

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 18 of the Housing (Scotland)
Act 1988**

Chamber Ref: FTS/HPC/EV/18/2830

Re: Property at 33c Douglas Road, Dundee, DD4 7SN (“the Property”)

Parties:

Mr Barry Gray, 128 Balunie Street, Dundee, DD4 8TX (“the Applicant”)

Miss Lisa Vannart, 33c Douglas Road, Dundee, DD4 7SN (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatrige (Legal Member) and Linda Robertson (Ordinary Member)

Decision in absence of the Respondent

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Application is refused.

Procedural Background:

The application for an order for possession in terms of Rule 65 had been made on 16 October 2018 and was accompanied by a copy of a blank and unsigned tenancy agreement, copy form AT6 dated 31 July 2018 for a date of 15 August 2017 stated as the earliest date at which proceedings can be raised, an Execution of Service signed by Mr Campbell stating service had been done by letterbox service by him personally on 31 July 2018, copy S11 Notice stating as the date of the commencement of the tenancy 1 October 2016, copy Notice to quit from Messrs Campbell Boath dated 31 July 2018 for a date of possession of 30 September 2018, a document described to be a S 33 Notice dated 31 July 2018 for a date of removal from the property on 30 September 2018, Delivery slip for recorded delivery service dated 2 August 2018 and a rent statement.

The tribunal was satisfied that the Respondent had received notification of the hearing on 14 December 2018 by documentation from the Tribunal served on her on 26 November 2018 by Sheriff Officers.

The Hearing took place at Dundee on 14 December 2018. Present were the Applicant Mr Gray with Mr Alec Campbell on behalf of Campbell Boath solicitors representing the Applicant. The Respondent was not present.

The 14 day notice period stated in rule 24 of the Rules of Procedure had been given. The Respondent has not made any representations.

The Hearing:

At the hearing Mr Campbell confirmed that the application is made in terms of Rule 65 and that the application relies on the service of the form AT6 on the Respondent.

The Applicant gave evidence that the Respondent had commenced payments to him on 28 June 2016 and initially stated that the tenancy commenced in June 2016. He then changed his mind and stated that the payment may have been for a tenancy commencing on 1 July 2016. He recalled that the tenant had received the keys prior to the tenancy agreement being signed as she needed somewhere to stay. The rent agreed with the Respondent was £475 per month. All he could recall regarding the signing of the lease was that this had happened after the tenant received the keys. The Applicant confirmed that the tenancy was still ongoing and that the Respondent had not paid rent since 1 July 2017. The Applicant confirmed that the style tenancy agreement lodged would have been the type of agreement that was signed for the property by the Applicant and the Respondent.

Mr Campbell gave evidence that on 31 July 2018 he personally attended at the property and could hear a dog barking inside. He knocked several times and when there was no reply he placed the document described as a S 33 Notice, the AT6 document and Notice to Quit through the letterbox.

Mr Campbell stated that the AT6 document was thus served on 31 July 2018. The AT6 relied on grounds 8 and 11 of Schedule 5 of the Housing (Scotland) Act 1988. He stated that the ish date in the Notice to Quit and S 33 document was based on a tenancy commencing on the first day of the month.

When the Tribunal queried the start date of the tenancy he stated it should be agreed that this was 1 July 2016 although he had stated 1 October 2016 as the start date of the tenancy in the S 11 Notice to the Council.

When the Tribunal asked him to clarify on what basis a Notice to Quit with a removal date of 30 September 2018 could be issued in light of the purported start date of the tenancy and the provisions in the blank tenancy agreement he stated that he considered that if a tenancy started on the first day of the month then the end date of the tenancy period would fall on the last date of the month of the tenancy period. He did not address the question how a date in September could be an ish date for a tenancy of not less than 6 months commencing on 1 July of a year where a renewal period for the tenancy was not stated in the tenancy agreement and tacit relocation would thus extend the tenancy by the same period as the original agreement.

When it was pointed out that the date for raising proceedings on the AT6 document referred to a date in 2017, which is before the date of the AT6 date of 31 July 2018,

he stated he wishes to amend the AT6 document to the date of 15 August 2018 rather than 15 August 2017.

He stated the action was undefended and the Respondent had not taken part in the hearing. The Respondent owed more than 3 months rent and had persistently delayed to pay rent.

He moved for an order for possession on the basis of the documents and evidence provided.

