Decision 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/19/1639

Re: Property at 18 Woodcot Park, Stonehaven, Aberdeenshire, AB39 2HG ("the Property")

Parties:

Mr Graham Walker, 48 Arduthie Road, Stonehaven, Aberdeenshire, AB39 2EH ("the Applicant")

Ms Nicola Evans, 18 Woodcot Park, Stonehaven, Aberdeenshire, AB39 2HG ("the Respondent")

Tribunal Members:

George Clark (Legal Member) and Mike Scott (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 granted and made an Order for Possession of the Property. The application for an award of expenses was refused.

Background

By application, received by the Tribunal on 29 May 2019, the Applicant sought an Order for Possession against the Respondent under Section 18 of the Housing (Scotland) Act 1988 ("the 1988 Act"). The Grounds relied on were Grounds 8, 10, 11 and 12 of Part I of Schedule 5 to the 1988 Act. The application stated that the Applicant had purchased the Property on 16 April 2013. The Respondent was a family member who commenced occupation on that date under an unwritten lease. There were, therefore, implied terms, namely that the lease was for one year's duration, which tacitly relocated annually thereafter, and the period of notice required to terminate it was 40 days. Rent payments were agreed and varied by verbal agreement between the Parties. The Respondent was due to pay rent of £773.09 per month to April 2016, then £727.50 per month to the present, but she had made no rental payments since August 2018. The Applicant had served a Notice to Quit on 1

March 2019, giving more than the required 40 days' notice and the lease was to be terminated from 16 April 2019.

The application was accompanied by a spreadsheet of rent payments, which showed that the rent arrears had been cleared to the end of July 2018, but that no payments had been received since then. Ten monthly payments had fallen due between 18 August 2018 and 18 May 2019 and the arrears stood at £7,275. The Applicant also provided the Tribunal with copies of a Notice to Quit and a Form AT6 Notice given under Section 19 of the 1988 Act, both dated 1 March 2019, stating that the Applicant required vacant possession of the Property by 16 April 2019.

Written representations were submitted on behalf of the Respondent by D.W. Shaw solicitors, Ayr, dated 5 July 2019. They stated that the Applicant purchased the Property for £197,000, with a deposit of £53,504 and a mortgage from Nationwide Building Society for £150,000. The Respondent had loaned him the deposit of £53,504. The Parties had been agreed that the Respondent would reside in the Property from April 2013 and would make monthly payments of £573 to a bank account and £200 in cash, to cover the Applicant's mortgage payments. This was done with a view to transferring the outstanding mortgage and the title to the Respondent after a period of 3-5 years.

The Respondent's representations stated that the Respondent had installed a new kitchen, a new central heating system, had removed artex ceilings, installed a shower *en suite* of the master bedroom, fitted raised decking and new fencing, replaced all the carpets, added new skirtings to the hall and installed Karndean flooring, a new bathroom suite and light fittings. Following a family dispute in June 2018, the Respondent had attempted to make the agreed monthly payment to the Applicant, but he had refused to accept it. The Respondent had spent £31,000 on improving the Property and was seeking return of this sum, together with the deposit of £53,504. The Respondent's position was that she had made a further payment of £3,200 and it was submitted that, taking this into account together with the payments she had made by way of improvements and the rent payments she had made, there were no rent arrears and the Order should not be made.

At a Case Management Discussion on 29 July 2019, at which both Parties were represented by solicitors, The Applicant dropped Ground 10 of Part I of Schedule 5 to the 1988 Act as a Ground for Possession on which he intended to rely. The agreed position of the Parties was noted to be that, whilst there was no written agreement entered into by them, there was an Assured Tenancy and that a valid Notice to Quit had been served. The Tribunal decided to fix a Hearing, noting that a number of issues remained to be resolved by the Tribunal, namely what was agreed between the Parties when the Applicant purchased the Property, whether the sum of £3,200 had been paid by the Respondent's parents to the Applicant in December 2018, whether the Applicant had refused to accept payments from August 2018 onwards, whether the Respondent was currently occupying the Property and whether the sum of £53,504 paid by the Respondent to the Applicant should be applied to the outstanding rent arrears and whether, therefore, there was any rent due by the Respondent.

On 12 August 2019, the Applicant's solicitors wrote to the Respondent's solicitors advising them that the Applicant's mortgage payments had increased to £844.11 from August 2019 and that the monthly rent would, therefore, increase to that sum.

The Hearing

The Hearing was scheduled for 13 September 2019. On 12 September, the Respondent advised the Tribunal that she no longer had legal representation and was suffering from a bad back. She subsequently e-mailed the Tribunal to confirm that she was unable to attend the Hearing because of her bad back and made reference to her doctor but did not provide a medical certificate. She sought a postponement. At the Hearing, the solicitor for the Applicant opposed any motion to postpone, but, after an adjournment, the Tribunal concluded that the Hearing should be postponed. The Tribunal agreed that it would direct the Respondent to provide a medical report on soul and conscience from her doctor that she had been unable on medical reasons to attend the Hearing. Pending the medical report, the question of expenses in connection with the postponed Hearing was reserved by the Tribunal. The Tribunal also directed both Parties to lodge any authorities, if so advised, prior to the next Hearing, to enable the Tribunal to determine whether any lease was established.

