



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/21/1572

Re: Property at Deansmill, Maybole, Ayrshire, KA19 7SN (“the Property”)

Parties:

Miss Susan Hawkins, 1 Malin Court, Hardings Close, Hemel Hempstead, HP3 9AQ (“the Applicant”)

Mr James Macdonald, Mrs Christina Macdonald, Deansmill, Maybole, Ayrshire, KA19 7SN (“the Respondents”)

Tribunal Members:

Neil Kinnear (Legal Member) and Eileen Shand (Ordinary Member)

Decision

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

Background

This was an application dated 30th June 2021 brought in terms of Rule 65 (Application for order for possession in relation to assured tenancies) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant sought an eviction order and provided with her application copies of a notice to quit, a form AT6, and a section 11 notice.

The form AT6 intimated to the tenant that the landlord intended to raise proceedings for possession of the house on grounds 1, 6, 14 and 15 of Schedule 5 to the *Housing (Scotland) Act 1988*.

The Respondents had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 28th October 2021, and the Tribunal was provided with the executions of service.

A Case Management Discussion was held at 14.00 on 3rd December 2021 by Tele-Conference. The Applicant participated, and was not represented. The Respondents participated, and were represented by Mr Muir, solicitor.

The Tribunal noted that the Applicant was unable to provide a written tenancy agreement, nor was she able to provide any details as to the date when the tenancy commenced or its *ish* date. She candidly accepted that she simply did not know what the *ish* date of the lease was, and in those circumstances had simply selected a suitable date for the notice to quit which allowed her to provide the Respondents with sufficient notice when it was served on them.

The Tribunal noted that there were a number of other potential issues regarding the application, but that if the Applicant was unable to establish that the date given in the notice to quit was an *ish* date of the lease agreement, then she was unable to establish the validity of the notice to quit. In those circumstances the application must fail, unless the Applicant was able to show what the *ish* date of the agreement was, and her basis for any such assertion.

Mr Muir's position was also that unless the Applicant could establish that the date given in the notice to quit for the Respondents to leave the Property was an *ish* date of the lease, then the application must fail as the Applicant could not establish the validity of the notice to quit. He noted that he had other further arguments to make in the event that the Applicant succeeded in passing this initial legal requirement.

The Tribunal explained to the Applicant the legal requirement that a notice to quit specifies a date to leave which is an *ish* date of the lease, in order that the notice be valid. The Applicant sought a continuation to seek legal advice upon her position, and Mr Muir did not oppose that request in the circumstances.

Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal discretion on its own initiative, or on an application by a party, to adjourn a Case Management Discussion.

The Tribunal considered that in these circumstances it would be appropriate to continue the Case Management Discussion to a further date, to allow the Applicant to obtain further legal advice.

On the 17th January 2022, the Applicant e-mailed the Tribunal advising that she had obtained advice, and that her position was that the 19th February is the *ish* date for the lease agreement. She provided a replacement notice to quit giving the Respondents notice that they were to quit the Property by 19th February 2022, and a replacement form AT6 stating that proceedings would not be raised before 12th July 2022.

Continued Case Management Discussion

A continued Case Management Discussion was held at 14.00 on 18th January 2022 by Tele-Conference. The Applicant participated, and was not represented. The Respondents participated, and were represented by Mr Muir, solicitor.

Mr Muir submitted that the application should be dismissed upon the basis that regardless of the question of whether the new notices were valid or not in other respects, the periods of notices in both were in the future and accordingly any application relying upon those new notices was premature. As the notices previously relied upon did not specify the *ish* date of the 19th February which the Applicant now relied upon, those notices were also invalid.

The Applicant invited the Tribunal to allow the application to proceed, but accepted that the notice periods in the new notices upon which she relied had not yet expired.

Statement of Reasons

Section 18 of the *Housing (Scotland) Act 1988* as amended (hereinafter referred to as “the Act”) provides:

“18.— Orders for possession.

(1) The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.

