



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/23/0041

Re: Property at 11E Sandeman Street, Dundee, DD3 7NP (“the Property”)

Parties:

Ms Lucy Picken, 11 Palmerston Road, Edinburgh, EH9 1TL (“the Applicant”)

Ms Veronica Ballantyne, 11E Sandeman Street, Dundee, DD3 7NP (“the Respondent”)

Tribunal Members:

Rory Cowan (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that it was reasonable to issue a possession order relative to the Property.

- Background

By application dated 5 January 2023 (the Application), the Applicant sought a possession order relative to the Property in terms of section 33 of the Housing (Scotland) Act 1988 (1988 Act). With the Application, the Applicant, through her representatives, lodged the following:

- 1) Lease dated 27 April 2017 along with Form AT5;
- 2) Copy Notice to Quit and section 33 notice dated 4 October 2022 along with recorded delivery receipt by way of proof of postage;
- 3) Section 11 Notice; and
- 4) Rent statement.

Following acceptance of the Application, a Case Management Discussion (CMD) was fixed for 24 April 2023 to be heard by way of conference call. In advance of the CMD, the Applicant’s representatives lodged updated rent statements as well as a

further recorded delivery receipt. Despite intimation of the Application by sheriff officers to the Applicant, no response was received from or on behalf of the Respondent. At that CMD, the Tribunal resolved to grant an order for possession relative to the Property. Thereafter, by letter dated 9 May 2023, a request to recall that decision was received by the Tribunal. That application for recall was received one day too late. By email of 10 May 2023 an objection to the recall and it being allowed late was received on behalf of the Applicant. Following receipt of the Recall request, the Tribunal fixed a hearing in terms of Rule 30(9)(c) of the Tribunal's rules of procedure to consider the recall request and the reasons for same. The hearing under Rule 30(9)(c) was scheduled for 3 July 2023 to be heard by way of telephone conference. That date was intimated to the parties.

- The Hearing under Rule 30(9)(c)

The Applicant was represented by a Mrs Hazel Young of Rockford Properties. The Respondent was represented by a Rebecca Falconer, solicitor of the Dundee Law Centre. In addition, a Collette Goodman, a trainee solicitor, attended with Mrs Falconer to observe but played no part in the proceedings. Neither the Applicant or the Respondent appeared.

The application for recall has been intimated 1 day too late. Mrs Falconer was asked to explain why the recall had been lodged late. She explained that the Respondent had sought an appointment with her office and the first available one had been on 5 May 2023. Thereafter, her office was closed on 8 May 2023 and the application for recall was lodged the next day, albeit one day late. It is understood that it was not until the Respondent received the decision from the CMD on 24 April 2023 that the Respondent sought help. Prior to that she had "buried her head in the sand". Mrs Young objected to the application for recall being lodged late but offered no substantive reasons for that objection. However, Mrs Young did explain that the arrears of rent had increased since the CMD on 24 April 2023 and were now £1,359.54 and indicated that she would have thought that, if the Respondent was concerned about the proceedings, she would have sought to address the arrears and not have them increase.

The Tribunal resolved to allow the application for recall albeit late and therefore extended the period for seeking recall by one day in terms of Rule 30(5) of the Tribunal's rules of procedure.

The Tribunal then turned to the question of whether it was in the interests of justice to allow recall the decision dated 24 April 2023. Mrs Falconer indicated that there were no issues to be taken with the substantive merits of the case and that the Applicant had complied with the requirements of section 33 of the 1988 Act. The only issue was one of reasonableness. Mrs Falconer spent some time detailing the Respondent's financial circumstances and current entitlement to benefits as well as possible future entitlements. Mrs Falconer did accept the arrears as at 24 April 2023 were £1,167.23 and that they were currently £1,359.54. Mrs Young thereafter objected to the decision of 24 April 2023 being recalled. Having heard both parties the Tribunal decided to recall the decision dated 24 April 2023, primarily to allow a full consideration of the Respondent's circumstances, being circumstances that had

not been put before the Tribunal at the previous CMD on 24 April 2023 due to the Respondent's failure to appear or be represented.

