Decision with Statement of Reasons 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/18/2195

Re: Property at 1/3, 46 Cardwell Road, Gourock, PA19 1UN ("the Property")

Parties:

Inverclyde Taxis, 3 Earnhill Road, Larkfield Industrial Estate, Greenock, PA16 0EQ ("the Applicant")

Mr Stephen O'Neill, 1/3, 46 Cardwell Road, Gourock, PA19 1UN ("the Respondent")

Tribunal Members:

Lesley Ward (Legal Member)

Decision

The tribunal dismissed the application on the basis that the notice to quit is invalid and the tenancy agreement does not comply with the terms of s18(6) of the Housing (Scotland) Act 1988.

This is a case management discussion 'CMD' in connection with an application, either in terms in terms of s18 of the Housing (Scotland) Act 1988 and rule 65 of the First-tier Tribunal for Scotland (Housing and Property Chamber)(Procedure) Regulations 2017, 'the rules' or in terms of s33 and rule 66. The application was made on behalf of Mr David Coombes of Inverclyde Taxis by Mr Duncan Luke of Blair and Bryden Solicitors. The application was made on the 22 August 2018.

The tribunal had before it the following copy documents:

1. Application dated 21 August 2018 and received by the Tribunal on 22 August 2018.
2. Lease dated 5 and 6 August 2015.
3. Portion of AT5 form.
4. S33 notice dated 4 July 2018.
5. Notice to quit dated 4 July 2018.

6. S11 notice to local authority.
7. AT6 dated 4 July 2018.
8. Execution of service of the s33 notice, AT6 and notice to quit dated 4 July 2018.
9. Land certificate.
10. Letter from tribunal to applicant's agents dated 10 September 2018
11. Email from applicant's solicitors dated 10 September 2018.
12. Copy of page 1 of the tenancy agreement.
13. Execution of service of the application and CMD date by sheriff officer on 6 November 2018.

Ms Swan solicitor attended on behalf of the applicant. (Mr O'Neill was late in attending and came after the decision to dismiss the application was made. The tribunal explained the decision to him).

Preliminary matters

1. The tribunal noted that the application was in terms of rule 66 of the rules however the documents lodged and the email of 10 September 2018 suggest that the applicant wishes to proceed in terms of rule 65. Ms Swan confirmed that the application is in terms of rule 65.

2. This being the case, The tribunal noted that clause 3 of the tenancy agreement first lodged states:

   The occupancy shall be for a period of six months from the date of entry".

   The date of entry is given as 6 August 2015. The page of the tenancy agreement lodged with the email of 10 September 2018 has a different date of entry and it states at clause 2:

   The date of entry will be 6th August 2015 to 5 February 2016.

   The date is handwritten and the part which states "5 February 2016 " appears to have been added and 6 of the 2016 seems to have been changed from a 5 to a 6.

   Having noted these documents the tribunal explored the ish date with the applicant's solicitor. In their email of 10 September 2018 they stated that in their view the notice to quit is valid. Ms Swan's position today is that the notice to quit gives the appropriate amount of notice and gives an ish date of 5th of September. The tribunal noted however that the lease appears to be for a 6 month period and since there is no provision for tacit relocation on a month to month basis, the lease will continue for 6 months, from August to February and then February til August. The tribunal does not therefore consider the 5 September 2018 to be an ish date.

   The tribunal is not therefore satisfied that the notice to quit is valid.

3. This being the case, it is open to the applicant to rely on the terms of the tenancy agreement and seek possession on the basis that there is a contractual tenancy in term of s18(6) of the Act. S18(6) of the Act provides:

The sheriff shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless-

(a) The ground for is Ground 2 or Ground 8 in Part I of the Schedule 5 to this Act or any of the grounds in part II of that Schedule, other than Ground 9 , Ground 10 Ground 15 of Ground 17; and

(b) The terms of the tenancy make provision for it to be brought to an end on the ground in question.

The tribunal considered the terms of the tenancy agreement and in particular clause 10 which provides:

I acknowledge that the tenancy constituted by this offer and acceptance is a Short Assured in terms of Section 32-35 of the Housing (Scotland) Act 1988 and that I have received Notice in n Form AT5 to this effect, and understands that the tenancy may be brought to an end by an order for possession granted by the Sheriff on the application of you, or of a heritable creditor of you, in any of the circumstances set out in Grounds 2 and 8 or 9 to 17 inclusive of Schedule 5 of the Housing (Scotland) Act 1988, provided always that you have complied with Section 19 of that Act. My liability for rent under this agreement until the date of termination or the date of relinquishing vacant possession (whichever shall be the later) shall be a continuing liability notwithstanding the termination of this Agreement for any reason.

The tribunal is not satisfied that this clause of the agreement complies with the terms of s18(6) of the Act. The tribunal considered the judgment of Sheriff Principal Wheatley in the case of Royal Bank of Scotland-v- Boyle 1999 Hous L.R.63 and Sheriff Jamieson in the case of Eastmoor LLP-v-Bulman 2014 G.W.D. 26-529. The tribunal considers that the tenancy agreement must contain the "essential ingredients" of the grounds for recovery of possession in Schedule 5 to the Act. Sheriff Jamieson states at paragraph 30:

Since therefore a tenancy agreement may only be brought to an end prior to its ish on certain permitted conventional grounds I am of the view, as with the sheriff Principal in the Royal Bank case, that the parties must contract in such a way that the contract itself sets out the grounds for bringing to an end the lease prior to determination of the ish. It is not sufficient for the tenancy agreement merely to refer to the number of the grounds in Schedule 5. Best practice is to refer to the number and terms ad longum; if the ground is summarised, the summary must contain the "essential ingredients" of the ground in question.

In the absence of any legal submissions from Ms Swan to the contrary the tribunal accordingly decided that the lease does not comply with the terms of s18(6). The

AT6 form makes reference to grounds 8,11.12 and 13 of schedule 5 o the Act. The lease makes reference to the grounds numbered 8 11 12 and 13 but nothing more.

Reasons

As narrated above, the tribunal is not satisfied that the notice to quit is valid as it does not tie in with the ish date. It is open to the applicant to proceed under s18 (6) of the Act on the basis that the contract between the parties is still in force. As narrated above the lease does not comply with the terms of s18(6) of the Act as it does not contain the essential requirements of schedule 5 of the Act. The lease refers to the grounds of schedule 5 without giving any detail whatsoever as to what the grounds are. It cannot therefore be said that the lease makes provision for the tenancy agreement to be brought to an end on the grounds in question. Accordingly and in accordance with the overriding objective the tribunal dismissed 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.

Lesley Ward

26 November 2018

Lesley A Ward, Legal Member **Date**