

Rent Assessment Committee: Summary reasons for decision.**Housing Act 1988****Address of Premises**

21a Brunswick Road
Shoreham-by-Sea
West Sussex BN43 5WA

The Committee members were

Ms J A Talbot MA (Cantab.)
Mr A O Mackay FRICS
Mrs J Morris

1. Background

On 17/08/2004 the tenant of the above property referred to the Committee a notice of increase of rent served by the landlord under section 13 of the Housing Act 1988.

The landlord's notice, which proposed a rent of £125.00 per week with effect from 18/08/2004, is dated 01/07/2004.

There was some dispute about the legal status of the tenancy. The tenant's case was that she had an oral weekly periodic assured tenancy that arose by default when she moved in, in August 1996. The landlord's case was that this tenancy had been terminated, or surrendered, and that a fresh assured shorthold tenancy had commenced on 18 January 1999 between the tenant and her former landlord, upon signing a new assured shorthold tenancy agreement.

This issue was considered by the Committee as a preliminary matter, because of the effect on the Committee's jurisdiction in this case.

2. Inspection

The Committee inspected the property on 05/11/2004 and found it to be in fair condition.

The property consists of a self-contained first floor flat above shop premises, occupying a corner position at the junction of Brunswick Road and Western Road close to Shoreham Station and the main road. The property has solid walls rendered and painted, under a pitched slated roof. The windows are replacement UPVC and double glazed. Externally the property is in reasonable condition.

Internally the property is accessed through a street side door, though a small paved courtyard area and up an iron staircase. The accommodation comprises a double-aspect living room, bedroom, kitchen and bathroom/WC. Attached to the bedroom is a small ensuite shower which has not worked since the tenant moved in. The kitchen and bathroom fittings are dated and basic with some defects, e.g. poorly fitting kitchen sink, damaged kitchen units and missing bath side panel. All white goods and furnishings belong to the tenant, apart from an integral hob in the kitchen, and the floor coverings.

The property has central heating. The electrical wiring was poor with some insecure power points. There was no evidence of damp, apart from some bubbling to the interior wall surface in the hallway near the door, under a flat roof, but at the inspection this area was not wet to the touch.

3. Evidence

The committee received written representations from the landlord and tenant and these were copied to the parties.

A hearing was held on 05/11/2004 in Brighton at which oral representations were made by and on behalf of the landlord and tenant. The tenant was represented by Ms Sue Stevens of Adur District Council. The landlord was represented by Mr Robert Simon, solicitor.

The status of the tenancy

The Committee first heard evidence from both parties on the status of the tenancy.

It was agreed between the parties that the tenant, Ms Urwin-Mann, first moved in to the property in early August 1996, under a verbal agreement with her former landlord, Mrs Cheryl Gumbrell, who was a family friend. In the absence of any documentation, in particular any notice under S.20 of the Housing Act 1988, this tenancy was, by default, a weekly periodic assured tenancy. The rent was £70.00 per week, which Ms Urwin-Mann normally paid in cash every week to Mrs Gumbrell on Mondays.

Subsequently, during 1998, Mrs Gumbrell entered into negotiations to sell the freehold interest in the property, both the shop premises and the flat above, to the current landlords, Susan Ellman Baker and trustees of Zoe Ellman-Brown and David John Ellman-Brown. These negotiations were handled by Mr Darren Baker, who is related to the landlords, and is a chartered surveyor now occupying the shop premises.

At that time, both the prospective new landlords and Mrs Gumbrell were represented by solicitors, Wannop & Fox and Simon & Co respectively, but Ms Urwin-Mann was not, neither was it suggested by either firm of solicitors that she should seek independent legal advice. Mr Simon acknowledged that it would be good practice to recommend to an unrepresented lay tenant in such a situation that he or she should seek such advice.

