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/18/0597

Re: Property at FLAT 1/2, 384 ALLISON STREET, GLASGOW, G42 8HR ("the Property")

Parties:

MALIK ESTATES, 10 HOLM CRESCENT, NEWTON MEARNS, GLASGOW, G77 6UX ("the Applicant")

MR CALIN MOLDVAN, FLAT 1/2, 384 ALLISON STREET, GLASGOW, G42 8HR ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

1. This is an application by the Applicant for an order for possession in relation to an assured tenancy in terms of rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended ("the Procedure Rules"). The tenancy in question was a Short Assured Tenancy of the Property by the Applicant to the Respondents commencing on 4 August 2017.

2. The application was dated 13 March 2018 and lodged with the Tribunal shortly thereafter. The application relied upon a notice in terms of section 19 (also known as an "AT6") of the Housing (Scotland) Act 1988 dated 29 January 2018, providing the Respondent with notice that proceedings would not be raised before 15 February 2018. Evidence of service of the

said AT6 upon the Respondent by Sheriff Officers was provided with the application, service being on 31 January 2018.

3. The said AT6 rely upon three grounds under Schedule 5 to the 1988 Act; Grounds 8, 11 and 12. All three rely upon "Rent payment due 4 months at £375 per month", which would be rent arrears of £1,500 outstanding as at the date of the AT6. The lease for the Tenancy, lodged with the application, does disclose a monthly rent of £375. A rental statement provided with the application shows rent arrears at £1,875 as at 4 March 2018.

4. Evidence of a section 11 notice in terms of the Homelessness Etc. (Scotland) Act 2003 served upon Glasgow City Council on 13 March 2018.

The Hearing

5. On 10 May 2018, at a case management discussion ("CMD") of the First-tier Tribunal for Scotland Housing and Property Chamber, sitting at the Glasgow Tribunals Centre, I was addressed by Mr Ritchie, a solicitor acting for the Applicant. There was no appearance by the Respondent and both my clerk and the Applicant's agent confirmed that no contact had been received from or on behalf of the Respondents since the scheduling of the CMD.

6. As of 10:05, there being no appearance or contact from the Respondent, I was satisfied to consider the application in full at the CMD in the absence of the Respondent.

7. In advance of the CMD, I had noted a question as to whether the lease complied with section 18(6) of the 1988 Act, given that the tenancy did not expire until 4 August 2018 and therefore remained an assured tenancy (and not a statutory assured tenancy). I had sought for this question to be directed to the Applicant's agent with a request that I be addressed specifically on these issues. The Applicant's agent came prepared with a short written submission which he provided at the commencement of the CMD and then expanded upon during further discussion.

8. The Applicant's agent addressed me on the current level of rent arrears, stating that no further rent had been received since the raising of the application and therefore there were now seven months of unpaid rent, totalling £2,655. (By my calculation, I think the correct figure would be £2,625.) The rent statement showed that the payments of August, September and October 2017 had been missed, along with the payments from February 2018 to present. The payment for January 2018 was said to have been received one month late on 5 February 2018. (I was not addressed on why this payment was regarded as late payment of the payment due on 4 January 2018 and not a slightly late payment of the rent for 4 February 2018. Either way, the level of arrears remains the same.) The AT6 was in sufficient detail and evidence of service was available.

9. The Applicant's agent confirmed that the Applicant had received little contact from the Respondent and none recently. He provided sight of a letter received by his firm from Govanhill Law Centre for the Respondent on 23 February 2018. In the letter, the Respondent's agent explained that the Respondent had been unable to work during September and October 2017 due to illness and had not obtained benefits during this period. The letter offered payments of £400 per month against rent and arrears (which would be £25 per month against arrears which were, as at 23 February 2018, already £1,500). The Applicant's agent explained to me that prior to the letter being received from Govanhill Law Centre, the Respondent had attended at his office to make an offer of £400 towards the lease but that sum had not then been paid. The Applicant's agent provided sight of a file copy letter by him to Govanhill Law Centre dated 27 February 2018 responding to their letter and explaining the failure to pay the promised £400, and asking for an immediate payment of £1,500 towards the arrears. The Applicant's agent said that his letter had not been responded to in any way (nor even acknowledged).

10. The Applicant's agent submitted that the Respondent was not known to be in receipt of any benefits; and that no issues of non-provision of benefit had been raised by the Respondents as a reason for failure to make payment of rent. (The letter from Govanhill Law Centre mentioned benefits only in passing. It did not suggest that a benefit application was being pursued or would have any materially effect on the arrears situation.) The Applicant's agent further submitted that the Respondent was believed to have no dependents. The Applicant's agent submitted that there were no other issues of reasonableness known to him and submitted that, in regard to the test of whether it was reasonable to evict under Grounds 11 and 12, it was reasonable to do so.

