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/22/2972

Re: Property at 28 Downie Grove, Edinburgh, EH12 7AX ("the Property")

Parties:

Mr Gareth Moores, 14 Betchworth Way, Macclesfield, SK10 2PA ("the Applicant")

Miss Karen Craig, 28 Downie Grove, Edinburgh, EH12 7AX ("the Respondent")

Tribunal Members:
George Clark (Legal Member) and Mike Scott (Ordinary Member)

Decision
The Tribunal decided that the application should be determined without a Hearing and made an Order for Possession of the Property

Background

1. By application, received by the Tribunal on 22 August 2022, the Applicant sought an Order for Possession under Section 33 of the Housing (Scotland) (Act) 1988 ("the 1988 Act"), namely recovery of possession on the termination of a Short Assured Tenancy.

2. The application was accompanied by copies of a Short Assured Tenancy Agreement between the Parties, commencing on 1 May 2017 and, if not brought to an end on 1 May 2022, continuing on a month to month basis thereafter until ended by either Party, a Form AT5 Notice dated 1 May 2017, a document bearing to be a combined Notice to Quit and Notice under Section 33 of the 1988 Act, requiring the Respondent to vacate the Property and advising that an application to the Tribunal would not be made before 1 August 2022, and a Notice, headed "AT6", citing Section 33 of the 1988 Act as the reason for the Applicant intending to raise proceedings for possession of the Property.

3. On 11 October 2022, the Applicant's representatives, Clarity Simplicity, Glasgow responded to a request by the Tribunal for further information. They submitted that on 4 May 2022, notice had been duly served on the Respondent that the Applicant was terminating the lease. He had, therefore, provided the Respondent with sufficient notice and had both terminated the tenancy at its ish and provided notice of his intention to raise proceedings to recover possession. They also referred to the secondary notice, referred to as an "AT6" which, they contended, provided sufficient notice to the Respondent that proceedings for eviction would be raised against her in line with Section 33 of the 1988 Act should she not vacate the Property at the point that both Notices required. Both Notices, they said, were valid, and provided the Respondent with notification both that the tenancy was being terminated (by Notice to Quit) and that proceedings would be raised against her in accordance with Section 33 of the 1988 Act.

4. On 29 November 2022, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the Respondent was invited to make written representations by 20 December 2022.

5. On 26 January 2023, the Tribunal received written representations on behalf of the Respondent, in which the question of whether a Form AT5 Notice had been received by the Respondent prior to the creation of the tenancy was raised and the validity of the document bearing to be a combined Notice to Quit and Section 33 Notice was challenged. The argument put forward was that a Notice to Quit and a Section 33 Notice needed to be separate documents and that the Form AT6 Notice should be disregarded as it was only applicable to situations where landlords were relying on one or other of the Grounds for Possession set out in Schedule 5 to the 1988 Act and did not apply to Short Assured Tenancies. The Respondent's representatives provided authorities for their arguments and invited the Tribunal to reject the application for the reasons they had given and also because the Applicant had provided no information on the question of whether it would be reasonable for the Tribunal to make an Order for Possession.

6. In relation to the Notices, the Respondent's representatives contended that the "AT6" Notice should be dispensed with as incorrectly drafted and not relevant to the application, as the sole ground given was Section 33 of the 1988 Act, not one of the Grounds set out in Schedule 5 to the Act. A Form AT6 Notice is given under Section 19 of the Act. They referred to the observation by Adrian Stalker (Stalker, A. (2021) "Evictions in Scotland", 2nd edition at p62) that *"Under Scots law, a fairly rigorous view has tended to be taken of the requirement for accuracy in giving notice to quit."* They invited the Tribunal to follow the reasoning and decision of Sheriff Jamieson in *Beattie v Rogers* (2021 Hous.L.R.107) that a Notice to Quit and notice under Section 33 of the 1988 Act require to be two separate documents. The public interest and the purpose of the legislation require that standard to be applied.

7. On the issue of whether it would be reasonable to make an Eviction Order, the Respondent's representatives stated that the Respondent is a lone parent,

with an 18-year-old dependent child still in full-time education. The Respondent works full-time as a mental health nurse. She receives no welfare benefits. She has approached City of Edinburgh Council for assistance and is actively seeking alternative accommodation in the social sector or mid-market rent but has not been able to find affordable alternative accommodation for the family.

Case Management Discussion

8. A Case Management Discussion was held on the afternoon of 2 February 2023. Mr Scott Stevenson of Clarity Simplicity, Glasgow, represented the Applicant and Mr Andrew Wilson of Community Help and Advice Initiative (CHAI), Edinburgh, represented the Respondent.