Ms Urwin-Mann gave evidence that she heard about the proposed transaction from Mrs Gumbrell, who wrote to her on 2 December 1998: "as notice that your tenancy will end on 18 January 1999", and further, "that the buyers are prepared to offer you a new formal Assured Shorthold Tenancy Agreement but they would need to know that you had left the property and had waived any rights that you may have had before you sign up to a new Assured Shorthold Tenancy Agreement". The proposed rent under the new tenancy agreement was to be £95.00 per week.

Ms Urwin-Mann replied on 9 December stating: "I am writing to confirm my receipt and acceptance of this [notice]" and that she could not afford the proposed rent of £95.00 per week, especially as her rent had only recently been increased to £80.00.

In her oral evidence, Ms Urwin-Mann said that she did not understand what Mrs Gumbrell had meant by waiving her rights, and that she was unaware of her assured tenancy status, or of the effects of signing a new assured shorthold tenancy on her security of tenure. She had just wanted to keep her home at a rent she could afford. She did not intend to terminate her existing tenancy, or to move out. She was also worried that she had no documents in relation to her tenancy, and she wanted to help out Mrs Gumbrell, whom she trusted as an old family friend, so essentially she did what Mrs Gumbrell asked. She did not think of taking advice at the time.

Therefore, when she was offered a new tenancy agreement by Mrs Gumbrell at the existing rent £80.00, she signed it. Mrs Gumbrell wanted her to move out and then move back in again, before signing the agreement, but this proved to be impractical, so on the day she gave Mrs Gumbrell a spare key, kept her own key, went to work as normal, came back, signed the agreement and the spare key was returned. Ms Urwin-Brown said in evidence that she did understand why she had to do this. Mrs Gumbrell had not explained it to her but said: "Just do it for me, I know it's silly".

Ms Stevens, in her legal submissions, argued that Ms Urwin-Mann was still an assured tenant, and that the assured shorthold tenancy agreement was invalid, because generally, the original tenancy status cannot be varied by a contract subsequently signed. She further contended that Ms Urwin-Mann's security of tenure was protected by S.19A and Schedule 2A Housing Act 1988 (inserted by S.96 and Schedule 7 Housing Act 1996), which provided that where a tenancy is granted after 27 February 1997 to someone who immediately before its grant was an assured tenant, and is granted by someone who was the landlord under the old tenancy, then the new tenancy cannot be an assured shorthold, but will remain assured.

Ms Stevens contended that the only way that Ms Urwin-Mann could have become an assured shorthold tenant in January 1999 would have been for her to serve a statutory notice on Mrs Gumbrell to that effect; Ms Urwin-Mann had not done this.

Mr Simon, on behalf of the landlord and Mr Baker, explained that the idea of granting an assured shorthold tenancy to Ms Urwin-Mann came from the purchasers' solicitors, Wannop & Fox. Mr Simon was at that time acting for Mrs Gumbrell, the

vendor. The purchasers were aware that Ms Urwin-Mann had an assured tenancy of the flat. The aim of the deal was to put matters on a footing that was more favourable to the purchasers in terms of security of tenure and rent, and for the vendor to obtain a more favourable price on the basis of a sitting tenant with an assured shorthold rather than an assured tenancy. Mr Baker added that if they had not been able to reach agreement with Ms Urwin-Mann on the rent, then she would have had to leave, although he did not explain how this would have been achieved.

Mr Simon said that the solicitors were aware of the difficulty in changing the assured tenancy to a shorthold. There was correspondence between the solicitors as to the correct method. Their intention was that Ms Urwin-Mann should give up the property, move out briefly, and then sign the new agreement. In the end, she did not move out because of the inconvenience, and instead, the purchasers and Mrs Gumbrell were accommodating to the tenant by allowing a more informal arrangement to take place, namely, the handing in of the key for one day. Everything was done to ensure that there was a break between the two events, i.e. the ending of the assured tenancy and the commencement of the assured shorthold.