Mrs Young indicated that it was still the Applicant's position that she was seeking a possession order under section 33 of the Housing (Scotland) Act 1988 (the 1988 Act). She explained that the arrears had increased to £1,359.54 since 24 April 2023 and that this was as a result of their being a shortfall between the Respondent's benefit payments and the monthly rent of £700. Mrs Young confirmed that they had received payment of housing benefit of £585.41 in May 2023 and £552.28 in June 2023. In addition, they had received a payment of £50 in May 2023 from the "guarantor", the Respondent's sister. No additional payment was received in June 2023. Her position was that the arrears were continuing to increase and had been in place "since 2018". She explained that the Applicant is self-employed with 2 young primary aged children. Whilst the Applicant has been understanding with the Respondent, she does need the property to pay for itself and cannot carry the consistent arrears that have been in place with the Respondent. In short, it was explained that the Applicant needs to get the Property let again to someone who will pay the rent on an ongoing basis. Mrs Young explained that the Applicant had a mortgage over the Property and that, whilst she did not have precise details of the monthly costs, she confirmed that the Applicant did not profit from the Property but needed the full rent to be paid to "break even" otherwise she was losing money on it. Mrs Young also indicated that the Respondent had been in the Property for a long time and that, as a result, the monthly rent of £700 per month was well below the current market rate. Mrs Young suggested that would be around £925 per month. She confirmed that the Applicant was very concerned about the arrears and is in regular contact with her about the arrears. Mrs Young also indicated that raising this action was very much the "last resort". She explained that she had had various meetings with the Respondent and had set up payment plans with the Respondent since 2018 that had been defaulted upon and that she felt they had "exhausted all we can do ourselves" in relation to the arrears and the ongoing rent. She also stated that "in the last 2 years" there had been no communication with the Respondent and there were periods where, even the Respondent's sister (the guarantor) appeared to have fallen out with her meaning there were no lines of communication to the Respondent. Mrs Young indicated that during this period the Respondent would not speak to them to discuss the arrears or ongoing rent and would not reply to emails, not respond to attempts to visit the Property or answer telephone calls. She summarised by indicating that what they receive by way of benefits does not cover the ongoing rent and the Respondent's refusal to engage with them on the Applicant's behalf meant that they felt the relationship had "broken down" and that "perhaps the Respondent needs a fresh start".

Mrs Falconer indicated that she took no issue with what had been said by Mrs Young, but that it was her position that it was not reasonable to evict. She started by explaining that, except for the arrears, there were no issues with the tenancy. She also stated that the Respondent was now taking steps with her firm to try and "resolve" the arrears as well as to have the rent covered on an ongoing basis. It was explained that universal credit was now paying the Respondent's rent, but that it was limited to the Local Housing Allowance, which if paid in full meant a shortfall of around £50 per month. However, deductions were being made for "non-dependants" living with her. Mrs Falconer advised that they had written to the local authority to get

one deduction removed (£85.73 for one of her sons because of his position) and there was some prospect for a similar application for another son. It was hoped therefore that the £85.75 would be added to the sums the Respondent had and that there was a prospect that it could be backdated to at least January 2022 when she moved onto Universal Credit. No decision had been made in relation to that claim. The Respondent has 3 adult sons living with her, twins aged 22 and an older son aged 23. She explained that the Respondent is not working and is the carer for one of her sons. She received £111 per month by way of universal credit and £69 per week by way of carer's allowance. She explained that both twins have autism, and one has "learning difficulties" and her older son as "mental health difficulties". It was suggested that, as a result and because of the period of time the Respondent and her sons had lived at the Property, they would find moving out "distressing". Under questioning by the Ordinary member of the Tribunal, Mrs Falconer explained that the current housing element of Universal Credit was £478.56 per month and that if the non-dependant deduction that had been applied to be reversed was added back in, the housing element of Universal Credit would be £564.29 per month and therefore a shortfall of £135.71. Mrs Falconer indicated that they had also applied for a discretionary Housing Payment to cover at least some of the shortfall for an unspecified period to "see what can be done". Mrs Falconer also indicated that they would look at other deductions to "see if they can free up income to help pay rent". When asked about the arrears being in place since 2018 and what advice the Respondent may have taken previously, Mrs Falconer indicated that she did not know what advice may have been taken, but that she had not consulted her firm previously. She indicated that the Respondent did have some family support and had "muddled through herself". Mrs Falconer also confirmed that the Respondent was on the local authority housing list and that her firm had written to the local authority about the Respondent. She also indicated that there may have been a previous application for a discretionary housing payment made previously, which did not progress with the local authority due to them having difficulty getting information from the Respondent and that Mrs Falconer's firm were advised to submit a new application.

In response, Mrs Young indicated that, whilst the Respondent had initially been friendly, it was not correct to say there were no issues with the tenancy. She claimed that the Property was not well looked after by the Respondent to the extent that contractors engaged by them for the Applicant did not like going to the Property due to its condition. She described "holes in walls and floors" and plugs/sockets being damaged. Mrs Falconer indicated that the Respondent had not mentioned any issues of disrepair.

- Findings in Fact

- 1) The Parties entered into a contractual tenancy relative to the Property dated 27 April 2017 with an end date of 22 August 2018.
- 2) No new contractual tenancy was entered into after 22 August 2018 and the lease continued on a month-to-month basis thereafter, with ish dates on the 22nd of each month.

