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 33 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/22/1458

Re: Property at 2 Beech Terrace, Larkhall, ML9 2LX ("the Property")

Parties:

A & N Residential Properties Ltd, Unit D, Block 9, South Ave, Blantyre, G72 0XB ("the Applicants")

Mr Derek Burns, 2 Beech Terrace, Larkhall, ML9 2LX ("the Respondent")

Tribunal Members:

Rory Cowan (Legal Member) and Frances Wood (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be refused.

- Background

By application dated 17 May 2022, the Applicants sought an Order for Possession relative to the Property in terms of section 33 of the Housing (Scotland) Act 1988 (the Application). With the Application, the Applicants, through their representatives, lodged various supporting documents including:

1) Copy lease dated 6 October 2017;
2) Copy AT5 dated 6 October 2017;
3) Notice to Quit and Section 33 notice dated 21 December 2021 along with recorded delivery receipt and proof of delivery; and
4) Statement of arrears.

Following acceptance of the Application, a Case Management Discussion (CMD) was fixed for 13 September 2022 to be heard by way of conference call. Prior to the CMD the Applicants, through their representatives lodged further documents by email dated 5 August 2022.

- The Case Management Discussion

The Applicants were represented by a Mr Munro of GBS Lets Limited of 8 Union Street, Larkhall. The Respondent did not appear, nor was he represented. Despite this, the Tribunal was satisfied that he was aware of the date of the CMD, that the matter could be dealt with in his absence if he did not attend and the procedure had been fair. Service of the Application had been carried out by Sheriff Officers on 29 July 2022 and the Tribunal decided that the CMD could proceed in his absence.

At the CMD the Tribunal raised a preliminary issue of competency with Mr Munro. The issue related to whether the underlying tenancy was a short-assured tenancy. In particular, the Tribunal sought to be addressed on whether the initial term of the tenancy was for a period of "not less than 6 months" as required by section 32(1)(a) of the Housing (Scotland) Act 1988. It was noted that this was not something that had been raised with the Applicant prior to the CMD and Mr Munro was given the opportunity, as a matter of fairness, to seek a continuation of the CMD to consider the preliminary issue and to take legal advice on the issue if required. It was explained that, even though the Respondent had not appeared, as this was a matter of competency, it was something the Tribunal required to consider. It was explained that, if the underlying tenancy was not a short-assured tenancy, the Applicants could not rely upon section 33 as a basis for recovery of possession and the Tribunal could not grant the order sought.

Mr Munroe decided that he would not seek a continuation of the CMD to consider matters or to take legal advice and asked for the matter to be determined at the CMD. It was explained that, whilst there were a number of "hurdles" the Applicants needed to get over, if the underlying tenancy was not a short-assured tenancy, then the Tribunal would not require to go on to consider whether the Applicants had complied with the requirements of section 33 of the 1988 Act and whether it would be reasonable to grant an Order for Possession in the circumstances of the case. It was explained that, if the decision was that there was a short-assured tenancy, then he would be given the opportunity to make further submissions on such matters as appropriate.

Mr Munroe went on to submit that his company had submitted previous applications to the Tribunal for Orders for Possession under section 33 of the 1988 Act and these had been granted previously with the same or similar formulation of the initial term. He referred to a CMD that had taken place on 25 August 2022 where, it was claimed, the lease had been constructed in the same way and the tribunal on that occasion had granted the application. He stated that this Tribunal should look at the Application in the same way so that it was dealt with "fairly". He felt that there was a "precedent set". He also stated that, as the Application had gone through the sifting process, the Tribunal had had plenty of time to raise this issue prior to the CMD. He stated that setting up their leases in this way had been their practice. He stated that the "natural interpretation" for the lease would mean that it was for a 6 month term and that the Respondent, when he signed the lease, had not stated that the term was not 6 months and that he had also signed to acknowledge the form AT5. The Respondent, it was said, had thereby agreed to it being a short-assured tenancy.

The Tribunal thereafter adjourned for a short period to consider the Application and Mr Munroe's submissions. The CMD was thereafter reconvened, and the Application was refused.

- Findings in Fact and Law

1) The Applicants and the Respondent entered into a tenancy for the Property which "commenced on" 6 October 2017 and ended on 5 April 2018.

2) That this is a period of less than 6 months.

3) That the tenancy created on 6 October 2017 is not a short-assured tenancy.

4) That the Applicants are therefore not entitled to seek possession of the Property in terms of section 33 of the Housing (Scotland) Act 1988.

5) That the Application should therefore be refused.

- Reasons for Decision

The starting point for consideration of the Application was that, in order to rely upon section 33 of the 1988 Act as a basis for recovery, the underlying tenancy required to be a short-assured tenancy (SAT). A SAT is a creation of statute and not one of contract. It therefore matters not how the tenancy created is described in a written document, if it does not comply with the statutory requirements for a SAT, it is not a SAT. The requirements for the creation of a SAT were set out in section 32 of the 1988 Act and, paraphrasing they are an assured tenancy:

1) Which is for a term of not less than 6 months; and
2) For which the prescribed form (AT5) is served on the prospective tenant before the creation of the tenancy in question.

Whilst not part of the discussion at the CMD, there appeared to be no issue with the form AT5 lodged in support of the Application. The question was whether the initial; term, as expressed in the lease, was for a term of "not less than 6 months".

The initial term of the tenancy in question was expressed in clause 3 of the lease dated 6 October 2017 as follows:

"*The tenancy will commence on: 6th October 2017*

and will end on: 5th April 2018"

Mr Munro agreed that, in order for this period to be 6 months, the whole of the first day required to be included in the calculation of the initial term. It was his position that it was and therefore the term was for 6 months.

Whilst the Tribunal had considerable sympathy for the position of the Applicants, this was not a position the Tribunal could accept.

The calculation of the initial term, in the view of the Tribunal falls to be interpreted with reference to the general rule that time is to be calculated *de diem in diem* with reference to the aid to construction *civilis computatio.* In short, that operates to exclude fractions of days from the calculation of the term of a lease. Whilst it is perfectly permissible for the parties to contract for some other method of calculation of time to be used (McCabe v Wilson 2006 Hous. L.R. 86), that is something that has to be expressed in the lease itself or, at very least implied from its terms.

The question that the Tribunal wrestled with was whether there was anything in the lease that would either expressly include the first day (6 October 2017) or at very least something that would allow that implication to be drawn. In both cases, the answer was in the negative. The formulation of the words used in the lease were that the term of the lease "commenced on" 6 October 2017. The use of "on" suggests that entry can be taken at any time during that day. Had some other formulation of words been used, for example "at" that may have led to an implication that entry was at the beginning of that first day (Calmac Developments Limited v Murdoch 2012 WL 3062547). There was no express statement that the term would be for 6 months. If it had, the only basis this could be correct with the dates specified in the lease, would be if the whole of the first day had been included. All in all, the Tribunal was of the view that there was nothing in the lease that would allow them to find that the application of *civilis computatio* had been excluded for some other method of calculating the term, for example *naturalis computatio*.

In making this decision the Tribunal recognises the consequences that may be felt by the Applicants and, whilst they have sympathy for their circumstances, as the issue was fundamentally one of competency, it was not something that could be ignored.

There being no reason to go on to consider issues of the compliance with the requirements of section 33 of the 1988 Act or address any questions of reasonableness, the Tribunal invited no further submissions and offers no formal views in relation to same.

- Decision

The Application is refused.

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

V.

Prom R. Cowan

Member/Chair **Date 13 September 2022**