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/18/2760

Re: Property at 0/1 16 Strachur Cresent, Glasgow, G22 6RB ("the Property")

Parties:

Lowther Homes Ltd, 25 Cochrane Street, Glasgow, G1 1HL ("the Applicant")

Mr Chuku Nwoko, 0/1 16 Strachur Cresent, Glasgow, G22 6RB ("the Respondent")

Tribunal Members:

George Clark (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") decided that the application should be granted without a hearing and made an Order for Possession of the Property.

Background

By application, received by the Tribunal on 17 October 2018, the Applicant sought an Order for Possession of the Property under Section 33 of the Housing (Scotland) Act 1988 ("the 1988 Act"). The application was accompanied by copies of a Notice given under Section 33 of the 1988 Act and a Notice to Quit, both dated 1 September 2017, together with Confirmation of Intimation of both Notices by sheriff officer on 5 September 2017. Both Notices required the Respondent to remove from the Property on or before 28 November 2017.

The sheriff officer had been unable to find the Respondent personally and had deposited a copy of the Notices, in a sealed envelope, at the Property, the Respondent's dwelling place. The sheriff officer had also sent a letter containing a copy of the documents by ordinary post to the Respondent's address (the Property).

The Notices related to a Short Assured Tenancy Agreement between the Parties, which commenced on 22 January 2016 and ended on 28 July 2016.

A Case Management Discussion was held at Glasgow Tribunals Centre on 30 November 2018. The Applicant was represented by Mr David Adams, Wheatley

Housing Group Litigation Team. The Respondent was present and was represented by Ms Rona Macleod, Legal Services Agency.
The Parties were agreed that the tenancy had reached its ish, that there was no further contractual tenancy in existence and that the necessary Section 33 Notice, stating that the Applicant required possession of the Property, had been validly served. The Respondent's representative argued, however, that the further requirement of Section 33, namely that tacit relocation was not operating, had not been met, as the Notice to Quit had been served by sheriff officer.
Ms Macleod had made written representations on this point in advance of the Case Management Discussion, but these had not been seen by the Legal Member of the Tribunal. Accordingly, the Case Management Discussion was adjourned, to allow the Legal Member to consider the written representations and to allow the Applicant's representative to consider his response to them. The Legal Member advised the Respondent's solicitor that, if he did not uphold her contention that the Notice to Quit was invalid, he would grant the Order for Possession.
A further Case Management Discussion was held at Glasgow Tribunals Centre on the morning of 11 January 2018. The Applicant was again represented by Mr Adams and the Respondent (who was not present) was again represented by Ms Macleod. Mr Adams referred to written submissions that he had made to the Tribunal and Ms Macleod to a Second List of Authorities, neither of which had been seen by the Legal Member of the Tribunal prior to the Case Management Discussion. The Legal Member allowed the Case Management Discussion to proceed, with the Parties accepting that the Decision would be issued at a later date.

Summary of written representations

1. **On behalf of the Respondent**

In her written representations on behalf of the Respondent, Ms Macleod's contention was that termination of the contract between the parties is required before an order for possession of a house let on a Short Assured Tenancy can be made and the contractual tenancy must be terminated through the service of a valid Notice to Quit; otherwise, tacit relocation continues to operate. Section 6 of the Removal Terms (Scotland) Act 1886 ("the 1886 Act") states that a notice of removal may be given by registered letter. Following the Recorded Delivery Service Act 1962, service under the 1886 Act may be effected by recorded delivery. The 1886 Act remains in force and there is no other legislative provision to allow for service of a Notice to Quit. Previously, it could be served by sheriff officer as per the Sheriff Courts (Scotland) Act 1907 ("the 1907 Act"). The Summary Cause Rules allow for service of a Notice to Quit by sheriff officer in accordance with an action under Section 38 of the 1907 Act, but the Summary Cause Rules do not apply to actions raised in the First-tier Tribunal for Scotland and the present action is not, in any event, raised under Section 38 of the 1907 Act. Accordingly, as the 1907 Act does not apply, the only provision for service of Notices to Quit is the 1886 Act and, to be valid, a Notice to Quit must, therefore, be served by recorded delivery. The Applicant attempted service by hand delivery by sheriff officer, so valid service has not been effected. A notice not validly served is not a competent notice. Tacit relocation had, therefore, not been terminated and the present action should be dismissed as incompetent.

2. On behalf of the Applicant

In his written submissions on behalf of the Applicant, Mr Adams contended that the statement that there is no provision other than Section 6 of the 1886 Act to allow for service of a Notice to Quit is incorrect. Service of a Notice to Quit by sheriff officer is competent in terms of Rule 14(1)(c) of the Act of Sederunt (Messengers-at-Arms and Sheriff Officers) Rules 1991 ("the 1991 Rules"), which provide that an officer of court may execute a citation or serve any document required under any legal process. Service of a Notice to Quit is clearly "a document required under any legal process". The present action was raised under Section 33 of the 1988 Act, which provides that the Tribunal shall make an order for possession if it is satisfied, *inter alia*, that tacit relocation is not operating. Service of the Notice to Quit is consequently part of that legal process and this is reinforced by the fact that the Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988 make provision for certain information to be provided where a Notice to Quit is given by a landlord to terminate an assured tenancy under the 1988 Act.