9. The Tribunal told the Parties that its preliminary conclusions from reading the written representations were that the Respondent had received the Form AT5 Notice timeously, as the tenancy agreement which she had signed contained an acknowledgement by her that she had received it prior to the creation of the tenancy, that the document bearing to be a combined Notice to Quit and Section 33 Notice was at least a valid Notice to Quit and that the Tribunal would have to determine whether it also met the requirements of a Section 33 Notice, whether a combined notice was competent and whether the "AT6" Notice served in this particular case could be regarded as a separate Notice under Section 33 of the 1988 Act.

10. Mr Stevenson told the Tribunal that he was in a position to make oral submissions on the question of whether it would be reasonable to make an Order for Possession, but Mr Walker pointed out that, having had no prior notice of the argument to be put forward by Mr Stevenson and, therefore, no opportunity to take further instructions, he would be opposed to the Tribunal determining the application at this stage.

11. The view of the Tribunal was that it was in the interests of justice both that the Applicant be afforded the opportunity to present an argument on the question of reasonableness and that the Respondent be given the chance to consider and, if appropriate, respond to that argument. Accordingly, the Tribunal decided to adjourn the Case Management Discussion to a later date and in the meantime to issue a Direction to the Applicant to provide written submissions in support of his contention that, should the Tribunal determine that the other requirements of Section 33 of the 1988 Act had been met, it would be reasonable for the Tribunal to make an Order for Possession of the Property. Both Parties would also have the opportunity prior to the reconvened Case Management Discussion, to make any further representations they wished in relation to the remaining issues before the Tribunal.

12. On 23 March 2023, the Applicant's solicitors provided further written representations in response to the Tribunal's Direction. They stated that they agreed the reasoning and decision of Sheriff Jamieson in *Beattie v Rogers*,

namely that there should be two separate notices, but submitted that two separate notices had in fact been given in the present case, so the *Beattie* decision was not at odds with the circumstances of the present case. They contended that the Respondent was aware that the Applicant required possession of the Property. This was specified in six places across the Notices served upon her. The information was consistent, and it was submitted that the information provided within the Notices was clear and unambiguous. As the secondary notice titled an AT6 was served upon the Respondent, it defeated the Respondent's argument that the Notice to Quit acted as a combined notice.

13. On the question of reasonableness, the Applicant's solicitors stated that, at the commencement of the tenancy, the Parties had a personal relationship and, as a result, the Applicant had rented the Property at a significantly lower rent than the market average. The Respondent pays £500 per month and market averages are £1,450 for a similar property in that area. The Respondent on occasions fails to pay the rent, but the Applicant has never pursued her for the arrears, given the current cost-of-living crisis and as a gesture of goodwill. He would prefer that the Respondent use the money due to him towards finding suitable alternative accommodation. It was accepted that the Respondent was unlikely to find similar accommodation in the area at a similar monthly rent. The Applicant requires to sell the Property. He currently has an interest-only mortgage which equates to monthly payments around £736, so he makes a loss of £236 per month, increasing to £736 if the Respondent does not pay the rent. This will continue until the Respondent vacates the Property and it is unaffordable to the Applicant for this to continue. The purpose of letting a property is to supplement the landlord's income, which the Property does not do. It would, therefore, be unreasonable for an Order not to be granted given the current financial climate and for the Applicant to be financially penalised as a result of being unable to sell. It was also likely that interest rates on the current mortgage would increase, causing further loss to the Applicant.

14. The Applicant's solicitors provided the Tribunal with a letter from his mortgage company confirming that his monthly payments from 1 February 2923 would be £736.88, following his request for a product transfer.
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15. The Respondent had been aware since 4 May 2022 that the Applicant requires possession of the Property. The Respondent said in written representations that she had approached the Council, but the Applicant's solicitors said that it is clear that City of Edinburgh Council will require an Eviction Order to provide assistance to the Respondent. It would be unreasonable not to grant such an Order, because the Applicant has satisfied all statutory requirements and ought not to be required to wait years to obtain vacant possession of his property.

Reconvened Case Management Discussion

16. The Case Management Discussion was reconvened on the afternoon of 6 April 2023. The Applicant was again represented by Mr Stevenson and the Respondent by Mr Wilson. The representatives of the Parties told the Tribunal that they were content that the Tribunal determine, on the basis of the written submissions already made, the matter of whether a valid Notice to Quit and Section 33 Notice had been served and it was agreed that the issue to be discussed was whether it would be reasonable for the Tribunal to make an Order for Possession.

