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 33 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/22/0090

Re: Property at 2 Torrance Avenue, East Kilbride, G75 0RN ("the Property")

Parties:

Mr John Doubt, Miss Emma Banks, c/o Home Connexions, 21 St James Avenue, Hairmyres, East Kilbride, G74 5QD ("the Applicants")

Mr Mohammed Sylla, Miss Julie McFadden, 2 Torrance Avenue, East Kilbride, G75 0RN ("the Respondents")

Tribunal Members:

Alison Kelly (Legal Member) and Elizabeth Dickson (Ordinary Member)

Decision

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

Background

The Applicant lodged an application on the 12th January 2022 under Rule 66 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules") seeking eviction of the Respondents.

Lodged with the application were :

1. Tenancy Agreement
2. AT5
3. Section 33 Notice dated 4th May 2021 with a termination date of 2nd December 2021
4. Notice To Quit dated 4th May 2021 with a termination date of 2nd December 2021
5. Section 11 Notice

The Tribunal raised a query regarding the validity of the Notice To Quit. The Applicant's solicitor responded by email on 12th February 2022. The case was allowed to proceed to a Case Management Discussion ("CMD") on the basis that the Applicants would require to address the Tribunal on the matter of the validity of the Notice to Quit.

The Second Respondent's solicitor lodged Written Submissions late on 5th May 2022.

Case Management Discussion

The CMD took place by teleconference. The Applicants were represented by Mr Grant of Wright, Johnston & Mackenzie, the First Respondent represented himself and the Second Respondent was represented by Sean McPhee of the Legal Services Agency.

The Chairperson introduced everyone and explained the purpose of a CMD in terms of Rule 17.

Mr Grant confirmed that he had no formal objection to the lateness of the Written Submissions on the basis that the Second Respondent's solicitor would make them orally anyway.

As there were disputed issues of fact the Tribunal decided that the case required to proceed to a Hearing.

The issues to be decided are:

a) The competency of the Notice to Quit

b) Whether it is reasonable to grant the order

The parties will advise the Tribunal of who they intend to call as witnesses in terms of the Rules.

The Tribunal also made a direction that the First Respondent should dial in direct to the Hearing rather than phoning the Second Defender and listening to and participating in the proceedings through her phone.

Hearing

The Hearing took place by teleconference. The Applicants were represented by Mr Grant of Wright, Johnston & Mackenzie and the First Applicant, John Doubt, was also on the call. The First Respondent represented himself and the Second Respondent was represented by Miss Cochrane of the Legal Services Agency.

The First Respondent was again participating through the Second Respondent's phone. The Tribunal asked him to dial in direct. After roughly ten minutes of trying this turned out not to be possible. With the consent of all parties the Tribunal decided to proceed with the First Respondent listening and participating through the Second

Respondent's phone as an adjournment would not meet the overriding objective of the Tribunal to act justly and to avoid delay.

The Chairperson confirmed that there were two disputed issues. Firstly, was the Notice To Quit valid, and secondly was it reasonable to grant an order for eviction. The second issue would only have to be dealt with if the first issue was decided in the Applicants' favour.

Mr Grant confirmed that he would only require to call Mr Doubt as a witness if a matter of fact was in dispute. Miss Cochrane said she would only be calling Miss McFadden as a witness if the question of reasonableness had to be decided.

Mr Grant confirmed that he had not lodged any submission additional to his response to the Tribunal's queries, contained in his email of 12th February 2022.

Mr Grant said that the Notice To Quit was issued on 4th May 2021, requiring possession on 2nd December 2021. The original term of the tenancy was as stated in the lease as "from 3rd December 2013 including to 3rd December 2014". He said that the lease said "to 3rd December 2013", it did not state "to 3rd December inclusive". He submitted that the lease would therefore end at a second before midnight on 2nd December 2014. He said that this would mean that the ish date would be 2nd December in each year, as tacit relocation can only operate for a maximum of a year at a time.

Mr Grant said that even if there was any inconsistency in the dates, the tenants had received the Notice To Quit and would read from that that they had to remove on or by 2nd December 2021.

Mr Grant continued that even if there was any inconsistency the tenants had not suffered any prejudice in relation to any error in the Tenancy Agreement or the Notice To Quit. No steps were taken by the Applicants to raise proceedings on the 2nd, 3rd or 4th of December 2021. They were not raised until 12th January 2022, which was significantly beyond the date. He said that there was no issue with the Notice To Quit until the Tribunal raised it. There had been no suggestion by the tenants that they had refused to remove because of a technicality.

