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/22/0651

Re: Property at 44 BRUNTSFIELD CRESCENT, DUNBAR, EH42 1QZ ("the Property")

Parties:

MR GERARD BENT, c/o 34 WOODLANDS ROAD, GLASGOW, G3 6UR ("the Applicant")

MR ANTHONY KEARNEY, Elizabeth McAndrew also known as Donna McCafferty also known as Louise Hanscombe, 44 BRUNTSFIELD CRESCENT, DUNBAR, EH42 1QZ ("the Respondents")

Tribunal Members:

Rory Cowan (Legal Member) and Ahsan Khan (Ordinary Member)

Decision (in absence of the Respondents)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that and order for possession of the Property should be granted against the Respondents.

- Background

By application dated 25 February 2022 (the Application), the Applicant sought an order for possession relative to the Property in terms of Ground 1 of schedule 5 of the Housing (Scotland) Act 1988 (The 1988 Act). With the Application, the Applicant produced:

a) Copy Tenancy Agreement dated 23 January 2014;
b) Notice to Quit and Form AT6 dated 17 September 2021;
c) Sheriff officer executions dated 17 September 2021 for the notices;
d) Copy section 11 notice and proof of notification; newspaper articles; and
e) An affidavit by the Applicant.

After acceptance by Tribunal administration, the Application was served on the Respondents by sheriff officers on 6 April 2022. Subsequent to that, an email was received by Tribunal administration from the second named Respondent on 25 April 2022, where the second named Respondent observed that the Applicant had a "buy to let" mortgage over the Property, which "forbids" him from residing in the Property. In response, written submissions addressing this email were received from the Applicant's solicitors on 20 May 2022. There was further correspondence received directly from the Applicant enclosing correspondence from his letting agent which detailed difficulties he had in gaining access and inspecting the Property as well as enclosing further copies of newspaper articles relative to the second named Respondent.

- The Case Management Discussion

Following acceptance of the Application a Case Management Discussion (CMD) was fixed for 25 May 2022 to be heard by way of WebEx video conference. Details of the video conference and guidance on how to participate in the WebEx meeting were sent to all parties including the Respondents. At the CMD, the Applicant appeared and was represented by a Miss Bruce, trainee solicitor. The Respondents did not appear, nor were they represented. There was no contact from either indicating any difficulty with participating in the CMD and the Tribunal were satisfied that they knew of the CMD, of their requirement to participate and therefore decided it was appropriate, in the circumstances, to proceed in their absence.

Miss Bruce invited the Tribunal to grant a possession order relative to the Property in terms of Ground 1(a) of Schedule 5 of the 1988 Act. Her position can be summarised as being that the contractual tenancy had been validly terminated, that the Property is the Applicant's former home, that despite prior notification of the applicability of ground 1 not having been given (because it was not by separate notice and merely referred to in the lease) it was reasonable to dispense that requirement and reasonable therefore to order possession of the Property in the circumstances.

In relation to the termination of the contractual tenancy, Miss Bruce's position was that the initial term of the tenancy, being 23 January 2014 to 22 July 2014 was a term of 6 months. As a result, as tacit relocation had not been excluded and whilst not expressly stated by Miss Bruce, the implication of her position was that the lease had continued thereafter on 6 monthly intervals with *ish* or end dates on the 22 of January and July of each year. With the Application, a Notice to Quit (NTQ) dated 17 September 2021 and served by sheriff officers was produced. In terms of clause "Two" the required period of notice was "4 months". Again, whilst not expressly stated, the implication of her position was that the NTQ gave more than the required period of notice in advance of 22 January 2022, which was an *ish* date.

