



**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/18/0666

Re: 1/L 55 Dens Road, Dundee DD3 7JB (“**the Property**”)

Parties:

Baldragon Properties Limited, c/o 7 South Tay Street, Dundee DD1 1NU
(“**the Applicant**”)

Daniel Burns, 1/L 55 Dens Road, Dundee DD3 7JB
(“**the Respondent**”)

Tribunal Member: Pamela Woodman (Legal Member)

Present:

The case management discussion in relation to case reference FTS/HPC/EV/18/0666 took place at 2.10pm on Tuesday 29 May 2018 at Dundee Carer’s Centre, Seagate House, 132-134 Seagate, Dundee, DD1 2HB (“**the CMD**”). The Applicant was not present but was represented by Neil Dymock of Easylets Ltd (“**the Applicant’s Representative**”). The Respondent was not present nor was he represented at the CMD. The clerk to the Tribunal was Linda O’Neill. Tracy Morrill, also of Easylets Ltd, was an observer.

Summary of decision (made in the absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“**the Tribunal**”) determined that the order for possession on termination of a short assured tenancy sought in relation to case reference FTS/HPC/EV/18/0666 be refused.

Background

1. The Applicant made an application to the Tribunal under rule 66 (*Application for order for possession upon termination of a short assured tenancy*) in terms of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“**HPC Rules**”) which are set out in the schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended, (“**2017 Regulations**”). Rule 66 of the HPC Rules relates to an application by a landlord under section 33 (*recovery of possession on*

termination of a short assured tenancy) of the Housing (Scotland) Act 1988, as amended ("**1988 Act**").

2. During the CMD, the Applicant's Representative confirmed that the Applicant was seeking an order for possession in terms of rule 66 of the HPC Rules (as stated in the application form), as opposed to rule 65 of the HPC Rules.
3. The application form in relation to case reference FTS/HPC/EV/18/0666 was dated 12 March 2018, stamped as having been received by the Tribunal on 13 March 2018 and named Daniel Burns as the tenant/occupier. The order sought from the Tribunal was an order for possession.
4. The application form was accompanied by copies of the following:
 - a. Signed tenancy agreement between Baldragon Properties Ltd. (as landlord), represented by EasyLets (as agent for the landlord) and Daniel John Burns (i.e. the Respondent) and Andy Law (together as tenants) dated 1 November 2016 ("**the Tenancy Agreement**");
 - b. Signed Form AT5 to the Respondent and Andy Law from EasyLets dated 1 November 2016 ("**the Form AT5**"), in which the name and address of the landlord were not stated and part 3 (*Address and telephone number of the Agent (if appropriate)*) was not completed;
 - c. Certificate of service by Fraser Shaw, sheriff officer, regarding service of "the foregoing Notice to Quit under Section 33 of the Housing (Scotland) Act 1988 together with Notice under Section 19 (Form AT6)" on Andy Law on 11 December 2017 ("**the Certificate of Service**") – copies of the notices purporting to have been served by the sheriff officer were not attached to the copy of the certificate of service provided to the Tribunal;
 - d. Notice to quit issued by the Applicant's Representative for the Applicant which stated that it was "issued... under s33 of the Housing (Scotland) Act 1988", which was addressed to the Respondent and Andy Law and which was dated 6 December 2017, requiring them to "quit and remove" from the Property on or [by] 28 February 2018 ("**the Notice to Quit**");
 - e. Form AT6 (*notice under section 19 of the 1988 Act of intention to raise proceedings for possession*) informing the Respondent and Andy Law that the Applicant intended to raise proceedings for possession of the Property on grounds 8, 10 and 11 as set out in schedule 5 to the 1988 Act, such Form AT6 being dated 6 December 2017 and stating that proceedings would not be raised before 28 February 2018 ("**the Form AT6**");
 - f. Rent statement in respect of the Respondent from 23 November 2017 to 5 March 2018; and
 - g. Rent statement in respect of Andy Law from 23 November 2017 to 1 March 2018.

5. A letter was sent by the Tribunal to the Applicant's Representative dated 21 March 2018 to request further information, in response to which the Applicant's Representative provided a copy of the section 11 notice (*notice by landlord of proceedings for possession*) to Dundee City Council in respect of the Respondent and Andy Law with the "other proceedings for possession of a dwellinghouse" option selected but with a handwritten note to state that it was a short assured tenancy. In addition, the Applicant's Representative (by e-mail on 26 March 2018) provided a scanned copy of a letter from Ann Banks (on behalf of the Applicant) to the Tribunal dated 26 March 2018 confirming that the Applicant's Representative was authorised to represent the Applicant in respect of case reference FTS/HPC/EV/18/0666 ("**the Letter of Authorisation**"). However, this was re-requested by the Tribunal administration on 25 May 2018 because, as a result of an administrative oversight, a copy of the Letter of Authorisation was not recorded as having been received by the Tribunal. The Letter of Authorisation was provided again and a copy was sent to the Legal Member and the Respondent on 25 May 2018.
6. A notice of acceptance of the application in respect of case reference FTS/HPC/EV/18/0666 was issued by the Tribunal dated 4 April 2018 under rule 9 of the HPC Rules.
7. Letters were sent by the Tribunal to each of the Applicant's Representative and the Respondent dated 25 April 2018 confirming that the application had been received, intimating the date of the CMD and noting that written representations from the Respondent must be received by 22 May 2018.
8. The Legal Member had been provided with the certificate of intimation from William Wywalec, sheriff officer, regarding service of the letter from the Tribunal dated 25 April 2018 (and accompanying documentation) on the Respondent on 26 April 2018.
9. No written representations from the Respondent were provided.
10. This decision arises out of the CMD.

