for example, Department of Agriculture for Scotland-v Goodfellow, in which it was held that alternative methods of service in relation to service of statutory notices under ss34-38A of the Sheriff Courts (Scotland) Act 1907 (notices of removal in respect of tenancies) and associated rules of court (now OCR 1993, rr34.5-34.9), provided by the 1907 Act and Ordinary Cause Rules were ‘exhaustive’, despite the use of the word ‘may’ in relation to those methods of service.* ‘’

22. Stalker at page 503 discusses the terms of s54 in the context of service of notices under the 1988 Act by sheriff officer. He writes:

‘’…it arguably follows that service of statutory notices under section 54 of the 1988 Act…. may only be effected if it is done by sheriff officers, if it is done in one of the three ways set out in the section. ‘’

23. Further, Stalker at page 503, like sheriff Jamieson, refers to the case of Department of Agriculture for Scotland-v Goodfellow 1931 SC 556. The court held that a landlord was entitled to adopt one of the three methods set out in the rules. The court decided that a notice sent by unregistered letter was invalid as this was not one of the three methods listed in the rules. Justice -Clerk Alness in that case said:

“I am clearly of the opinion that Rule 113 is not enabling in its character, but it exhaustive. In other words, the word ‘may ‘ in that rule, in my judgment, imports a choice which is limited to these three methods. There is a choice as between any of the three. There is no choice outside of the three”.

24. Although this case is not in relation to the 1988 Act, there are strong similarities with the terms of s54. It is the tribunal’s view that the terms of s54 are exhaustive and it is not open to the applicant to attempt to serve a s33 notice by first class post. For the foregoing reasons the tribunal dismissed the application.

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.

15 February 2021

Lesley A Ward Legal Member **date**