11. The bulk of the CMD concerned the terms of the lease and whether it complied with section 18(6) of the 1988 Act. Submissions were made on the decision of (then) Sheriff Principal Wheatley in *Royal Bank of Scotland v Boyle, 1999 Hous LR 63*. Like the lease in *Royal Bank v Boyle*, the lease between the Applicant and Respondent did not list at length the various grounds in Schedule 5 of the 1988 Act. The Applicant's agent submitted that the lease contained only two provisions that attended to the issue in section 18(6)(b) of ensuring that "the terms of the tenancy make provision for it to be brought to an end on the [Schedule 5] ground in question". These were:

    - Clause 7.3: "Before the expiry of the term the landlord can only end the tenancy by obtaining a court order for possession of the premises on one of the grounds listed in schedule 5 of the Housing (Scotland) Act 1988 (as amended by the Housing Act 1996) or repossession under Section 33 of the Housing (Scotland) Act 1988. The landlord will give the notice periods prescribed by law before making the relevant application to the court".
    - Clause 8: "In the event that any rent or other sum due under this agreement is unpaid for Twenty-one days after becoming due (whether

formally demanded or not), or if there is material breach of any of the tenants obligations, then the landlord may re-enter upon the property and this tenancy shall immediately come to an end and the re-entry shall not prejudice any of the landlords other rights and remedies."

(Both all *sic*)

12. The Applicant's agent accepted that the case was good law but sought to distinguish it in two ways in consideration of the lease in question:

- The lease in *Royal Bank v Boyle* lacked any attempt to incorporate by reference the Schedule 5 grounds whereas the Applicant's lease had clause 7.3.

  The Applicant's agent accepted Sheriff Principal Wheatley stated at paragraph 12-11 of the reported decision: "I am not however satisfied that necessarily in all cases incorporation by reference would be sufficient or indeed appropriate. It is also doubtful whether such a device is good drafting practice. The statutory references may change, and in any event I do not think it is reasonable to expect tenants to require access to the relevant legislation in order to understand their contact." I was invited to regard that as an *obiter* comment and not binding.

- The landlord in *Royal Bank v Boyle* sought eviction only on Grounds 8 and 11. Here, the Applicant's agent submitted that – if I was against him on the above point – it was still available to me to consider that clause 8 "of the tenancy make[s] provision for it to be brought to an end on" Ground 12 (to paraphrase section 18(6)(b)).

13. Subject to the issues regarding whether section 18(6) of the 1988 Act was satisfied, the Applicant's agent submitted that the Ground 8 of the 1988 Act was satisfied and, being a mandatory ground, an order for removal should be granted. If failing, the Applicant's agent submitted that it was reasonable to grant an order for removal under Grounds 11 and 12.

14. The Applicant's agent further confirmed that the full name of the Applicant was "Malik Estates Limited" and he was satisfied for the application to be so amended.

15. The Applicant's agent confirmed no order in respect of expenses was to be made.

Findings in Fact

16. On 4 August 2017, the Applicant let the Property to the Respondent by lease (stating it was a Short Assured Tenancy) with a start date of 4 August 2017 and an end date of 4 August 2018 ("the Tenancy").

17. Under the Tenancy, the Respondent was to make payment of £375 per month in rent to the Applicant on the 4th of each month.

18. The Tenancy's terms fail to make provision for the Tenancy being brought to an end on, amongst others, Grounds 8 and 11 of Schedule 5 to the Housing (Scotland) Act 1988 while it is still an "assured tenancy" in terms that Act.

19. The Tenancy's terms make provision for the Tenancy being brought to an end on Ground 12 of Schedule 5 to the Housing (Scotland) Act 1988 while it is still an "assured tenancy" in terms that Act.

20. On 29 January 2018, the Applicant's agent drafted an AT6 form in correct form addressed to the Respondent, giving the Respondent notice in terms of section 19 of the 1988 Act of an intention to raise proceedings for possession in terms of Grounds 8, 11 and 12 of Schedule 5 to the 1988 Act, all based on there being rent arrears of £1,500 (being four months of rent arrears) as at the date of the AT6. The AT6 gave the Respondents notice that proceedings would not be raised before 15 February 2018.

21. On 31 January 2018, a Sheriff Officer acting for the Applicant competently served the AT6 upon the Respondent. The Respondent was thus provided with sufficient notice of the Applicant's intention to raise proceedings for possession on the said grounds.

22. On 13 March 2018, the notice period under the AT6 having expired, the Applicant raised proceedings for an order for possession with the Tribunal, on the grounds narrated in the AT6.

23. A section 11 notice in the required terms of the Homelessness Etc. (Scotland) Act 2003 was served upon Glasgow City Council on 13 March 2018 on the Applicant's behalf.

24. On 10 May 2018, a Sheriff Officer acting for the Tribunal intimated the application and associated documents upon the Respondent, providing the Respondent with sufficient notice of the CMD of 10 May 2018.

25. On 10 May 2018, the Respondent was in rent arrears under the Tenancy of £2,625, being seven months of unpaid rent in total. Within this figure are two periods of at least three months of consecutive unpaid rent.

