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/21/0255

Re: Property at 44 Bruntsfield Crescent, Dunbar, EH42 1QZ ("the Property")

Parties:

Mr Gerard Bent, No Fixed Address, No Fixed Address ("the Applicant")

Mr Anthony Kearney, Ms Elizabeth McAndrew also known as Donna McCafferty, 44 Bruntsfield Crescent, Dunbar, EH42 1QZ; 44 Bruntsfield Crescent, Dunbar, EH42 1QZ ("the Respondents")

Tribunal Members:

Rory Cowan (Legal Member)

Decision (in absence of the Respondents)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be refused.

- Background

By application dated 2 February 2021 (the Application), the Applicant seeks an order for possession against the Respondents in relation to the Property in terms of Ground 1 of schedule 5 of the Housing (Scotland) Act 1988 (the 1988 Act). Various supporting documents were lodged including the following:

1) Copy lease and Form AT5;
2) Notice to Quit dated 28 September 2020;
3) Form AT6 dated 29 September 2020; and
4) Recorded delivery receipt and proof of postage.

A Case Management Discussion (CMD) was initially set for 6 May 2021, but following a request from the Respondents, that CMD was postponed and a new date for the CMD was fixed for 4 June 2021 to be heard by way of conference call.

Intimation of that new date was given by Tribunal Administration to the Applicant's then solicitors as well as the Respondents. In addition, the Tribunal issued a letter to the parties dated 30 April 2021 intimating that the parties would require to address the Tribunal at the CMD on the following:

"1) Whether the Contractual Tenancy has been validly terminated?

a) Has adequate contractual notice been given by the Notice to Quit? Reference should be made to the terms of the lease, for example clause "Two".

b) Is the date specified in the Notice to Quit, being 31 December 2020 an ish date?

2) If not, can the Tribunal competently grant the application for a Possession order. Reference should be made to section18(6) of the Housing (Scotland) Act 1988.

3) Has adequate notice of the applicability of Ground 1 of Schedule 5 of the Housing (Scotland) Act 1988 been give? If not, is it reasonable to dispense with such a requirement to give notice. Reference should be made to the requirements set out in Ground 1 of schedule 5."

At the CMD on 4 June 2021, the Applicant appeared and represented himself personally. Neither Respondent appeared or were represented. It became clear that the Applicant's former solicitors had not provided the Applicant with a copy of the Tribunal's letter dated 30 September 2021 and, as a matter of fairness, the Tribunal agreed to the Applicant's request to continue the said CMD to another date to allow him to consider the issues and take further legal advice. A note was issued following the CMD on 4 June 2021 setting out the issues for the parties to consider at the next CMD. The intention was that, any further CMD, would be dealt with by way of video conference, but following communications from the second Respondent indicating that the Respondents could not accommodate a video conference, an "in person" hearing was arranged and assigned for 12 August 2021.

At the CMD on 12 August 2021, the Applicant appeared in person and with a new representative Miss Dalgleish, solicitor. Neither Respondent appeared or were represented. Notwithstanding, the Tribunal was satisfied that they had been made aware of the date of the CMD on 12 August 2021 and their requirement to attend. Intimation of the date had been made by way of letter dated 20 July 2021 and had been sent by email to the email address for the Respondents and the one where communication had been received from them previously. As such, the Tribunal was content to proceed with the CMD in their absence.

- The Case Management Discussion

Miss Dalgleish confirmed that she had received and considered the terms of the Tribunal's letter of 30 April 2021 and had reviewed the terms of the CMD note for 4 June 2021. She confirmed that she accepted that, in order to be able to grant an Order for Possession in terms of Ground 1 of Schedule 5, the Tribunal had to be first satisfied that any contractual tenancy between the parties had been terminated. She accepted that this meant that a valid Notice to Quit (NTQ) required to be served and

that the Tribunal had no power to dispense with that requirement. Whilst the was some initial discussion about the requirements relative to the Form AT6 and the notice periods applicable to Ground 1 in terms of the Coronavirus (Scotland) Act 2020, by agreement with Miss Dalgleish, the focus of discussions was the NTQ and its validity. It was agreed that this was a "hurdle" that the Applicant required to get over first before there could be discussions regarding whether there was prior notification of the applicability of Ground 1 given to the Respondents and if not, whether it would be reasonable to dispense with such notification. There of course still remained the final "hurdle" of satisfying the Tribunal of the reasonableness of granting the order sought (assuming all the requirements of ground 1 had been met).

The two issues identified with the NTQ related to:

1) Did it expire on an *Ish* date; and
2) Was adequate notice given?

