



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 (“the 1988 Act”)

Chamber Ref: FTS/HPC/EV/23/0748

Re: Property at 105 Martin Avenue, Irvine, KA12 9NT (“the Property”)

Parties:

Erchi Limited, 1 Springfield Gardens, Irvine, KA11 2DD (“the Applicant”)

Miss Jacqueline Kerr, 105 Martin Avenue, Irvine, KA12 9NT (“the Respondent”)

Tribunal Members:

Alastair Houston (Legal Member) and Elaine Munroe (Ordinary Member)

Decision (in absence of the Respondent)

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

1. Background

1.1 This is an application under Rule 66 of the Chamber Rules whereby the Applicant seeks an order for recovery of possession of the property. The application was accompanied by copies of the written tenancy agreement between the parties, a form AT5, a notice to quit and a notice in terms of section 33 of the 1988 Act.

1.2 Prior to the Case Management Discussion, a representative for the Respondent had contacted the Tribunal to advise that both he and the Respondent were unable to attend but, in any case, the application was not opposed albeit the Respondent sought a delay of two months in enforcement of any order to allow her to secure alternative accommodation.

2. The Case Management Discussion

2.1 The Case Management Discussion took place on 25 May 2023 by teleconference. The Applicant was represented by Ms Black of Taylor &

Henderson solicitors. The Respondent, as expected, was neither present nor represented.

2.2 The Tribunal highlighted to Ms Black that there appeared to be a fundamental issue with the application in that the tenancy is said to have commenced on 1 October 2018 when it was no longer possible to create short assured tenancy agreements. Following a short adjournment for Ms Black to clarify when the Respondent's occupation of the property commenced, she confirmed that the position as stated in the application was correct, with the tenancy commencing on 1 October 2018. She accepted that the tenancy between the parties would constitute a private residential tenancy agreement.

2.3 Ms Black confirmed that no notice to leave had been served. She requested the Tribunal continue the Case Management Discussion as permitted by Rule 28 of the Chamber Rules. This would be to allow a notice to leave to be served which constituted the production of further evidence, as referred to in the Rule. In support of this she referred to the Respondent's knowledge of the application and the lack of opposition to it. The Tribunal adjourned the Case Management Discussion for a further short period to consider the matter, during which Ms Black, by way of message, also referred the Tribunal to the terms of Rule 5 and the acceptance of the application.

2.4 Following this adjournment, the Tribunal refused the application.

3. Reasons For Decision

3.1 Section 52 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") governs consideration by the Tribunal of applications for eviction orders in respect of private residential tenancies. Section 52 is in the following terms:-

52 Applications for eviction orders and consideration of them

(1) In a case where two or more persons jointly are the landlord under a tenancy, an application for an eviction order may be made by any one of those persons.

(2) The Tribunal is not to entertain an application for an eviction order if it is made in breach of—

(a) subsection (3), or

(b) any of [sections 54 to 56](#) (but see subsection (4)).

(3) An application for an eviction order against a tenant must be accompanied by a copy of a notice to leave which has been given to the tenant.

(4) Despite subsection (2)(b), the Tribunal may entertain an application made in breach of [section 54](#) if the Tribunal considers that it is reasonable to do so.

(5) The Tribunal may not consider whether an eviction ground applies unless it is a ground which—

*(a) is stated in the notice to leave accompanying the landlord's application in accordance with subsection (3), or
(b) has been included with the Tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought.*

The terms of section 52 of the 2016 Act are clear. In terms of subsections 2(a) and (3), the Tribunal is not to entertain an application for an eviction unless it is accompanied by a copy of the notice to leave given to the tenant. There is no discretion afforded to the Tribunal to overlook this.

3.2 Ms Black relied upon the ability of the Tribunal under Rule 28 to adjourn to a further Case Management Discussion to allow time for a notice to leave had been served. In the opinion of the Tribunal, any action such as an adjournment would constitute entertaining of the application. The terms of the 2016 Act must trump any procedural power afforded by the Chamber Rules. The fact that the application had been accepted by the Tribunal, albeit apparently incorrectly, did not circumvent the provisions of section 52.

3.3 Despite the acquiescence of the Respondent to an eviction order being granted, the Tribunal considered itself bound by the terms of section 52 to refuse the application, given that no notice to leave had been served on the Respondent and did not accompany the application.

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.

A Houston

Legal Member/Chair

25 May 2023
Date