17. For the Respondent, Mr Wilson stated that he had an issue with some of the facts as set out by the Applicant in the written submissions. The Applicant had not produced a Rent Statement, so had not vouched the position regarding arrears of rent. Accordingly, Mr Wilson could not agree that rent had not been paid. Further, the Applicant appeared to have changed his mortgage product and it was possible that he had done so to increase his monthly payments to bolster his case that he was making losses on the tenancy. His view was that these matters should be clarified at a full evidential Hearing. There had also been no discussion as to whether the rent might be increased by mutual agreement.

18. For the Applicant, Mr Stevenson said that it was not necessary to have an evidential Hearing, as the Applicant was not seeking to recover arrears of rent and the level of mortgage payments was a matter of fact, evidenced by the letter from the mortgage company. He could categorically confirm that the increased monthly payments had not resulted from any action on the part of the Applicant to make his mortgage commitments appear more onerous. The Applicant requires to sell the Property. The fact that he had let it to the Respondent at a low rent and that he had not increased the rent since the tenancy started in 2017 were further matters which fed into the reasonableness argument. It had been stated prior to the first Case Management Discussion that the Respondent has been looking for assistance, but it appears that no progress has been made and that the current situation will simply continue, with monthly losses, unless an Order is made.

19. The Parties' representatives then left the Case Management Discussion and the Tribunal members considered all the evidence, written and oral, that had been presented to them.

Findings of Fact

20. The Applicant and the Respondent are, respectively, the landlord and tenant in a Tenancy Agreement, which commenced on 1 May 2017 at a rent of £500 per month.

21. In the tenancy agreement, the Respondent acknowledged that she had been served a Form AT5 Notice before the creation of the tenancy. The tenancy is, therefore, a Short Assured Tenancy.

22. The tenancy continued by tacit relocation until ended by a Notice to Quit, served on 4 May 2022 and effective on an ish date, namely 1 August 2022.

23. The current rent for the Property is £500 per month.

24. The current monthly payments on the Applicant's interest-only mortgage are £736.88.

25. The Applicant served a Notice to Quit and Section 33 Notice on the Respondent, requiring her to vacate the Property by 1 August 2022.

Reasons for Decision

26. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to enable it to decide the application without a Hearing.

27. Section 33 of the 1988 Act states that the Tribunal may make an Order for Possession of a house let on a Short Assured Tenancy if it is satisfied that the Short Assured Tenancy has reached its ish, that tacit relocation is not operating, that no further contractual tenancy is for the time being in existence, that the landlord has given to the tenant notice stating that he requires possession of the house, and that it is reasonable to make the Order for Possession.

28. The Tribunal considered first the question of whether a valid Notice to Quit and a valid Notice under Section 33 of the 1988 Act had been served on the Respondent.

29. Neither Notice has a statutory form, but, in terms of the Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988, a Notice to Quit must contain certain prescribed information. The Tribunal considered that the letter from the Applicant's representatives of 4 May 2022 did contain that information and stated an ish date by which the Respondent was required to remove from the Property. The Tribunal was, therefore, satisfied that it constituted a valid Notice to Quit and that the contractual tenancy terminated on 1 August 2022.

30. *In gremio* of the letter of 4 May 2022 there was a further paragraph which gave the Respondent notice that, not earlier than 1 August 2022, being in excess of two months from the date of the letter, the Applicant required vacant possession of the Property and therefore intended to apply to the Tribunal for an Order for Possession in terms of Section 33 of the 1988 Act.

31. The argument put forward by the Respondent's representatives was that the two Notices had to be separate, and they cited as authority the decision of Sheriff Jamieson in *Beattie v Rogers.* In that case, the Sheriff held that a "combined" notice was a valid Notice under Section 33 of the 1988 Act, but was not a valid Notice to Quit, even though it contained the prescribed information as a footnote. The Sheriff's reasoning, however, was that nowhere in the body or the absent heading of the letter was it actually referred to as a Notice to Quit. The footnote could not turn the letter into a Notice to Quit when it was erroneously described as a Section 33 Notice. Accordingly, it did not terminate the lease at its ish and was continuing by tacit relocation and thus the Pursuer was not entitled to an Order for Possession under Section 33 of the 1988 Act. The Sheriff's opinion was that there ought to have been two separate notices, one headed up as a notice under Section 38 of the Sheriff Courts (Scotland) Act 1907 and the other headed up as a notice under Section 33 of the 1988 Act. The two notices serve different purposes.

