



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”)

Chamber Ref: FTS/HPC/EV/21/1503

Re: Property at 1 Balbeg, Drumnadrochit, IV63 6XG (“the Property”)

Parties:

Mrs Sandra Fraser, Inchtellach House, Bunloit, IV63 6XG (“the Applicant”)

Mr Eric Frew, 1 Balbeg, Drumnadrochit, IV63 6XG (“the Respondent”)

Tribunal Members:

Sarah O'Neill (Legal Member) and Janine Green (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an eviction order for recovery of possession should be granted in favour of the applicant against the respondent.

Background

1. An application was received from the applicant’s solicitor, Mr John Grant of Wright, Johnston and Mackenzie LLP, on 22 June 2021 under rule 109 of Schedule 1 to the First-tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 rules”) seeking recovery of the property under Grounds 4 (landlord intends to live in property) and 5 (family member intends to live in property) as set out in Schedule 3 of the 2016 Act.
2. Attached to the application form were:
 - (i) Copy private residential tenancy agreement between the applicant and the respondent and Ms Kirsty McKee dated 29 August 2018.
 - (ii) Copy notice to leave dated 9 March 2021, citing grounds 4 and 5.

3. Following a request from the tribunal administration, the following documents were also received from Mr Grant on 20 July and 2 August 2021:
 - (i) Copy affidavit signed by the applicant and notarised by Mr Grant on 15 July 2021.
 - (ii) Copy licence to occupy granted by Balmac Forrest Limited to the applicant to occupy the property at Intellach House, Bunloit, signed by the parties on 7 and 15 May 2021.
 - (iii) Copy certificate of confirmation issued on 12 May 2016 by the Commissariat of Grampian, Highlands and Islands in favour of the applicant as executrix-nominate on her husband's estate.
 - (iv)** Copy notice under section 11 of the Homelessness etc (Scotland) Act 2003 with proof of sending to Highland Council on 22 June 2021.
 - (v)** Proof of sending the notice to leave by email on 9 March 2021.
 - (vi) Certificate of posting for the Notice to leave dated 9 March 2021.
4. The application was accepted on 11 August 2021. Notice of the case management discussion (CMD) scheduled for 22 September 2021, together with the application papers and guidance notes, was served on the respondent by sheriff officer on behalf of the tribunal on 20 August 2021.
5. No written representations were received from the respondent prior to the CMD.

The Case Management Discussion

6. A CMD was held by teleconference call on 22 September 2021. The applicant was represented by Mr Grant. The respondent was not present or represented on the teleconference call.
7. The tribunal was satisfied that the requirements of rule 17 (2) of the 2017 rules regarding the giving of reasonable notice of the date, time and place of a CMD had been duly complied with. The tribunal delayed the start of the CMD by 10 minutes in case the respondent had been detained. He did not appear, however, and no telephone calls, messages or emails had been received from him. The tribunal therefore proceeded with the CMD in the absence of the respondent in terms of rule 29 of the 2017 rules.
8. Mr Grant asked the tribunal to grant an order in favour of the applicant against the respondent for recovery of possession of the property. He told the tribunal that the applicant had confirmed to him that the respondent had moved out of the property some time ago. She still sought an order, however, in order to be certain that she was entitled to move into the property. He also confirmed that the second tenant named in the tenancy agreement, Ms McKee, had left the property a number of years ago.

9. Mr Grant confirmed that the applicant wished to move into the property as soon as possible. As stated in her affidavit, she was currently living temporarily in the home which she had formerly owned and had sold in June 2021, under the licence to occupy granted by the new owner.
10. He also confirmed that he was content to rely on ground 4 only. When the application had been made, there had been a possibility that the applicant's son might wish to also move into the property. He did not believe, however, that her son now wanted to move into the property.