26. No information was provided to the Tribunal regarding any delay resulting from failure in the payment of relevant housing benefit or relevant universal credit.

27. No information was provided to the Tribunal regarding any reason why it would be unreasonable to grant an order for possession under any of the discretionary grounds in Part II of Schedule 5 to the 1988 Act.

Reasons for Decision

28. The application was in terms of rule 65, being an order for possession in relation to assured tenancies. But for the question of whether the lease satisfied section 18(6), I was satisfied, on the basis of the application and supporting papers, and submissions provided by the Applicant's agent at the CMD, that a valid AT6 had been issued to the Respondent; that this had expired without the breaches being resolved; and that the non-payment of rent remained unaddressed as at the date of the CMD. As at the date of the CMD, total arrears amounted to seven months of rent. Though the Respondent had made some effect to engage with the Applicant, this was brief, the offer made would have taken five years to clear off the then level of arrears, and had not been accepted by the Applicant. In any case, the Respondent did not make the (unilaterally) offered payment of £400, then fell further behind in arrears, and has made no contact since.

29. I was satisfied from the submissions of the Applicant's agent that there were no known issues of failure or delay in benefit and, barring the issue of section 18(6), it would have been reasonable to grant an order in terms of Ground 8 of Schedule 5 to the 1988 Act.

30. I was further satisfied that, barring the issue of section 18(6), it was reasonable to grant any order in terms of Grounds 11 and 12 of Schedule 5 to the 1988 Act as there were no material circumstances brought to the Tribunal's attention that would suggest it would be unreasonable in the circumstances of seven months arrears of rent, with two periods of at least three months continuous non-payment.

31. Turning to section 18(6) of the 1988 Act, I was not satisfied that clause 7.3 of the lease addresses the requirements of that section. I accept that Sheriff Principal Wheatley's comments are *obiter* (though they are treated as more significant within the editorial comment with the report in Housing Law Reports and in subsequent drafting practice). As the Applicant's agent submitted, there are many circumstances where incorporation by reference is commonly used in Scotland. Conversely, I hold that there are many circumstances where that may not be sufficient due to, for example, legislative provisions that seek to protect contracting parties with weaker bargaining powers or such provisions requiring specific terms incorporated and made clear to parties in specific legal circumstances. Residential tenancies under the 1988 Act are both. The requirements upon the landlord are not severe. A single additional page (or less) of text would suffice. This is absent in this lease.

32. Furthermore, clause 7.3 is not clear in itself. It covers both eviction under the Schedule 5 grounds as well as referring to eviction following termination of the Short Assured Tenancy at the ish under section 33 of the 1988 Act. It therefore refers to two different forms of notice period, without clarifying which one is which. It states "the landlord can only end

the tenancy by obtaining a court order for possession". More correctly, the landlord can only seek repossession by obtaining a court order, for which the notice is a preceding formal requirement. Further, it refers to a statutory provision "as amended by" another provision. I agree with Sheriff Principal Wheatley's concerns that "statutory references may change, and ... I do not think it is reasonable to expect tenants to require access to the relevant legislation in order to understand their contact".

33. I was however persuaded by the Applicant's agent that – read together – clause 7.3 and 8 do alert the Respondent to there being a notice period before repossession can take place and that the Applicant may seek to regain possession in the event that "any rent... is unpaid for Twenty-one days after becoming due". This provision is close to, but not identical to, the provision relied upon by the landlord in *Royal Bank v Boyle*. Sheriff Principal Wheatley characterises it as term on the "principle of irritancy in circumstances where the rent or any part of it is in arrears and the tenant fails to make payment for a [specified] period" (paragraph 12-10 of the report). In that case, as here, it is materially different to the terms of Grounds 8 and 11 and is not sufficient to give notice of those grounds. Unlike in *Royal Bank v Boyle*, the Applicant in this case also seeks to rely on Ground 12 which is far simpler in its terms:

> *Some rent lawfully due from the tenant—*
>
> *(a) is unpaid on the date on which the proceedings for possession are begun; and*
>
> *(b) except where subsection (1)(b) of section 19 of this Act applies, was in arrears at the date of the service of the notice under that section relating to those proceedings.*

Ground 12 is, in essence, an irritancy provision and clause 8 foreshadows it (though I suspect this may be inadvertently).

34. The Procedure Rules allow at rule 17(4) for a decision to be made at CMD as at a hearing before a full panel of the Tribunal. I was thus satisfied, having due consideration to section 18(6), that I was entitled to make a determination that it was reasonable to grant an order in terms of Ground 12 of Schedule 5 to the 1988 Act only.

Decision

35. In all the circumstances, I was satisfied to amend the application into the name of Malik Estates Ltd and thereafter make the decision to grant an order against the Respondents for possession of the Property under section 18 of the Housing (Scotland) Act 1988 in normal terms.

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.

Joel Conn

Legal Member/Chair	18 May 2018 **Date**