32. The Tribunal did not agree with the view of the learned Sheriff that the two notices ought to have headings referring to the respective legislation. There is no prescribed style for either notice and, provided it is clear from its wording that one is a Notice to Quit and contains the prescribed information and the other states at least in its body that it is given under Section 33 of the 1988 Act, they need not follow any particular style. The problem in *Beattie* was the failure to state that it was a Notice to Quit. The present case is, however, materially different. The letter of 4 May 2022 made it clear that it was a Notice to Quit. The question is whether it was sufficient to constitute also a valid Notice under Section 33 of the 1988 Act. The Tribunal did not, however, have to answer that question, because the Applicant's representatives had served a separate Notice which purported to be an AT6, dated 3 May 2022 and the Tribunal found the matter settled by that second Notice.

33. A Form AT6 Notice is served under Section 19 of the 1988 Act and has to strictly follow a prescribed form, narrating the Ground in Schedule 5 to the 1988 Act under which a landlord intends to raise proceedings to recover possession. The prescribed form includes a heading "*Notice under Section 19 of Intention to Raise Proceedings for possession".* The Notice in the present case does not contain that heading. It states that it is "*Notice under Section 33 of Intention to Raise Proceedings for Possession".* Accordingly, it is does not follow the prescribed style and is not an AT6 Notice. The question for the Tribunal to determine is, therefore, whether it was sufficient in its terms to constitute a valid Notice under Section 33 of the 1988 Act.

34. The Notice is clearly headed as being given under Section 33 and it informs the Respondent of the terms of the Section and that "*Proceedings will not be raised until 1 August 2022 (which is the earliest date at which proceedings can be raised under Section 33 of the Housing (Scotland) Act 1988.*" It does mistakenly indicate that the ground for raising proceedings is a ground for possession as set out in Schedule 5 to the 1988 Act and it also contains further superfluous information regarding the tenant's rights and periods of notice, these being contained in boxes which from part of the statutory style of

a Form AT6 Notice, but the view of the Tribunal was that, whilst it was far from ideal to “cannibalise” a prescribed form to cover a situation for which it was not designed, the Notice was sufficient to meet the requirements of Section 33 of the 1988 Act. It was clearly separate from the Notice to Quit, so met the *Beattie* test.

35. The Tribunal was, therefore, satisfied that, following service of the Notice to Quit, the tenancy had reached its ish, that tacit relocation is not operating, that no further contractual tenancy is for the time being in existence, and that the landlord had given to the tenant notice stating that he required possession of the house (the Section 33 Notice). Accordingly, the one remaining matter for the Tribunal to consider in determining the application was whether it would be reasonable to make an Order for Possession.

36. The Tribunal did not regard it as credible that the Applicant might have negotiated a product transfer on his mortgage in order to increase his monthly payments and bolster his application to the Tribunal. Such a strategy would have carried with it very substantial risk to the Applicant, the possibility still being that the Tribunal might not regard it as reasonable to make an Order for Possession. Accordingly, the Tribunal did not regard it as necessary to continue the application to a full evidential Hearing, where this would have been the only matter for proof, apart from the question of whether there were rent arrears. The Tribunal disregarded the question of possible rent arrears in arriving at its Decision, so did not require further proof by way of a Rent Statement.

37. The Respondent did not contest the representations by the Applicant that the Property had been rented out at a preferential, lower monthly rent and the Tribunal noted that the rent had not been increased during the almost 6 years of the tenancy. The Applicant had also provided evidence that his mortgage repayments exceeded the rent by £236 per month, and his solicitor had told the Tribunal that he regarded this as unaffordable and that he wished to sell the Property. The Tribunal also noted that the Respondent is a lone parent with a dependent child of 18 and that, given the preferential level of rent that she had enjoyed it would be difficult for her to find alternative accommodation in the area at her present rent level, but she is in full-time employment and has known for 11 months that the Applicant wished to recover possession of the Property.

38. The Tribunal recognised the necessity to consider the implications for both Parties of its decisions on reasonableness and that these are very often fine judgements, but having considered all the evidence before it, the Tribunal decided that the ongoing deficit between the rent and the mortgage payments was such that, on balance, it would be reasonable to make an Order for Possession. The Respondent might not be able to find an equivalent property in the area at or around her current rent level, but it appeared that she had benefitted for 6 years from paying rent at below the market level and it was not reasonable to expect the Applicant to continue indefinitely to subsidise the Respondent in this manner.

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.

George Clark

_____	**6 April 2023**
Legal Member	**Date**