(2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3A) If the First-tier Tribunal is satisfied—

(a) that Ground 8 in Part I of Schedule 5 to this Act is established; and

(b) that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit,

the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4) If the First-tier Tribunal is satisfied that any of the grounds in Part I or Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 8 in Part I of Schedule 5 to this Act or on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is

established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit.

(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

(6) The First-tier Tribunal shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless—

(a) the ground for possession is Ground 2 or Ground 8 in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9, Ground 10, Ground 15 or Ground 17; and

(b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.

(6A) Nothing in subsection (6) above affects the First-tier Tribunal's power to make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.

(7) Subject to the preceding provisions of this section, the First-tier Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

(8) In subsections (3A) and (4A) above—

(a) “*relevant housing benefit*” means—

(i) any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or

(ii) any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;

(aa) “*relevant universal credit*” means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;

(b) references to delay or failure in the payment of relevant housing benefit or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant.”

The provisions of this section relevant to the issues raised in this application are that the Tribunal may only make an order for possession on one or more of the grounds set out in Schedule 5 to the Act, and shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless the terms of the tenancy make provision for it to be brought to an end on the ground in question.

The Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

The effect of these provisions is that the Tribunal may only make an order for possession on the grounds sought in this application if either the terms of the tenancy make provision for it to be brought to an end on the ground in question, or if the contractual tenancy has been terminated (by a valid notice to quit) and a statutory assured tenancy has arisen.

As the lease is for a period of no more than one year, it may be validly constituted verbally and without a written agreement (see *Stair Memorial Encyclopedia, Landlord and Tenant (Reissue)* at paragraphs 27). The Applicant submits, however, that there was a written agreement, but that she cannot provide a copy of its terms.

The notice to quit required to end the lease on a date which is an *ish* of the lease, but the date specified of 27th April 2021 in the original notice to quit was accepted by the Applicant to have been simply selected by her in the absence of any information as to the correct *ish* date.

In the absence of any basis to establish the *ish* date, the Applicant was unable to show that the 27th April 2021 was an *ish* of the lease, which she required to prove in order to serve a valid notice to quit (see *Rennie & Ors. – Leases S.U.L.I.* (1st Ed.) paragraphs 22-46 to 22-49, *Gloag & Henderson – The Law of Scotland* (14th Ed.) paragraph 35-25 and 35-26, *Stalker – Evictions in Scotland* (2nd Ed.) pages 58-60, and section 38 of the *Sheriff Courts (Scotland) Act 1907*). Upon that basis, the original notice to quit provided with the application is invalid.

In the absence of any basis to establish the *ish* date of the lease, the Applicant was unable to show that the lease had been terminated by a valid notice to quit. The lease, therefore, remains in force, and a statutory assured tenancy has not arisen.

The next question is whether the Tribunal was entitled to make an order for possession in this application, upon the basis that the terms of the lease agreement are deemed by the Tribunal in relation to ground 8 of Schedule 5 of the Act to “make provision for it to be brought to an end on the ground in question” in terms of section 18(6)(b) of the Act. That question is easily answered in circumstances where the Applicant is unable to produce a copy of the written lease agreement.

To deal with these legal problems, the Applicant produced a replacement notice to quit and a replacement form AT6. These may be valid, or they may not be valid, and Mr Muir reserved his position upon those questions. However, whether valid or not, the notice period in both the notice to quit and the form AT6 had not yet expired, and in those circumstances whatever their validity or not, this application is premature. The Tribunal cannot consider an application for eviction brought before the periods of notice have expired.

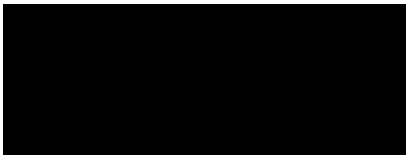
In those circumstances, the Tribunal was not entitled to make an order for possession, and dismissed the application.

Decision

For the above reasons, the Tribunal dismissed the application and refused the order sought.

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/Chair

Date: 18 January 2022