Separatim, Section 112 of the Rent (Scotland) Act 1984 ("the 1984 Act") makes provisions anent the content and validity of a Notice to Quit to be given to a tenant. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act") provides, *inter alia*, that where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person, the document may be served on the person by being delivered personally to the person. Hand delivering the Notice personally by a sheriff officer is, therefore, a competent means of effecting service in terms of the 2010 Act.

Mr Adams stated in the written representations that one of the benefits of the Tribunal system is said to be the ability of the Tribunal to avoid delay and to seek informality and flexibility in proceedings in order to deal with the proceedings justly. The Respondent did not dispute having received service of the Notice to Quit by the sheriff officers; he simply objected to the manner in which it was served. In terms of Rule 2 of Schedule Part 1 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations"), the overriding objective of the Tribunal is to deal with the proceedings justly and this includes (per Rule 2(2)(b)) seeking informality and flexibility in proceedings.

Case Management Discussion

At the Case Management Discussion on 11 January 2019, Ms Macleod referred the Tribunal to the authorities she had provided and pointed out that the Interpretation and Legislative Reform (Scotland) Act 2010 to which Mr Adams had referred applied only instruments of the Scottish Parliament. Accordingly, Mr Adams' argument in relation to the effect of that Act on Section 112 of the Rent (Scotland) Act 1984 was unsound as the 1984 Act was not an instrument of the Scottish Parliament. The overriding obligation to deal with proceedings justly required the Tribunal to conform with the law. Tacit relocation could only be ended by a Notice to Quit which had been validly served.

Ms Macleod submitted that a Notice to Quit is not a "document required under any legal process", relying on the case of *Bank of Scotland v Stevenson 2012 S.L.T. (Sh.Ct.) 155* as the only authority in point. It related to a calling-up notice served under the Conveyancing and Feudal Reform (Scotland) Act 1970. Sheriff Jamieson at para 91 of his decision in that case stated that the issue was resolved by asking whether a sheriff officer would be carrying out an "official function" when serving a calling-up notice and whether a particular statutory pre-litigation process notice fits

the description of a "document required under any legal process". Sheriff Jamieson was of the opinion that, as a calling-up notice must be served prior to an application for a warrant in terms of Section 24 of the 1970 Act, it must fit the description of a "document required under any legal process" and, in serving it, the sheriff officer would be acting in his "official capacity" and "ought to follow the rules relating to citation...set out in the legislation dating back to 1540 and which the rules of court are but a restatement and refinement".
Ms Macleod submitted that a Notice to Quit is a common law, not a statutory, notice. There was a distinction to be drawn between a Notice to Quit under common law and a dual-purpose notice, which ends a tenancy and creates the legal basis for proceedings to begin. A Notice to Quit merely terminated a tenancy, so could not be a statutory pre-litigation process. She pointed out that Rule 66 of the 2017 Regulations does not include a Notice to Quit amongst the documents which must accompany an application for recovery of possession under Section 33 of the 1988 Act, so the Notice to Quit was not a "document required under any legal process".
Ms Macleod's submission was that there was no way of validly serving a Notice to Quit other than in accordance with the 1886 Act. The Rent (Scotland) Act 1984 did not make provision for Notices to Quit; it merely set out requirements relating to the content of such notices. Other than the fact that they had to be given in writing, the previous common law practices relating to Notices to Quit had fallen away.
Mr Adams, for the Applicant, contended that the very fact that there are statutory provisions relating to Notices to Quit negated the Respondent's argument. He was of the view that Sheriff Jamieson's decision in *Bank of Scotland v Stevenson* entirely supported the Applicant's position.

Reasons for Decision
Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations provides that the Tribunal may do anything at a case management discussion which it may do a t a hearing, including making a decision. The Tribunal was satisfied that it had before it all the information and documentation it required and that it would decide the application without a hearing.
The Tribunal recognised the importance of the decision it had to make, not least because a very large proportion of Notices to Quit are served by sheriff officers in Scotland and are not sent by recorded delivery. The Tribunal agreed that the 1907 Act and the Summary Cause Rules do not apply.
The Respondent's agent had referred the Tribunal to the decision of Sheriff Mackie in *Santander UK plc v Gallagher (2011 S.L.T. (Sh. Ct.)2013)*. There, the sheriff had dismissed as incompetent a calling-up notice served by sheriff officer on the ground that Section 19(6)(b) of the 1970 Act stipulated that, whilst service may be made by delivery to the person, depositing the notice within the dwellinghouse of the debtor by means of a letterbox could not be considered to conform as closely as may be to personal service, Section 19(6)(b) of the 1970 Act provided service by "delivery to the person" as an alternative to recorded delivery.
In the present case, there is no equivalent to the constraint created by the wording of the 1970 Act. In the *Santander* case, the sheriff was seeking to set out Parliament's intention in the use of the words "delivery to the person" and she decided that simply leaving the notice within the property did not satisfy the Section 19(6)(b) test.
Sheriff Mackie also noted that it was accepted in that particular case by the pursuer's solicitor the sheriff officers were not performing any official function in terms of the 1991 Rules, so the point was not argued before her. She pointed to different wording