There was a third area of discussion around whether or not the notices had actually been received by the Respondents as no proof of delivery could be obtained from the Royal Mail (the notices had been sent by recorded delivery and a receipt for such postage lodged with the application). Reference was made to correspondence lodged with the Application including emails from East Lothian Council who had made contact with the Applicant on behalf of the Respondents referring to the notices served (and therefore presumably received by the Respondents).

In any event, that matter was put to one side as Miss Dalgleish fairly conceded that, if the NTQ was invalid, the matter could proceed no further.

Her submission relative to whether the NTQ expired on an *ish* date, is fairly easily stated. In short, the position was that the term or duration of the initial lease between the parties was properly expressed as being 181 days. As the lease had continued under the operation of Tacit Relocation after the first ish date on 22 July 2014, if you run the term as being 181 days (rather than say 6 months), it gives an Ish date on 31 December 2020, which is the date stated in the NTQ as being the date of expiry.

There was some subsequent discussion about whether or not the date of 23 January 2014 should be included in calculation of the duration. The reason being that the lease rather unhelpfully states that 23 January 2014 is the "Date of Commencement", but refers in clause "ONE" to the duration as being calculated with reference to "the date of entry", which is not formally defined anywhere. It may be that one could read "Date of Commencement" as being the "date of entry" referred to in clause "ONE", but submissions did not develop beyond a brief discussion on that point.

The real focus of discussions became about whether adequate notice had been given by the NTQ and therefore whether, leaving to one side any issues of service or *ish* dates, whether the contractual tenancy had been validly terminated. Miss Dalgleish acknowledged that, if that had not happened, the Tribunal could not grant the order.

Clause “TWO” of the lease between the parties states *inter alia* as follows:

“The Lease is terminable as at the date of termination on either party giving 4 months notice in writing of their intention to do so.”

The position advanced on behalf of the Applicant was that, notwithstanding the terms of clause “TWO” of the lease and the requirement to give 4 months’ notice, the Tribunal could find that any contractual tenancy between the parties had been terminated. She claimed that, as more notice had been given than the irreducible minimum set by section 112 of the Rent (Scotland) Act 1984 and any common law requirements (she referred to the decision in Signet Group PLC v C & J Clark Retail Properties Ltd 1996 SC 444 as authority for the common law requirement of 40days notice for any lease longer than 4 months), the Tribunal could find that the contractual tenancy had been validly terminated. She was unable to refer to any authority for that proposition. She did however concede that the parties had contracted for a period of 4 months’ notice per clause “TWO”. I was agreed that the Tribunal should make a decision based on that submission before proceeding further to hear any broader submissions as it was accepted by Miss Dalgleish that, if the Tribunal were not with her in relation to that submission, the Tribunal could not grant the order she sought.

- Findings in Fact

1) The Parties entered into a contractual tenancy relative to the Property dated 23 January 2014 with an initial end date of 22 July 2014.

2) No new contractual tenancy was entered into after 22 July 2014 and tacit relocation operated to renew the lease thereafter.

3) On or around 28 September 2020 the Applicant sought to serve a Notice to Quit and Form AT6 on the Respondents seeking to terminate the contractual tenancy as at 31 December 2020 and to seek possession of the Property in terms of Ground 1 of Schedule 5.

4) Clause “TWO” of the lease between the parties requires that, in order to terminate the contractual tenancy, each party required to give not less than 4 months’ notice in advance of any *ish* date.

5) The NTQ dated 28 September 2020, at best, gives on 3months and 3 days notice.

6) The contractual tenancy entered into on has not been terminated.

7) The Applicant has not met the requirements of section 18 of the Housing (Scotland) Act 1988 and is not entitled to an order for possession.

- Reasons for Decision

The discussions and submissions are detailed above. Ultimately, the issue for the Tribunal to consider was, leaving the other issues to one side for the time being, whether sufficient notice had been given by the NTQ dated 28 September 2020 and expiring on 31 December 2020. This was irrespective of any argument about whether or not 31 December 2020 was an *ish* date or not. Ultimately the Tribunal was not able to accept the submission that they could ignore any express contractual provision in the lease between the parties that requires either party to give more notice than any statutory minimum period or the basic requirements of common law. Miss Dalgleish was unable to point to any authority to support that proposition and the Tribunal does not view that such a proposition is an accurate statement of the law. That being the case, the Tribunal was unable to find that the contractual tenancy had been validly terminated. Whilst the *ish* date was an issue, the Tribunal felt it was unnecessary to opine on that point as the required contractual notice had not been given in any event.

- Decision

The application for an Order for Possession is refused.

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.

Rory Cowan ___ **12 August 2021**

Legal Member/Chair **Date**