Mr Simon contended that the legal effect of Mrs Gumbrell's letter of 2 December 1998 and Ms Urwin-Mann's reply of 9 December, was to terminate the assured tenancy. Either the tenant's letter was a tenant's notice to terminate, or, by the tenant's acknowledgment of Mrs Gumbrell's notice, the assured tenancy ended on 18 January 1998 just before the signing of the new assured shorthold agreement.

Alternatively, Mr Simon argued that the tenant's actions, including giving Mrs Gumbrell a key, amounted to a surrender of the assured tenancy and a re-grant of the new assured shorthold. This confirmed the landlord and tenant's intention that things would change and that the new agreement would confer different rights.

Mr Simon contended that the assured shorthold tenancy was valid despite the provisions of Schedule 2A Housing Act 1996, because the intention of the purchasers and vendor's solicitors was that there should be a clear break between the old assured and the new assured shorthold tenancy, and that Mrs Gumbrell wanted the sale of the freehold to go ahead on that basis.

Valuation Evidence

The Committee then heard evidence as to the open market rent for the property.

Mr Baker gave evidence based on his own experience as a chartered surveyor and letting agent and put forward the following comparables in support of the market rent sought for the subject property of £125.0 per week. The comparables were mainly one bedroomed flats, all in Shoreham, all unfurnished, and all at achieved rents rather than asking rents:

22 Corbyn Crescent: a first floor flat in a council type estate and mainly commercial area, close to the subject property but with smaller rooms, at £127 per week;

1 Doveley's Court, Riverside Road: on Shoreham Beach, a ground floor flat in an older style 1930's block, dated interior fittings, with 2 reception rooms and garage, at £137 per week;

1 Chatsworth Court, Riverside Road: a ground floor flat in a purpose-built 1980's block, in good order, at £150 per week;

8 Brooklands, New Salts Farm Road: on the A259 coast road near Shoreham Airport, a 1980's converted building of 8 flats with communal gardens, at £134 per week;

6 Dolphin Mews, Dolphin Road: near Corbyn Crescent, a ground floor flat in a 1980's block near the railway, at £127 per week;

10 Swanborough Court, New Road: a first floor flat near the town centre, 1960's style block, no central heating, historic let at £123 per week but would now fetch £127;

23 Glebelands Close: a one-bedroomed bungalow, to the east of the town centre in a residential area near to shops, at £134 per week;

8 The Vinery: a purpose built studio flat, 200 yards from the subject property, above estate agents shop premises, at £110 per week.

In reply to questioning from the Committee, Mr Baker said that the flats built in the 1980's and 1990's would have better quality, more modern fixtures and fittings, whereas Doveley's Court and Swanborough Court would be dated and age-worn, like the subject property. He confirmed that demand for one-bedroomed flats was high because Shoreham was more affordable than nearby Brighton & Hove, but only 15% of flats in the private sector were of that size.

Ms Urwin-Mann had not done any research on local properties, but had obtained copies of previous Rent Assessment Committee decisions on properties in Southwick, Worthing and Littlehampton. The determination for 32 Old Shoreham Road, Southwick, a 3 bedroomed house, was significantly lower than her current rent, at £295.00 per month. The other determinations were also cheaper. She thought that her flat was in worse condition than the comparables and contended that her flat would not be lettable in its current state.

4. The Decision

(a) The status of the tenancy

The Committee had no hesitation in deciding that the original tenancy was an oral weekly periodic assured tenancy commencing in August 1996, and that the rent day was a Monday. This had been agreed by the parties.

The Committee then considered whether a valid assured shorthold tenancy had been created on 18 January 1999, and reviewed the legal position. First, the Committee accepted the general overriding principle, established both under the Rent Act 1977, Housing Act 1988, and in case law, that there can be no contracting out of statutory protection. An assured tenancy could only be brought to an end in the manner authorised by that Act, and S.5 set out the scheme for security of tenure. There were also the anti-avoidance provisions contained in S.19A Housing Act 1996 and Schedule 2A Housing Act 1988 outlined above, that a tenancy entered into after 28 February 1997, would be an assured shorthold, unless it fell into one of the exceptions listed in Schedule 2A.

