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/20/1298

Re: Property at 9 Knowes Farm Cottage, Dunbar, EH42 1XJ ("the Property")

Parties:

Mr Peter Cochran, Mrs Peter Cochran, Knowes Farm, Dunbar, EH42 1XJ ("the Applicant")

Ms Alison Cleary, 9 Knowes Farm Cottage, Dunbar, EH42 1XJ ("the Respondent")

Tribunal Members:

Rory Cowan (Legal Member) and Angus Lamont (Ordinary Member)

Decision

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

- Background

Following a Case Management Discussion (CMD) held on 12 October 2020 a Hearing was assigned for 16 November 2020. The Hearing proceeded on that date, but during the course of discussing matters with the Parties it became evident that there may have been other tenancy documentation issued after the initial lease dated 8 October 2014. The Tribunal therefore resolved to adjourn the hearing on 16 November 2020 to allow the recovery and lodging of the full contractual documentation relative to the tenancy for the Property and issued a Direction to both parties to that effect. A Continued Hearing was assigned for 7 January 2021. Prior to the date of the Continued Hearing, Documents were lodged on behalf of the Applicant by email of 2 December 2020. The Respondent also sought to lodge documents in response to the Direction albeit the email provided to the Tribunal with such documents was dated 4 January 2021, which was after the date set for compliance with the Direction (7 December 2020).

- The Continued Hearing

The Continued Hearing was conducted by way of conference call. The Applicants were represented by a Callum Macleod of Garden Stirling Burnett Solicitors. The Respondent represented herself.

- Findings in Fact and Law

1) The Parties entered into a contractual tenancy relative to the Property dated 8 October 2014 with an end date of 7 April 2015.

2) On 31 March 2015 the Parties entered into a further contractual tenancy relative to the Property which took effect on 8 April 2015 and had an end date of 7 October 2015.

3) On 10 September 2015 the Parties entered into a further contractual tenancy relative to the Property for a term of 6 months which took effect on 1 October 2015 with an end date on 31 March 2016.

4) No new contractual tenancy was entered into after 31 March 2016 and tacit relocation operated to renew the lease on 6 monthly terms thereafter.

5) After 31 March 2016 there were ish dates on 30 September and 31 March each year.

6) On or around 7 October 2019 the Applicant sought to serve a Notice to Quit on the Respondent seeking to terminate the contractual tenancy as at 7 April 2020.

7) 7 April 2020 is not an end date or *ish*.

8) The contractual tenancy entered into on 10 September 2015 has not been terminated.

9) The Applicant has not met the requirements of section 33 of the Housing (Scotland) Act 1988 and is not entitled to an order for possession.

- Reasons for Decision

As detailed above, in advance of the Continued Hearing both Parties sought to lodge documents in response the Direction previously issued. The Respondent's email of 4 January 2021 was after the date allowed for in the Direction. The Respondent indicated that she had tried to lodge the documents earlier, but they were returned by Tribunal administration and she had had issues with her emails. The Tribunal did not take the view that there had been wilful non-compliance with the Direction. It was noted by the Tribunal that documents contained in the Respondent's email of 4 January 2021 were out of sequence and disorganised, but it appeared that they were materially the same as the documents lodged on behalf the Applicant. There was

one difference in that the Respondent had attached what appeared to be an "offer of lease" from the Applicant to the Respondent with a date of entry of 1 April 2016. The copy that was attached to the email of 4 January 2021 was signed only by the Applicant himself. The Respondent was unable to recall whether she had signed another copy of the agreement and returned it to the Applicant. Mr MacLeod indicated that he had seen the Respondent's email of 4 January 2021 and the documents attached and it was his understanding that, whilst this document may have been proposed to the Respondent, it had not been signed or returned to the Applicant by the Respondent and the Applicant did not have a copy of same. The Tribunal took the view that there was nothing else suggested by either party in the surrounding circumstances that could lead to an implication that there had been agreement to what was proposed in that document, for example the rent was the same as before so it could not be shown that the Respondent had agreed to and paid an increased rent thereafter. Indeed, for reasons detailed later in this Decision, it would not have affected the Tribunals decision even if it had been able to find that there had been agreement to this lease as the term expressed was 6 months starting on 1 October 2016 and ending on 31 March 2017, which would mirror the application of tacit relocation based on a 6 month term and an ish date of 31 March.

