



**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/20/1028

Re: Property at 10 Natal Place, Cowdenbeath, Fife, KY4 8XH (“the Property”)

Parties:

**Miss Angela Harris, 10 Cobden Court, Highgrove Park, Crossgates, Fife, KY4
8AU (“the Applicant”)**

**Miss Claire Duncan, Mr Andrew Wakley, 10 Natal Place, Cowdenbeath, Fife,
KY4 8XH (“the Respondents”)**

Tribunal Members:

Rory Cowan (Legal Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that an Order for Possession should be granted.**

- Background

This case called for a continued Case Management Discussion (CMD) by way of conference call on 4 December 2020. The case had been continued from 19 October 2020 to allow service of the Application on Ms Duncan. The Applicant did not attend, but was represented by a Ms Moran, solicitor. The Respondents both attended the conference call (although Ms Duncan required to leave shortly before the CMD concluded).

The Application relates to an application for a Possession Order relative to the Property under Rule 66, the underlying tenancy being a Short-assured Tenancy. With the Application the Applicant lodged the following:

- Copy Lease dated 1 August 2014
- Form AT5 dated 28 July 2014
- Section 33 Notice dated 13 January 2020
- Notice to Quit (NTQ) dated 13 January 2020

Following a request from the Tribunal administration, a copy recorded delivery receipt dated 13 January 2020 was also produced.

On 3 December 2020 the Applicant's solicitors sent an email to the Tribunal administration with information to address the claims of disrepair by the Respondents. These were discussed, but not admitted as they were not relevant to the Tribunal's considerations.

Following the CMD on 19 October 2020, the Tribunal issued a Note identifying 2 potential issues for the parties to consider. These were:

- 1) Whether the Applicants had complied with section 33(1)(d) of the 1988 Act and given the tenants notice that they required possession of the Property and whether the Notice to Quit (NTQ) had been validly served. The Section 33 Notice and NTQ was addressed to both Respondents and was addressed to them both at the Property. Only one envelope and set of notices was sent; and
 - 2) The NTQ did not contain the correct current prescribed information required from 6 March 2019 (see Regulation 3 of the First-tier Tribunal for Scotland Housing and Property Chamber (Incidental Provisions) Regulations 2019).
- The Case Management Discussion

It was agreed between Mr Wakley and Ms Duncan that Mr Wakley would speak on behalf of the Respondents although Ms Duncan was given the opportunity to comment by the Tribunal as the CMD proceeded.

The parties acknowledged receipt of the previous Note following the CMD on 19 October 2020.

Ms Moran submitted on behalf of the Applicant that the error in the NTQ (the use of the word "court" instead of "Tribunal") was a minor one that did not invalidate the NTQ. Such an error would not mislead the persons receiving it as it made it clear that an order was required from a judicial body before possession could be awarded. She urged the Tribunal to take a purposive approach in looking at the NTQ.

In relation to the service of only one set of notices on the Respondents, she indicated that the notices were addressed to both Respondents and sent to the Property. It was therefore clear that they applied to both parties not just one.

Mr Wakley on behalf of the Respondents indicated he took no issue with what was said in relation to the NTQ and the service of the notices as a whole. He indicated that he was "happy" that the NTQ was served properly and that there was no issue of the Respondents being misled. He also stated that it was "clear and obvious" that

the notices applied to both Respondents and no issue was taken as a result of only one copy being served.

Mr Wakley then went on to state that the Respondents took the view that the Applicant could not rely upon section 33 as a basis for recovery of possession, not because of any deficiency in the notices themselves or any suggestion that the tenancy was not a Short-assured Tenancy, but because the Applicant was in breach of her “contractual” obligations as a landlord. He explained that the alleged contractual breaches related to:

- The boiler receiving “lack of attention”;
- That the Property had “never been maintained”
- That they had never been able to speak to the Applicant on the phone.
- That as the Applicant had breached the contractual obligations regarding gas safety.

Rather surprisingly, in response to this submission on behalf of the Respondents, Ms Moran indicated that she accepted that, as a matter of law, issues of alleged disrepair could constitute a defence to the Application.

Mr Wakley also stated that they had no intention of remaining in the Property much longer.

- Findings in Fact and Law
 - 1) That the Respondents entered into a lease for the Property with the Applicant that commenced on 1 August 2014.
 - 2) That the lease so entered into was a Short-assured Tenancy.
 - 3) That on 13 January 2020 the Applicant served a Notice to Quit and Section 33 Notice on both the Respondents
 - 4) That the contractual tenancy was terminated as at 2 April 2020.
 - 5) That the required notice in terms of s33(1)(d) was thereby given to the Respondents.
 - 6) That the Respondents have remained in the Property since 2 April 2020.
 - 7) That the Applicant is entitled to an order for possession.
- Reasons for Decision

As detailed the Application proceeds under Rule 66. The basis for the request for a Possession order is therefore Section 33 of the Housing (Scotland) Act 1988, which is a landlord’s automatic right to recover possession at the end of a Short-assured Tenancy. Due to the date the notices were served, there is no application of the emergency provisions in the Coronavirus (Scotland) Act 2020.

In order to be able to grant such an order for possession, the Tribunal needs to be satisfied that the Applicant has complied with the requirements of section 33 of the 1988 Act. These are:

- 1) The Short-assured tenancy has reached its end;
- 2) That tacit relocation is not operating

- 3) There is no further contractual tenancy; and
- 4) The landlord has given the tenants notice that they require possession of the property concerned.

The notice period applicable in relation to section 33, as at the date of these notices, was 2 months. Both the NTQ and the section 33 notices were dated 13 January 2020 and were set to expire on 2 April 2020. 2 April 2020 was an ish or end date. From the documents lodged with the Application, it appeared that the underlying tenancy met the requirements of section 32 of the 1988 Act and was therefore a Short-assured Tenancy.

Whilst it may be best practice to serve a copy of any notices on each and every joint tenant on a tenancy, the service of one set of notices, addressed to both tenants by recorded delivery is sufficient for the purpose of section 54 of the Housing (Scotland) Act 1988 and in relation to the NTQ. The tenancy is a joint tenancy and the obligations are taken on jointly.

In relation to the NTQ, the failure to use the current prescribed wording to the extent of “court” rather than “tribunal”, whilst an error, is not an error that is sufficient to render the NTQ invalid for the purpose of terminating the contractual tenancy and stopping the application of tacit relocation.

In relation to the suggestion by the Respondents that the provisions of section 33 would not apply where a landlord was in breach of their obligations of repair in relation to the Property, was not a good one in law. Despite the concession by Ms Moran, whether the Applicant is or is not in breach of any duties of repair and maintenance to the Property is not relevant to the question of whether she is entitled to an order for possession under section 33. Section 33 is a statutory right a landlord has to recover possession at the end of a Short-assured Tenancy where they can demonstrate they have complied with the requirements of that section (detailed above). Whether the Property is or is not in disrepair is not relevant to the assessment of that remedy. The Tribunal accepts that, for example, if Application had proceeded based on rent arrears and under, for example, ground 8 of Schedule 5, the issue of disrepair would indeed be relevant. In order to establish that ground, any rent requires to be “lawfully due”. That arises from mutuality of obligations in contracts, the premise being that, where one party is in breach of their obligations under a contract, they are not entitled to insist upon reciprocal performance by the other party. That is not the situation here.

As such, the Tribunal was satisfied that the requirements of section 33 had been met and that the Applicant was entitled to an order for possession.

- Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) granted an order against the Respondent for possession of the Property under section 33 of the Housing (Scotland) Act 1988.

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.

Legal Member: Rory Cowan

Date: 4 December 2020