used by the sheriff officers in the certificate of execution of service of the calling-up notice from that in the service of the application, suggesting that this implied that the sheriff officers were aware that they were performing different functions. That point was taken up by Sheriff Jamieson in the *Bank of Scotland v Stevenson* case. Sheriff Jamieson provided a comprehensive review of the statutory provisions for service of process, starting with the Citation Act of 1540. He then went on to say that the two bases of Sheriff Mackie's decision in the *Santander* case, namely the concession by the pursuer that the sheriff officer was not acting in his official capacity in terms of Rule 14 of the 1991 Rules and the fact that the sheriff took the view the certificate of execution of the calling-up notice in that case confirmed this was so, were not valid in the case before him. No such concession was made by the pursuer and the sheriff officer's certificate of execution complied in all respects with the legislation and rules of court bearing on citation of process. Sheriff Jamieson had no difficulty in holding that the *Santander* decision was not binding on him and that the sheriff officer in this case did in fact consider he was exercising his official functions as an officer of court in serving the calling-up notice.

Noting that the 1991 Rules extended a sheriff officer's official functions in relation to citations and executions of diligence to service of "a document required under any legal process", Sheriff Jamieson stated his opinion that, since a calling-up notice must be served prior to an application to the court under Section 24 of the 1970 Act, it must fit the description of a "document required under any legal process".

The Tribunal could see no distinction between the status of a calling-up notice under the 1970 Act and a Notice to Quit in relation to a private residential tenancy, other than the fact that a calling-up notice is entirely a creature of statute. The Tribunal did not, however, regard this distinction as having a bearing on the question before it. Section 112 of Rent (Scotland) Act 1984 ("the 1984 Act") provides for certain prescribed information to be included in a Notice to Quit and stipulates that not less than four weeks' notice must be given. This is the legal basis for requiring a Notice to Quit to be given in writing, as opposed to verbally, as hitherto could happen at common law. Section 114 of the 1984 Act sets out that a Notice which requires to be served under any provision of that Act may be given to a person by, *inter alia*, leaving it at his proper address (as the sheriff officer had done in the present case). The Tribunal accepted that it might be argued that Sections 112 and 114 of the 1984 Act did not apply to the Notice to Quit in this case, as the application for an Order for Possession was made under the 1988 Act, but the view of the Tribunal was that it was not necessary to determine that matter, as the issue in the present case was answered by the 1991 Regulations. Section 33 of the 1988 Act requires the Tribunal to be satisfied that tacit relocation is not operating. The Respondent's solicitor stated at the Case Management Discussion that tacit relocation can only be ended by the service of a Notice to Quit. The Tribunal agreed that this was the normal method used by landlords and their agents. The Tribunal was of the view, following the reasoning of Sheriff Jamieson in *Bank of Scotland v Stevenson*, that, as a Notice to Quit must, therefore, be served prior to an application to the Tribunal under Section 33 of the 1988 Act, it must fit the description of a "document required under any legal process". Accordingly, Rule 14(1)(c) of the 1991 Regulations applies to Notices to Quit served in order to satisfy the Tribunal, in an application under Section 33 of the 1988 Act, that tacit relocation is not operating and, in serving a Notice to Quit in these circumstances, a sheriff officer is performing an official function.

Ms Macleod had pointed out that Rule 66 of the 2017 Regulations did not include a Notice to Quit amongst the documentation that must accompany an application to

the Tribunal under Section 33, but the Tribunal's view as that, as it was also necessary to satisfy the Tribunal that tacit relocation was not operating, the fact that Rule 66 did not specify that a Notice to Quit must accompany the application was not relevant.
Having determined that, as the Notice to Quit had been validly served, tacit relocation was not operating, the Tribunal was satisfied that all the requirements of Section 33 of the 1988 Act had been met and that, in terms of Section 33(1), the Tribunal was bound to make an Order for Possession of the Property.
The Tribunal decided that the Order it was making should not be enforceable until 31 days after the date of its Decision.

Decision
The Tribunal decided that the application should be granted without a hearing and made an Order for Possession of 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.

Mr George Clark

29 January 2019

George Clark
Legal Member/Chair