Proceedings, namely the CMD

11. The Applicant's Representative noted that there had been regular correspondence with the Respondent until 2-3 weeks prior to the date of the CMD. He noted that notice was given to the Respondent of the requirement for an inspection, to which no response was received, and that the Applicant's agents, Easylet Ltd, had taken entry to undertake the inspection. The Applicant's Representative noted that the Property "looked as if it had been abandoned" by the tenants.
12. The Legal Member noted that the Tenancy Agreement named both the Respondent (i.e. Daniel Burns) and Andy Law as the tenants but noted that only Daniel Burns was named in the application form provided with the case papers for case reference FTS/HPC/EV/18/0666. In response to a query from the Legal Member as to why this was the case, the Applicant's Representative produced a copy of a second application form which named Andy Law as the

tenant/occupier. He confirmed that this application form had been submitted at the same time as the application form for case reference FTS/HPC/EV/18/0666. During an adjournment, the Legal Member telephoned the Tribunal administration and received confirmation that the second application form had been submitted and received but that it had not been processed either as part of case reference FTS/HPC/EV/18/0666 or as a separate application.

13. The Applicant's Representative expressed his frustration at this, as well as the re-requesting of the Letter of Authorisation which had previously been provided.

Findings in fact

14. Whilst both the Form AT5 and the Tenancy Agreement were stated to be dated 1 November 2016 (with no time of signing recorded on either), the Tenancy Agreement included an acknowledgement from the Respondent and Andy Law (as the tenants) to the effect that they had received the appropriate notice and that the tenancy created was a short assured tenancy. Therefore, on the face of it, in the absence of any representations from the Respondent to the contrary and based on the Form AT5 and Tenancy Agreement, the tenancy appeared to be a short assured tenancy.
15. The Tenancy Agreement named both the Respondent and Andy Law as the tenants. The Notice to Quit was addressed to both the Respondent and Andy Law. The Certificate of Service referred to service on Andy Law but no mention was made of the Respondent. No evidence of service of the Notice to Quit on the Respondent was provided to the Tribunal. The Applicant's Representative confirmed that no separate certificate of service in relation to service on the Respondent had been provided by the sheriff officer. The Applicant's Representative challenged whether this was required.
16. The schedule to The Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988 sets out information which must be included in any notice to quit given by a landlord to terminate an assured tenancy ("**the Prescribed Information**"). The Notice to Quit contained most of the Prescribed Information but diverged from it, particularly in point 3.
17. The Applicant's Representative appeared to accept that the Form AT6 was not a notice under section 33(1)(d) of the 1988 Act.
18. The Applicant's Representative initially confirmed that a notice as required under section 33 of the 1988 Act had not been issued but, following an adjournment, submitted that the Notice to Quit was also the required notice under section 33 given that it stated that it was made "under s33 of the Housing (Scotland) Act 1988" and that, at numbered point 2, there was reference to "possession of the property".