In relation to the issue of dispensing with the requirement to give prior notification of the applicability of Ground 1, Miss Bruce relied upon the following circumstances:

a) That whilst notice of the applicability of Ground 1 had not been made by separate notice, there was reference to it in the lease itself. In particular, clause "Two" and the schedule to the lease.

b) That the Respondents were in substantial rent arrears, and no rent had been paid since August 2020. This has put the Applicant in severe financial distress and he has had to borrow money from family to avoid repossession of the property, pay child support and his ongoing rent. His last employment was in September 2021 although he plans to commence his own business shortly, which, if he were to recover the Property would allow him some financial stability.
c) That the first NTQ had been served as far back as September 2020.
d) That the Property was the Applicant's former family home in which he and his family had resided before he required to move to Cairo for his employment.
e) That the Applicant would face particular hardship should he not be able to gain possession and reside in the Property. He has 2 children aged 12 and 14 which he is entitled to see on a residential basis twice per week and half of their school holidays. He has not been able to see them since May 2021 when he, for financial reasons, had to move out of his rental property due to his financial circumstances. He is residing as a" lodger" in one bedroom with no cooking facilities and therefore cannot have contact with his children due to the unsuitability of those premises.
f) That the Respondents have breached the terms of the lease between the Applicant and them in that they have refused access and have kept pets within the Property.
g) That, whilst there was a "buy to let" mortgage, this would not prevent recovery under Ground 1 of Schedule 5. Even so, the Applicant's intention, once possession was obtained, would be to re-mortgage the Property immediately. The only reason why this had not happened sooner was due to the Respondents refusing access for surveyors to value the Property for that purpose where the Applicant had an offer of loan.
h) That the affect on the Applicant in not being able to recover the Property to reside in has caused him considerable stress and he has sought medical help regarding depression. No medical evidence was presented to support this claim.

Miss Bruce therefore invited the Tribunal to dispense with the requirement to give prior notification of the applicability of Ground 1 and find that Ground 1 was made out as the Property had been the Applicant's former home prior to the Applicant moving to Cairo for his employment. She also relied upon the same circumstances in relation to reasonableness of granting an order for possession generally, should the Tribunal decide to dispense with the notice requirement.

- Findings in Fact and Law

1) That the parties entered into a tenancy constituted by a signed lease dated 23 January 2014 relative to the Property from 23 January 2014 to 22 July 2014.

2) That the tenancy is one to which the provisions of the Housing (Scotland) Act 1988 apply including sections 18, 19 as well as schedule 5.

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

4) That the initial term of the lease was for a period of 6 months.

5) That, in terms of clause "Two" of the lease between the parties, in order to terminate the contractual tenancy for the Property each party is required to give not less than 4 months' notice in advance of an *ish* date.

6) That the Property is the Applicant's former home which he occupied prior to the Respondents' tenancy.

7) That on or around 17 September 2021, the Applicant sought to serve a Notice to Quit and Form AT6 on the Respondents seeking to terminate the contractual tenancy as at 22 January 2022 and to seek possession of the Property in terms of Ground 1 (a) of Schedule 5 of the Housing (Scotland) Act 1988 as at the same date.

8) That 22 January 2022 is an *ish* date and the contractual tenancy was terminated as at 22 January 2022.

9) That notice of the applicability of Ground 1 of Schedule 5 of the Housing (Scotland) Act 1988 was given to the Respondents no later than the beginning of the tenancy as required.

10) That, in any event, even if notice of the applicability of Ground 1 of Schedule 5 of the Housing (Scotland) Act 1988 had not been given, it would be reasonable to dispense with the requirement to give such notice in the circumstances.

11) That the Applicant has complied with the notice requirements of section 19 of the Housing (Scotland) Act 1988 and in relation to Ground 1 of Schedule 5 as amended by the Coronavirus emergency legislation.

12) That, in the circumstances, it is reasonable to grant an order for possession in terms of section 18 of the Housing (Scotland) Act 1988.

- Reasons for Decision

The initial discussions regarding the Application focussed on the question of the duration of the original tenancy for the Property. The Lease expresses the terms as being from 23 January 2014 and ending on 22 July 2014. The submission for the Applicant that this was a term of 6 months. The Tribunal considered the terms of the lease between the parties. It is poorly drafted. The lease refers to "Date of Commencement" in the definitions section as being 23 January 2014 but then mentions "date of entry" on clause "One". Clause "One" states:

"The Lease will commence on the date of entry and terminate on the date of termination."