Findings in Fact

11. The tribunal made the following findings in fact:

- The applicant had title to the property as executor-nominate on the estate of her husband, the late Andrew Thomas Fraser, as stated in the certificate of confirmation in her favour dated 12 May 2016.
- There was a private residential tenancy in place between the applicant and the respondent and Ms Kirsty McKee, which commenced on 29 August 2018.
- Ms McKee had left the property some years ago.
- The notice to leave was dated 9 March 2021 and was sent both by email and by recorded delivery to the respondent on that date. The notice stated that an application for an eviction order would not be submitted to the tribunal before 11 June 2021.
- The affidavit sworn by the applicant dated 15 July 2021 tended to show that she had the intention of living in the property as her only or principal home.

Reasons for decision

12. Firstly, the tribunal was satisfied that the notice to leave had been validly served on the respondent in terms of the 2016 Act, as amended by the Coronavirus (Scotland) Act 2020 ("the 2020 Act").

13. The relevant provisions of the 2016 Act are as follows:

- i) Section 62 (1)(b) which states that the notice to leave must specify the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the tribunal;
- ii) Section 62 (4) which states that the day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire;
- iii) Section 62 (4) which states that for the purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent;

iv) Section 54 (2) which states that the relevant period in relation to a notice to leave begins on the day the tenant receives the notice to leave from the landlord

14. Following the changes introduced by the 2020 Act, the relevant period in relation to a notice to leave which is served on or after 2 October 2020, where the notice relies on grounds 4 and 5 of schedule 3, is 3 months.

15. As the notice to leave was sent to the respondent by email and recorded delivery (which were the agreed methods of communication under section 4 of the tenancy agreement) on 9 March 2021, it was assumed to have been received on 11 March 2021. In terms of section 54(2), the day when the notice period began was therefore 12 March 2021. The date on which the applicant could make an application for eviction to the tribunal should therefore have been 12 June 2021. The date stated in the notice, 11 June 2021, was therefore incorrect.

16. The application was not submitted until 22 June 2021, however. Paragraph 10 of schedule 1 to the 2020 Act provides that a notice to leave is not invalid by reason of an error, but it may not be relied upon by the landlord for the purpose of seeking an order for possession until the date on which it could have been relied on has been correctly completed. Therefore, as the applicant did not apply to the tribunal before the date which should have been given on the notice to leave, the notice to leave it is not invalid.

17. The tribunal then considered whether ground 4 had been established by the applicant.

18. Ground 4 as set out in Schedule 3 of the 2016 Act (as amended) states:

[4 (1) It is an eviction ground that the landlord intends to live in the let property.

(2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if -

(a) the landlord intends to occupy the let property as the landlord's only or principal home for at least 3 months, and

(b) The Tribunal is satisfied that it is reasonable to issue an eviction order on account of that fact]

[(4) Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2) includes (for example) an affidavit stating that the landlord has that intention].

19. The tribunal was satisfied on the basis of the evidence before it that the requirements for ground 4 were established. The affidavit sworn by the applicant evidenced her intention to live in the property as her only or principal home for at least 3 months. The tribunal accepted Mr Grant's evidence that the applicant intended to move into the property as soon as possible.
20. The tribunal then went on to consider whether it would be reasonable to grant an eviction order, as required in terms of sub-paragraph 4 (2) (b) of schedule 3 of the 2016 Act. In doing so, it took into account all of the circumstances of the case on the basis of all of the evidence before it. The tribunal noted from her affidavit that the applicant wished to move into the property following the death of her husband, as it was smaller and more suitable than the property she was currently occupying, where they had previously lived together. It also noted that she was occupying the property where she was currently living on the basis of a temporary licence.
21. The tribunal also noted that, while it had received not written representations from the respondent, it appeared that he had vacated the property some time ago. There was accordingly no prejudice to the respondent in granting an order in favour of the applicant.
22. Having carefully considered all of the evidence before it, and all of the circumstances of the case as set out above, the tribunal considered that it was reasonable to grant an eviction order. The tribunal therefore grants an eviction order against the respondent under section 51 and ground 4 in Schedule 3 of the 2016 Act.

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.

Sarah O'Neill

22 September 2021

Legal Member/Chair

Date