Reasons for decision

19. Rule 66 of the HPC Rules provides that one of the mandatory requirements for lodgement of an application is the provision of a copy of "the notice given to the tenant under section 33(1)(d) of the 1988 Act".
20. In terms of section 33(1)(d) of the Housing (Scotland) Act 1988, a landlord requires to have "given to the tenant notice stating that he requires possession of the house".
21. Section 33(5) of the 1988 Act expressly states that "sections 18 and 19 [of the 1988 Act] do not apply for the purpose of a landlord seeking to recover possession of the house under this section."
22. The Form AT6 was a notice under section 19 of the 1988 Act and did not state that the Applicant required possession of the Property. Accordingly, the Form AT6 did not constitute the required notice under section 33(1)(d) of the 1988 Act.
23. The Applicant's Representative had challenged the requirement for language stating that the landlord "required possession" of the Property to be included and suggested that this could sufficiently be inferred from the other language in the Notice to Quit.
24. The Legal Member considered that the Notice to Quit was in reasonably commonly used terms (subject to the comments on the Prescribed Information, as referred to at paragraph 16 above). The reference to "possession of the property" (as referred to by the Applicant's Representative) was in point 2 of the Notice to Quit (substantially reproducing point 2 of the Prescribed Information). In the Notice to Quit, this read "If the Landlord issues a Notice to Quit but does not seek to gain possession of the property, the contractual tenancy which has been terminated shall be replaced by a Statutory Assured Tenancy". The Legal Member did not accept that this, even when coupled with the requirement to "quit and remove", was sufficient to meet the requirement of section 33(1)(d) of the 1988 Act. Looking at it another way, to find otherwise would be to suggest that if a notice to quit contained the Prescribed Information and otherwise included relatively commonly used notice to quit language (albeit not expressly referring to the landlord requiring possession of the property), then there would be no need for a notice under section 33(1)(d) at all. This would be contrary to the express terms of section 33(1)(d) of the 1988 Act, rule 66 of the HPC Rules, legal commentary and practice to date. That is not correct.
25. Whilst it would potentially be possible to combine a notice to quit and section 33(1)(d) notice into one document, that document would require to meet the requirements for each type of notice.
26. The Notice to Quit did not state that the Applicant required possession of the Property, as was required in terms of section 33(1)(d) of the 1988 Act, and so did not constitute the required notice under section 33(1)(d) of the 1988 Act.
27. Even if the Notice to Quit had constituted the required notice under the section 33(1)(d) of the 1988 Act (which it did not), it would also have been necessary for

the Applicant to provide evidence to the Tribunal that such notice had been properly served on the Respondent. No such evidence was provided as is referred to in paragraph 15 above.

28. The Applicant's Representative had challenged whether it was necessary to serve the Notice to Quit on each tenant individually and have a certificate of service from a sheriff officer for each.
29. In Scots law, in order to avoid *tacit relocation* operating in relation to a tenancy, notice to quit requires to be served. This is also one of the matters on which the Tribunal must be satisfied before granting an order for possession on termination of a short assured tenancy (section 33(1)(b) of the 1988 Act).
30. In the case of *Govan Housing Association v Thomas Kane (A763/01)* at Glasgow Sheriff Court (6 July 2001), Sheriff Johnston (in his Sheriff's Note) described a notice to quit as "a fundamental and important document for the purposes of recovery of heritable possession".
31. In terms of section 55(3) of the 1988 Act, "where two or more persons jointly constitute...the tenant in relation to a tenancy, then, except where otherwise provided, any reference in this Part of this Act to... the tenant is a reference to all the persons who jointly constitute...the tenant, as the case may require." The relevant "Part of this Act" is "Part II". Part II of the 1988 Act includes section 33.
32. Clause 17 of the schedule of terms and conditions which forms part of the Tenancy Agreement states that "Should the subjects be occupied by more than one Tenant then each Tenant shall be jointly and severally liable for payment of all rent, rates and any other charges relative to the property." This clause relates only to obligations of the tenants under the Tenancy Agreement to make certain payments. Furthermore and whilst this would not be definitive in a residential tenancy situation, there is no provision in the Tenancy Agreement regarding the service of notices on one of the two tenants being valid service on both or that one tenant was nominated as agent of the other to receive notices.
33. In light of the significant legal consequences of a notice to quit, it is essential that a landlord takes the necessary steps in order properly to serve the notice to quit on a tenant.
34. Therefore, in light of section 55(3) of the 1998 Act and in the interests of fairness and ensuring that each tenant has proper notice of the potential termination of the tenancy and the potential need to seek legal advice, it is necessary to serve the notice to quit on each of the Respondent and Andy Law individually and separately.
35. Accordingly, the Notice to Quit required to be served on both the Respondent and Andy Law and the Tribunal required evidence that this had been done by one of the permitted methods of service. This evidence was not provided in respect of service on the Respondent.
36. Furthermore, even if a valid notice under section 33(1)(d) of the 1988 Act (and a valid notice to quit) had been properly served on the Respondent (which had not

happened), it would not be competent to grant an order of possession against the Respondent alone, being only one of the “persons who jointly constitute... the tenant” (as referred to in section 55(3) of the 1988 Act). If the Tribunal were to be satisfied that the four formal requirements set down in section 33(1) of the 1988 Act, which required to be met before an order for possession on termination of a short assured tenancy should be granted, any order for possession would require to be granted against both the Respondent and Andy Law. However, the application in respect of Andy Law had not been processed (as referred to in paragraph 12 above). As a result, Andy Law had not been made aware of the application for an order for possession against him, had not been served with any documentation, had not been invited to provide written representations and had not been given notice of the CMD. Accordingly, it would not be in the interests of justice nor competent to grant any order of possession against him at the CMD.

Decision

37. For the reasons set out above, the Tribunal determined that the order for possession at the termination of a short assured tenancy in relation to case reference FTS/HPC/EV/18/0666 be refused

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.

PAMELA WOODMAN

Legal Member/Chair

29 May 2018

Date