The Respondent provided the Tribunal with a letter, dated 27 September 2019, from Dr Yeun Chong of Stonehaven Medical Group confirming, on soul and conscience, that the Respondent had contacted the Medical Centre on 12 September 2019 and that the symptoms she had described would have been the reason she was unable to attend the Tribunal on 13 September.

On 6 November 2019, the Applicant's solicitors asked leave to amend the application by increasing the amount due by the Respondent in respect of unpaid rent to £12,223.05.

The Hearing reconvened at the Credo Centre, John Street, Aberdeen on the afternoon of 21 November 2019. The Applicant was represented by Ms Leona Duff of Aberdein Considine solicitors, Edinburgh. The Respondent had advised the Tribunal that she would be unable to attend as a result of back surgery, but she had not requested a postponement and was not present or represented.

Ms Duff had provided the Tribunal with a list of authorities for the proposition that there was a lease between the Parties. She referred the Tribunal to *Gloag and Henderson: The Law of Scotland 14th edition at paragraph 35.02*, where it is stated that "The contract of lease is one whereby an owner or occupier of land grants exclusive possession of it to a tenant in return for rent, in money or goods". Later in that paragraph, the authors continue "There are four cardinal elements in a lease: the parties, the subjects, the rent and the duration: in the absence of *consensus in idem* as to these elements, or at least the first three, there will be no lease."

In St Andrews Forest Lodges Ltd v Grieve [2017] SC DUN 25, Sheriff Collins held that an agreement whereby the defenders had, from 7 March 2015 until at least March 2017, occupied a property under a lease agreement which gave them the right to occupy the premises as a separate dwelling, with exclusive possession, tacitly relocating on a month-to-month basis, at a rent of £2,000 per calendar month created a legal relationship between the parties of landlord and tenant and was an Assured Tenancy (the landlords had contended that it was a holiday let). In analysing the definition of a lease in Scots Law, the Sheriff had referred to the four cardinal elements and had added, citing *Gray v University of Edinburgh 1962 SC 157*, that in the absence of agreement as to duration, the law may sometimes infer a period of one year.

McAllister *The Scottish Law of Leases, 4th edition at paragraph 2.9* confirmed that, in a situation where parties had gone ahead without there being anything in writing at

all, the lease may still be enforceable because one of the parties has demonstrated a desire for the contract to continue by his or her actions.

Ms Duff asked the Tribunal to hold that there was a lease between the Parties and to grant an Order for Possession. She also addressed the Tribunal on the question of expenses of the Hearing on 13 September 2019. The Tribunal had originally indicated on the morning of 13 September that it was not prepared to postpone the Hearing but, at the commencement of the Hearing, the Tribunal had advised that it had now agreed to the Respondent's request for a postponement. Ms Duff was instructed to seek an award of expenses, as she had had to prepare twice and travel twice. The Respondent had only requested a postponement at 4.34pm on the day prior to the Hearing and had not at that time produced a medical certificate. The Applicant was seeking an award of expenses from the day after the Case Management Discussion of 29 July 2019 up to and including the commencement of the present day's Hearing, all in terms of Regulation 40 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations").

Findings in Fact

1. Although not committed to writing, there is an agreement between the Parties whereby the Respondent has had the right to occupy the Property as a separate dwelling, with exclusive possession from 16 April 2013.
2. The agreed rent was aligned with the Applicant's mortgage repayments and commenced at £773.09 per month, reduced to £727.50 with effect from April 2016 and increased to £844.11 in August 2019.
3. The Respondent has failed to provide any evidence that she has attempted to make any payments of rent since August 2018.
4. The Applicant served a valid Notice to Quit on the Respondent on 1 March 2019, giving more than 40 days' notice.
5. The Respondent has provided the Tribunal with a "soul and conscience" letter from her doctor confirming that, on medical grounds, she would have been unable to attend the Hearing on 13 September 2019.

Reasons for Decision

The preliminary issue that the Tribunal had to determine was whether there was a tenancy in place between the Parties. If it answered that question in the affirmative, the Tribunal was bound to find that it was an Assured Tenancy, as Section 12 of the 1988 Act states that "a tenancy under which a house is let as a separate dwelling is an Assured Tenancy if the tenant occupies it as his only or principal home".