In response to the Direction, on behalf of the Applicant there were 2 documents produced. These were:

1) A document signed by both the Applicant and the Respondent on 31 March 2015 along with a form AT5 of the same date; and
2) A document signed by both the Applicant and Respondent on 10 September 2015 along with a form AT5 dated 31 August 2015.

Both documents were set out as an "offer to let", which detailed the subjects as being the Property, the parties (being the Applicant and Respondent), the rent payable (£595 for each) and a duration (6 months each time). Both documents were signed by each party (confirmed by the Respondent and Mr MacLeod on behalf of the Applicant). The first document stated that the term of 6 months started on "The date of entry" which was 8 April 2015 and ended on 7 October 2015. The second document followed the same format with a date of entry on 1 October 2015 and ending on 31 March 2016.

Whilst these documents were produced on behalf of the Applicant in response to the Direction, Mr MacLeod initially proceeded to argue that they were not valid leases for 2 reasons (there was no suggestion that the cardinal elements of a lease were not present):

1) That they did not meet the formal requirements of section 3 of the Requirements of Writing (Scotland) Act 1995 (the 1995 Act) in that the signatures had not been witnessed and the place of signing had not been added; and
2) That, as the form AT5s had been served on the Respondent whilst she was in occupation of the Property, service could not have been before the "creation" of the tenancy and as such the tenancies purportedly created by these 2 documents were invalid.

With respect to Mr MacLeod both arguments are incorrect, something he conceded after further discussion. In terms of the 1995 Act, the formalities of section 3 apply to attempts to create a "real right in land" (section 1(2)(a)(i)). In terms of section 1(7) of the 1995 Act a tenancy for less than 1 year is not a "real right in land". There is therefore no requirement therefore for any particular formality in execution and technically no requirement for writing at all. As for the argument relative to the service of the AT5, the creation of a short-assured tenancy is a matter of statute and not contract. Prior to 1 December 2017, it did not matter what a lease is called, if the requirements of section 32 of the Housing (Scotland) Act 1988 (the 1988 Act) were not met, then you could not have created a short-assured tenancy. That being the case, whether an AT5 was served or not, or served after the creation of the lease only affected whether the tenancy would be classed as a short-assured tenancy or an assured tenancy (the default position in law at that point for residential lets to individuals as their only or principal home). It would not render any contractual lease entered into invalid. Again, after discussion, Mr MacLeod conceded that this was the position and that both the documents produced were valid and constituted leases for the Property where upon agreement to each new lease the previous lease was renounced.

Following that, Mr MacLeod confirmed that the ish or end date of the last contractual tenancy was 31 March 2016 and that the term had been 6 months. That tacit relocation applied and that, as a result, the lease had been renewed under tacit relocation on 6 monthly intervals meaning there had been ish dates on 31 March and 30 September each year since. He also conceded that the Notice to Quit dated 7 October 2019 which sought to end the contractual tenancy on 7 April 2020 was ineffective in that 7 April 2020 was not an ish or end date. He also conceded that, as a result, the Applicant could therefore not fulfil the requirements of section 33 and that the Applicant was therefore not entitled to an order for possession relative to the Property.

Whilst it was noted that, at the earlier Hearing date on 16 November 2020, most of the discussion revolved around whether or not the tenancy created by the lease dated 8 October 2014 was for a term of 6 months or not, standing the concessions by Mr MacLeod and the failure to serve a valid Notice to Quit, the Tribunal felt that there was no requirement for them to opine on whether or not the tenancy before them was or was not a short-assured tenancy. Indeed, it may very well be argued at another time that the lease dated 10 September 2015 and ending on 31 March 2016 should be treated as a new lease and, if the requirements of section 32 of the 1988 Act had been met at that stage, that the tenancy thereby created would be a short-assured tenancy. However, for the reasons set out above, that is not a determination that the Tribunal required to (or perhaps even should) make now.

- Decision

The application for an order for possession is refused.

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.

R. C

__ _________ _____**7 January 2021**__________

Legal Member/Chair **Date**