For the term of this lease to be 6 months, the whole of 23 January 2014 must be included in the calculation of its duration. The standard basis for calculation of the duration of a lease is by way of the aid to construction *civillus computatio*. If this were

to apply, then it would operate to exclude 23 January 2014 from the calculation of the duration, meaning the lease would be deemed to commence from 24 January 2014 and end on 22 July 2014, which would be a duration of 6 months less one day. However, whilst *civillus computatio* may be the default, it is not the only aide to construction that can apply and the parties to any lease can agree to use another method of calculating time such as *naturalis computatio* (McCabe v Wilson 2006 Hous. L.R. 86). If that method of calculating time is used, then 23 January 2014 would be included in the calculation of the duration and the duration would be 6 months. The question therefore is, what method of calculation of the duration has been agreed? Whilst the lease is poorly drafted and the same terms have not been used consistently, the Tribunal was of the view that "Date of Commencement" and "date of entry" were synonymous in this particular lease. Further, the view taken by the Tribunal is that the use of the words "date of entry" in clause "One" creates an exception to the general rule and to the application of *civillus computatio* (Calmac Developments Limited v Murdoch 2012 WL 3062547). That being the case, the initial term of the lease was for 6 months and the lease has continued under the application of tacit relocation on a 6 monthly term ever since. As such, 22 January 2022 was an ish date and by giving more than 4 months' notice with the service of the NTQ on 17 September 2021, the Applicant has validly terminated any contractual tenancy for the Property.

Having decided that the Applicant had validly terminated the contractual tenancy, the next issue to consider was the question of whether the notification of the applicability of Ground 1 had been given "not later than the beginning of the tenancy" as required by Ground 1 of Schedule 5 to the 1988 Act. The position advanced by Miss Bruce was that, because this was not done by separate notice, no such notice had been given and that the Applicant required to seek dispensation as provided for by Ground 1 on the basis that "it was reasonable to dispense with the requirement of notice". The Tribunal respectfully disagrees with that submission. Clause "Two" provides expressly that:

"Notice is hereby given to the tenant that the landlord may recover possession of the said premises let in terms of the Grounds of Part I and II of Schedule 5 to the Housing (Scotland) Act 1988. These grounds are as set out on the attached Schedule, and by his signature hereto the tenant acknowledges receipt of the said Notice."

The schedule attached to the lease contains a list of 17 grounds in terms of schedule 5 and summarises Ground 1 under the heading "Part I". It is clear therefore that the Respondents have, by signing the lease, expressly acknowledged that they had been notified of the applicability of ground 1 to this tenancy before the tenancy began. No position to the contrary was advanced on behalf of the Respondents. Even if that were not the case, and the Tribunal is incorrect and such notification was not given, in the circumstances the Tribunal would have been minded to exercise its discretion to dispense with that requirement for the reasons set out by Miss Bruce and as detailed above. Overall, and having regard to all the circumstances before it, the Tribunal was of the view that that the Applicant would suffer severe hardship as a result of not being able to reside in his property, not only in relation to his inability to exercise his contact with his children, but financial hardship too. The arrears in this case were substantial and nothing has been paid by way of rent since August 2020.

Further, even if notification of the applicability of Ground 1 was technically not quite sufficient by being included in the lease, the lease nonetheless contained notice of the possibility of possession being sought under that ground which was acknowledged by the Respondents.

Beyond that, the Tribunal was satisfied that Ground 1(a) had been made out in that the Property was the former home of the Applicant prior to the tenancy with the Respondents and, whilst not required for Ground 1 (a), the Tribunal was also satisfied that he wished the Property back to live in same. The point made by the second named Respondent in relation to the terms of the mortgage was of no assistance.

Whilst Ground 1 has been traditionally a mandatory ground for possession, it remains discretionary under the terms of the remaining parts of the Coronavirus legislation. The Tribunal therefore required to consider whether it was reasonable to grant an order for possession in the circumstances. For the same reasons detailed above and as submitted by Miss Bruce, the Tribunal was of the view that it was reasonable to grant a possession order relative to the Property.

- Decision

The Tribunal decided, in the circumstances that it was reasonable to issue a possession order relative to the Property.

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

_____ **25 May 2022**

Legal Member/Chair **Date**