Findings in Fact:

1. The property is let on an Assured Tenancy, which commenced at some point during the summer of 2016.
2. The rent due per month is £475.
3. 31 July 2018, 2 August 2018 and on 14 December 2018 the arrears exceeded 3 months rent.
4. No rent had been paid since 1 July 2017.
5. A form AT6 was served on the Respondent on 2 August 2018 by recorded delivery and delivered to the address of the Respondent on 31 July 2018 personally by Mr Campbell, stating as the grounds of repossession grounds 8 and 11.
6. The AT6 document is dated 31 July 2018 and stated as the earliest date at which proceedings can be raised 15 August 2017.
7. A Notice to Quit dated 31 July 2018 for a date of 30 September 2018 was served on the Respondent on 2 August 2018 by recorded delivery and delivered to her address on 31 July 2018 personally by Mr Campbell.
8. The tenancy agreement lodged states as the date of termination "which is no less than 6 full calendar months" and does not specify any period of continuation thereafter.
9. The tenancy agreement lodged does not set out the grounds of Schedule 5 of the Housing (Scotland) Act 1988.
10. The tenancy agreement lodged does not contain specific provisions for the termination of the tenancy by the landlord other than the provisions under S 33 of the Housing (Scotland) Act 1988.

Legal basis of Order for Recovery of Possession

S 18 of the Housing (Scotland) Act 1988 states:

"18 Orders for possession.

(1) The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.

(2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3) If the First-tier Tribunal is satisfied that any of the grounds in Part I of Schedule 5 to this Act is established then, subject to subsections (3A) and (6)] below, the Tribunal shall make an order for possession.

(3A) If the First-tier Tribunal] is satisfied—

(a) that Ground 8 in Part I of Schedule 5 to this Act is established; and
(b) that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit,
the Tribunal] shall not make an order for possession unless the Tribunal considers it reasonable to do so.]

(4) If the First-tier Tribunal is satisfied that any of the grounds in Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit.

(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

(6) The First-tier Tribunal] 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 possession is Ground 2 or Ground 8 in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9 Ground 10 Ground 15 or Ground 17; and

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

(6A) Nothing in subsection (6) above affects the First-tier Tribunal's power to 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, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.

(7) Subject to the preceding provisions of this section, the First-tier Tribunal] may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

(8) In subsections (3A) and (4A) above—

(a) "relevant housing benefit" means—

(i) any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or
(ii) any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;

(aa) "relevant universal credit" means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;

(b) references to delay or failure in the payment of relevant housing benefit or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant."

S 19 of The Housing (Scotland) Act 1988 states:

"19 Notice of proceedings for possession.

(1) *The First-tier Tribunal shall not entertain proceedings for possession of a house let on an assured tenancy unless—*

- (a) the landlord (or, where there are joint landlords, any of them) has served on the tenant a notice in accordance with this section; or*
- (b) the Tribunal considers it reasonable to dispense with the requirement of such a notice.*

(2) *The First-tier Tribunal shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the Tribunal .*

(3) *A notice under this section is one in the prescribed form informing the tenant that—*

- (a) the landlord intends to raise proceedings for possession of the house on one or more of the grounds specified in the notice; and*
- (b) those proceedings will not be raised earlier than the expiry of the period of two weeks or two months (whichever is appropriate under subsection (4) below) from the date of service of the notice.*

(4) *The minimum period to be specified in a notice as mentioned in subsection (3)(b) above is—*

- (a) two months if the notice specifies any of Grounds 1, 2, 5, 6, 7, 9 and 17 in Schedule 5 to this Act (whether with or without other grounds); and*
- (b) in any other case, two weeks.*

(5) *The First-tier Tribunal may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on Ground 8 in Schedule 5 to this Act.*

(6) *Where a notice under this section relating to a contractual tenancy—*

- (a) is served during the tenancy; or*
- (b) is served after the tenancy has been terminated but relates (in whole or in part) to events occurring during the tenancy, the notice shall have effect notwithstanding that the tenant becomes or has become tenant under a statutory assured tenancy arising on the termination of the contractual tenancy.*

(7) *A notice under this section shall cease to have effect 6 months after the date on or after which the proceedings for possession to which it relates could have been raised.”*

Reasons for Decision:

The tribunal considered the case on the basis of the evidence and the submissions of the Applicant's representative. The Applicant's representative did not submit any case law and did not make any detailed legal submissions.

The Tribunal believed the evidence of the Applicant in so far as he stated that a tenancy had been entered into in the summer of 2016 between him and the Respondent for which a rent of £475 per month had been agreed. The Tribunal did not find that the Applicant could provide a definite start date for the tenancy. In a conjoined civil case FTS/HPC/CV/18/2193 bank statements had been lodged showing the payment of a sum of around £475 per month for some time, which supported the Applicant's statement that this was rental payment agreed between

the parties. It also showed payments starting in June 2016 and repeated payments over several months at the end of the month, which did not support a specific start date of the tenancy. The Applicant could not recall details of the tenancy agreement or when it was signed other than that it was signed after the Respondent had received the keys. The Tribunal considered that his evidence did not prove conclusively the precise content of the tenancy agreement, service of an AT5 or other information to the Respondent or the actual start date.