- 3) That on 4 October 2022 the Applicant sent a Notice to Quit and Section 33 Notice to the Respondent by recorded delivery seeking to terminate the contractual tenancy as at 22 December 2022.
 - 4) That 22 December 2022 is an ish date.
 - 5) That the contractual tenancy has been validly terminated as at 22 December 2022.
 - 6) That the required notice in terms of s33(1)(d) has been given to the Respondent.
 - 7) That the Applicant has therefore complied with the requirements of section 33 of the Housing (Scotland) Act 1988.
 - 8) That the Respondent remains in the Property.
 - 9) That the Respondent lives in the Property with 3 adult sons, two of which suffer from autism and one has learning difficulties.
 - 10) That the monthly rent is £700 due for the Property, which is significantly lower than the current market rent.
 - 11) That the Respondent is in arrears of £1,359.54 as at 3 July 2023.
 - 12) That the Respondent has been consistently in significant arrears since on or around November 2018.
 - 13) That the Respondent is not in employment and is the carer for one of her younger sons.
 - 14) That the Respondent received benefit payments for housing in November and December 2018 and retained same rather than paying them to the Applicant.
 - 15) That the Respondent is currently in receipt of universal credit including a housing allowance of £478.56 and that, there is a shortfall between same and the monthly rent due for the Property meaning the Respondent requires to “to up” her rental payments.
 - 16) That the Applicant is self-employed with two young children.
 - 17) That without the full rent is paid for the Property, the Applicant’s costs are higher than the partial rent she receives.
- Reasons for Decision

The Application proceeds under Rule 66. The basis for the request for a Possession Order is therefore Section 33 of the Housing (Scotland) Act 1988.

In order to be able to grant such an Order for Possession, the Tribunal first needs to be satisfied that the Applicant has complied with the requirements of section 33 of the 1988 Act. These are:

- 1) The Short-assured tenancy has reached its end;
- 2) That tacit relocation is not operating;
- 3) There is no further contractual tenancy; and
- 4) The landlord has given the tenants notice that they require possession of the property concerned.

The required notice period applicable in relation to section 33, as at the date of these notices, has been given and the notice to quit and section 33 notice were set to expire on 22 December 2022, which the Tribunal determined was an end or end date. From the documents lodged with the Application, it appeared that the underlying tenancy met the requirements of section 32 of the 1988 Act and was a Short-assured Tenancy.

Mrs Falconer took no issue with any notices served or that the requirements of section 33 had been complied with. As such, the Tribunal was satisfied that the requirements of section 33 had been complied with.

The only issue remaining for the Tribunal was whether it was reasonable to grant an Order for Possession in the circumstances. Having heard both the Applicant's and the Respondent's representatives and having considered the relevant circumstances detailed above, the Tribunal was satisfied that it was reasonable to grant an Order for Possession. In particular, it was noted that, despite payments being made on her behalf (through benefits and latterly also by a guarantor) the Respondent had been in persistent and significant arrears since late 2018. It also appeared that no real attempt had been made by the Respondent to address those arrears or to engage with the Applicant or her representatives. Whilst it was noted that the Respondent and her adult sons would find the prospect of removal from the Property distressing, it was also noted that the Applicant was also finding the situation stressful particularly in the context of her own rising costs and the extent of the arrears that were increasing. Whilst the Tribunal had considerable sympathy for the Respondent, there was nothing specific that was put forward on her behalf that would address the arrears within a reasonable period of time or even that would demonstrate an ability for her to maintain the rent due for the tenancy which is significantly below a market rent for the Property and therefore avoid the accrual of further rent arrears. On that side of things, it was noted that some good work was being done on behalf of the Respondent by Mrs Falconer's firm, but none of this had crystallised as yet and there was nothing in front of the Tribunal to give it any confidence that the arrears would be addressed or that the Respondent could maintain her monthly rent for any prolonged period. For example, discretionary housing payments are usually for a defined period and generally not granted simply because a tenant does not have sufficient funds to meet their ongoing monthly rental obligations. In terms of the Respondent's family circumstances, whilst it was noted her adult sons had the various difficulties detailed and would likely be distressed at the prospect of removing from the Property (somewhere they had lived for some time), there was nothing before the Tribunal to suggest that there would be any medical impact on anyone within the Respondent's household should they remove from the Property or a medical necessity to remain there. Ultimately, the balance the Tribunal had to draw

was between the Respondent's desire to remain in the Property despite an apparent inability to meet the monthly rent and the Applicant's desire to have the Property returned to her to allow her to let same to a tenant who will be in a position to pay rent at a level to at least cover her costs. It seemed to the Tribunal that the Applicant had been very patient with the Respondent but that this patience had now ended and, as Mrs Young indicated, felt she had "exhausted" all options in terms of addressing the arrears. Simply put, the determining factor for the Tribunal was that, without something concrete to address the outstanding significant arrears within a reasonable period of time and the demonstration of an ability by the Respondent to maintain the ongoing rent, it was not reasonable to expect the Applicant to continue subsidising the Respondent's occupation of the Property to the detriment of herself and her own family. The Respondent has had in excess of 4 years to address the arrears and has failed to do so. It was also noted that, the arrears started in November and December 2018 which was the period that it was admitted that the Respondent received money by way of benefits to be used for housing costs, and retained those funds, presumably for her own use. Had those funds been paid over, the arrears would likely have been very much lower and therefore easier for her to address.

Standing the date the Application was lodged, the possession order issued by the Tribunal is affected by the current eviction moratorium meaning that enforcement of same will be delayed.

- Decision

The Tribunal decided that it was reasonable to issue an order for possession 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

Rory Cowan

3 July 2023

Legal Member/Chair

Date