The view of the Tribunal was that the Respondent was making monthly payments in return for the exclusive right to occupy the Property as her principal home. The monthly payments may have been linked to the amount of the Applicant's mortgage payments, but, by making these payments and, in particular, having paid the reduced amount when the Applicant's mortgage payments changed in 2016, the Respondent had accepted the formula for calculating the payments and the Tribunal was clear that what the Respondent was paying was rent and it could not be categorised as something else. The Respondent had, by her actions, in the words of *McAllister* "demonstrated a desire for the contract to continue".

The Tribunal was of the view that the fact that its terms were not reduced to writing did not prevent the agreement between the parties from being a tenancy. Although Section 30 of the 1988 Act imposes a duty on landlords under an Assured Tenancy to draw up a document stating the terms of the lease, the fact that, on application by a tenant, the Tribunal can draw up such a document where the landlord has failed in that obligation clearly implies that the absence of a written lease does not prevent an Assured Tenancy arising.

The Tribunal considered the authorities cited by the Applicant's solicitor and was satisfied that, in the present case, the first three cardinal elements in a lease were present and clear, namely the parties, the subjects and the rent. As there was no written lease, there was no provision regarding duration, but, following the *Gray v University of Edinburgh* decision, the Tribunal held that the tenancy ran for a year from on or about 16 April 2013 and had thereafter tacitly relocated on an annual basis.

The Respondent had failed to produce any evidence to support her contention that she had offered to make rental payments after August 2018, including her assertion that £3,200 had been paid to the Applicant in December 2018. Accordingly, the Tribunal determined, on the balance of probabilities, that no rent had been paid by the Respondent to the Applicant since the rent which had fallen due in July 2018, as set out in the rent statement spreadsheet that had accompanied the application. The Tribunal accepted the amendment lodged by the Applicant's solicitor on 6 November 2019 and held that the arrears of rent stood at £12,223.05 as at that date.

The Tribunal noted the written representations on behalf of the Respondent in relation to the fact that she had provided the funds to allow the Applicant to pay the deposit for the Property in 2013 and that she had expended £31,000 on the Property during the tenancy. The view of the Tribunal was that these were matters which lay outwith the jurisdiction of the Tribunal and that, if agreement could not be reached, they could only be determined by an application to the Sheriff Court. They did not fall within the jurisdiction transferred to the Tribunal by Section 16 of the Housing (Scotland) Act 2014 as they did not arise from the tenancy. The provision of the deposit was a loan by the Respondent to the Applicant and could not be set off against the rent. The Tribunal noted that, in any event, the Respondent had not provided any vouching for the sums she claimed she had expended.

Having determined that the arrangement between the Parties constituted a tenancy, the Tribunal was bound to hold that it was an Assured Tenancy under the 1988 Act and that it was, therefore, subject to the provisions of Section 18 of the Act as regards Orders for Possession. Section 18(4) states that if the Tribunal is satisfied that any of the Grounds in Part I of Schedule 3 to the Act is established then the Tribunal shall make an Order for Possession. Ground 8 of Part I of Schedule 3 provides that the Tribunal must make an Order for Possession where, both at the date of the service of the Notice under Section 19 of the Act (the Form AT6 Notice) relating to the proceedings and at the date of the Hearing, at least three months' rent lawfully due from the tenant is in arrears.

The minimum period for a Notice to Quit, where no provision is made in the agreement and the tenancy is for more than four months is laid down in the Sheriff Courts (Scotland) Act 1907 and is 40 days.

The Tribunal was satisfied that a valid Notice to Quit had been served on the Respondent, as had the Form AT6 Notice required under Section 19 of the 1988 Act and that, both at the date of service of the Form AT6 and at the date of the Hearing, the rent was more than three months in arrears. Accordingly, the requirements of

Ground 8 had been met and the Tribunal was bound to make an Order for Possession.
Having determined the application under Ground 8 of Part I of Schedule 5 to the 1988 Act, it was not necessary for the Tribunal to consider further the application under Grounds 11 or 12.
The Tribunal refused the request by the Applicant to award expenses in respect of the Hearing. Rule 40 of the 2017 Regulations permits the Tribunal to award expenses against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense. The issue raised by the Applicant's solicitor had been the fact that the Respondent had requested a postponement of the Hearing of 13 September 2019 at such a late stage, namely late on the previous afternoon, The Tribunal sympathised with the Applicant as there was no doubting that the late postponement had caused him to incur additional expense, but, at the Direction of the Tribunal, the Respondent had provided a "soul and conscience" Certificate from her doctor in respect of her inability to attend on 13 September and, standing that, the Tribunal could not hold that the Respondent's conduct of the case had been unreasonable. The Respondent had not attended or been represented at the adjourned Hearing, but that was her choice and she had not sought a further postponement when advising the Tribunal that she would not be attending.

Decision
The Tribunal determined that the application should be granted and made an Order for Possession of the Property. The application for an award of expenses was refused.
The Decision of the Tribunal was unanimous.

Right of Appeal
In terms of Section 46 of the Tribunals (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.

[redacted]
Legal Member/Chair

21 November 2019
Date