The Tribunal considers that for an application in terms of S 18 of the Housing (Scotland) Act 1988 and rule 65 of the Rules of Procedure, which relies on Ground 8 of Schedule 5 of said Act, one basic requirement is that a valid notice in terms of S 19 of the Housing (Scotland) Act 1988 is served. The application specifically relies on Ground 8 of Schedule 5 of the Housing (Scotland) Act 1988 and thus in terms of S 19(5) of said Act the Tribunal may not exercise the power conferred in S 19 (1) (b) of said Act to dispense with the requirement of such a notice.

It could be argued that on the basis of the grounds of eviction being states as 8 and 11 submissions could have been made to disregard ground 8. However, no such submissions were made and no case law provide to support such an argument. However, even if the Tribunal could have exercised the option under S 19 (1) (b) of the Housing (Scotland) Act 1988, it would not have considered it reasonable to dispense with the requirement of an AT6 notice. The Tribunal did not have access to the actual tenancy agreement, which the Applicant states was lost, or an AT5 document which may or may not have been provided. It cannot be satisfied what, if any, information was ever provided to the Respondent at the start of the tenancy regarding the rights of the Respondent in circumstances where the Applicant wished to end the tenancy. Information about the rights of a tenant is provided in the AT6 document and the Tribunal considered that this information would have been essential to advise the Respondent of the procedure of an application for possession. No submissions were made as to why it may have been reasonable to dispense with this requirement in this case. There was no suggestion from the Applicant or his representative that it would have not been possible to serve an AT6 document or that this would have delayed matters unreasonably or that there were any other circumstances which would justify not serving such a document. Indeed an AT6 document was prepared and served, although completed in a way which was likely to have caused confusion to the Respondent as set out below. The Tribunal considers that service of a valid AT6 document was required in this case.

The main issue arising is thus whether or not the AT6 notice, which is the notice required in terms of S 19 of the Housing (Scotland) Act 1988, was valid.

In terms of S 19 (3) of the Housing (Scotland) Act 1988, a notice under this section is one in the prescribed form informing the tenant that proceedings will not be raised earlier than the expiry of the period of two weeks or two months, whichever is appropriate under subsection (4) of S 19, from the date of service of the notice.

This requirement is reflected in Part 4 of the style AT6 form. In the AT6 document submitted Part 4 states: "Proceedings will not be raised before 15/08/2017 (date) (which is the earliest date at which proceedings can be raised under Section 19 of the Housing (Scotland) Act 1988." The AT6 notice is dated 31 July 2018.

It is clear that the date of 15 August 2017 predates the date of the notice of 31 July 2018. The notice does not conform to the requirement of S 19 (3) (b) of the Act because it refers to a date in the past as the first date when proceedings could be raised.

As the date stated in Part 4 is a date in the past it is also not possible for the AT6 notice to give the Respondent a notice period of two months or two weeks as required in S 19 (4) of the Housing (Scotland) Act 1988. One cannot give notice for a date in the past.

Mr Campbell had asked to amend the AT6 notice to correct the mistake. However, what is relevant for the Tribunal is the information provided on the original AT6 notice given to the Respondent. The content of the form cannot be changed once the document has been served on the Respondent.

The purpose of the notice is to give the Respondent information about what is required from the recipient, why it is required and what procedure has to be followed. In this case the information on the form and the dates entered clearly provide incorrect and confusing information and would leave any recipient in doubt as to whether the process set out in the AT6 could be started and when this could happen. The information in Note 4 states that if your landlord does not raise court proceedings this notice AT6 will cease to have effect 6 months after the earliest date on which court proceedings could have been raised. This date was stated as 15 August 2017 and the 6 months period would have expired by the time the Respondent received the AT6. This defies the purpose of the notice.

The Tribunal considers that the AT6 notice is invalid as it gives a date in Part 4 of the form which predates the date of the notice. It does not comply with the requirements of S 19 of the Housing (Scotland) Act 1988.

The Tribunal thus cannot entertain proceedings for possession in these circumstances. The other issues arising out of the uncertainty of the start date of the tenancy and the related question of the validity of the Notice to Quit does not require to be addressed further.

In all the circumstances the tribunal thus refuses the application.

Decision: The Tribunal refuses the order for repossession.

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.

P Henning-McFatrige

Legal Member/Chair

18.12.18

Date