Mr Grant said that the tenants had been aware of the Applicants' actions since May 2021 and that the Notice To Quit should be treated as valid. He said that if the Tribunal were not with him the Applicants would have to submit a fresh application and he was not sure if that fitted with the Tribunal's overriding objective to act justly, proportionately and to avoid delay.

The First Respondent had no submission to make.

Miss Cochrane referred to the submission for the Second Respondent made in writing on 5th May 2022. She said that the tenancy agreement said that the period ran "from 3rd December 2013 and including to 3rd December 2014". She said she noted Mr Grant's argument that the wording did not use "inclusive", but she said that it did use "including to", and that this wording was sufficient to mean that 3rd December was included in the term of the tenancy. She submitted that this would mean that the ish

date was 4th December 2013. She referred to section 33 of the Housing (Scotland) Act 1988 and said that eviction could not be granted if the tenancy had not been brought to an end and that tacit relocation was operating.

Miss Cochrane submitted that the contra proferentum rule should be applied to any ambiguity in the contract. This doctrine meant that where there is doubt about the meaning of the contract the words will be construed against the person who put them forward. The Applicant's agent had drafted the contract, not the Respondents.

Miss Cochrane submitted that even if the initial term of the contract had been one year 2nd December would still not be the ish date.

Miss Cochrane submitted that tacit relocation was operating, and the Tribunal had no discretion as the requirements of section 33 were absolute.

The Tribunal adjourned to consider their decision.

Findings In Fact

1. The parties entered in to a tenancy agreement for the property;
2. An AT5 was served prior to the commencement of the tenancy;
3. The tenancy is a Short Assured Tenancy;
4. Section 33 Notice dated 4th May 2021 with a termination date of 2nd December 2021 was served;
5. Notice To Quit dated 4th May 2021 with a termination date of 2nd December 2021 was served;
6. 2nd December is not an ish date for the tenancy;
7. The tenancy has not been brought to an end;
8. Tacit relocation is operating.

Reasons For Decision

The Applicants sought to evict the tenancy under Rule 66 of the Rules. Rule 66 covers applications brought in terms of section 33 of the Housing (Scotland) Act 1988.

Section 33 states as follows:

(1)Without prejudice to any right of the landlord under a short assured tenancy to recover possession of the house let on the tenancy in accordance with sections 12 to 31 of this Act, the First-tier Tribunal may make an order for possession of the house if the Tribunal is satisfied—

(a)that the short assured tenancy has reached its finish;

(b)that tacit relocation is not operating; and

(c) (repealed)

(d)that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house, and

(e)that it is reasonable to make an order for possession.

(2)The period of notice to be given under subsection (1)(d) above shall be—

(i)if the terms of the tenancy provide, in relation to such notice, for a period of more than two months, that period;

(ii)in any other case, two months.

(3)A notice under paragraph (d) of subsection (1) above may be served before, at or after the termination of the tenancy to which it relates.

(4)Where the First-tier Tribunal makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that finish shall end (without further notice) on the day on which the order takes effect.

(5)For the avoidance of doubt, sections 18 and 19 do not apply for the purpose of a landlord seeking to recover possession of the house under this section.

To establish that the tenancy has reached its finish the Applicants must serve a Notice To Quit, brining the tenancy to an end at an ish date.

The Tribunal examined the wording of the tenancy agreement in relation to its term. It says:

TERM OF	**FROM**	**3rd December 2013**
	AND INCLUDING TO	**3rd December 2014**

The Tribunal did not accept the Applicants' argument that the term of the tenancy would only have included 3rd December if the word "inclusive" had been used. The Tribunal agreed with the Second Respondent's solicitor that an ordinary person would have interpreted the use of the word "including" to mean that 3rd December was included. The Tribunal agreed that the maxim of contra proferentum applied. The Tribunal concluded that 2nd December was not an ish date, and therefore the Notice To Quit was invalid. It flowed therefore that the tenancy was not at its finish and that tacit relocation was operating. Section 33 had therefore not been satisfied and the order for eviction could not be granted.

The Tribunal did not agree with the Applicants' solicitor's arguments about the Tribunal's overriding objective.

The overriding objective of the Tribunal is contained in Rule 2.

2.—(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.

(2) Dealing with the proceedings justly includes—

(a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;

(b) seeking informality and flexibility in proceedings;

(c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;

(d) using the special expertise of the First-tier Tribunal effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the issues.

The overriding objective is to deal with the proceedings justly. To apply the law to the facts is to deal with the proceedings justly, and it cannot be just to disapply the law for the convenience of the Applicants when the foundation of the provision in section 33 is invalid.

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.

Alison Kelly

27th June 2022

Legal Member/Chair

Date