The Committee further accepted that, where a previous assured tenancy had been effectively terminated or surrendered before the grant of the new assured shorthold tenancy, then the anti-avoidance provisions would not apply. However, given the presumption that there can be no contracting out of statutory security, the Committee would have to be satisfied that there had indeed been a genuine, effective termination or surrender, for this presumption to be rebutted.

The Committee concluded that the actions of the tenant and the former landlord, Mrs Gumbrell, in their correspondence in December 1998 and the signing of the tenancy agreement of 18 January 1999, did not amount to an effective termination or surrender of the assured tenancy, and that therefore, the assured shorthold tenancy was invalid, and the tenant's original assured tenancy status subsisted.

The Committee reached this conclusion for the following reasons. First, it did not accept that Mrs Gumbrell's letter of 2 December 1988 terminated the assured tenancy. As a matter of law, under S.5 Housing Act 1988, an periodic assured tenancy cannot be terminated by a landlord's notice to quit, but only by a court order based on a ground for possession. Any attempt by the landlord to end a tenancy must be preceded by service of a notice seeking possession under S.8 Housing Act 1988 claiming a ground for possession under Schedule 2 of the 1988 Act, followed by possession proceedings and a court order. This had not happened. Mrs Gumbrell's letter therefore was of no legal effect.

Secondly, the Committee did not accept that Ms Urwin-Mann's letter of 9 December constituted either a tenant's notice to quit, or a surrender. A tenant's notice to quit must comply with common law and statutory requirements, which this letter did not. It did not in any way give 28 days notice of any clear intention to end the tenancy. The letter simply purported to accept Mrs Gumbrell's notice, but as the landlord's notice was ineffective, then any acceptance was also of no effect.

The Committee also concluded that the tenant's letter was not an express surrender. An express surrender must be in writing, and explicitly state an immediate intention that the tenancy should come to an end. Ms Urwin-Mann's letter simply did not do this. It was mainly concerned with the fact that she could not afford the proposed new rent of £95 per week. The Committee took the view that this correspondence had only arisen in the context of an attempt by Mrs Gumbrell and the purchasers to engineer a situation whereby a new assured shorthold tenancy could be brought about.

The Committee then considered whether, by the conduct of the landlord and tenant, there had been an implied surrender by operation of law. Again, it concluded that there had not. The Committee reminded itself that, for there to be an implied

surrender, the landlord and tenant must have behaved in an unequivocal way which is inconsistent with the continuation of the tenancy.

In this case, the most Ms Urwin-Mann had done, was to give Mrs Gumbrell a spare key and then sign the new agreement. She had not, in the event, moved out and moved back in to the property. The key she had given Mrs Gumbrell was only a spare key. She had kept her own key, gone to work and come home in the usual way. Most importantly, she had not understood the effect of what she was doing.

The Committee concluded that the giving of the spare key was merely a device, arranged by the solicitors for the vendor and purchaser, in an attempt to make valid the purported assured shorthold tenancy. Whilst it was easy to understand the deal between the purchaser and vendor, and the benefit to them of the increased purchase price and reduced security of tenure for the sitting tenant, it was hard to see how there could be any benefit to the tenant; on the contrary, it was intended that she should give up her security of tenure, when in fact any purchaser, as a matter of law, would have had to purchase the freehold subject to her existing assured tenancy.

The Committee particularly noted that neither solicitor had suggested to Ms Urwin-Mann that she should take independent legal advice on her position; had she done so, the Committee took the view that she would almost certainly have been advised not to sign the assured shorthold tenancy agreement, and that she was, and would continue to be, an assured tenant.

The Committee further concluded that at no time had Ms Urwin-Mann clearly or unequivocally, either in writing or by her conduct, expressed an intention to terminate or surrender her assured tenancy, or fully understood the legal implications of signing the assured shorthold tenancy agreement. The Committee accepted Ms Urwin-Mann's evidence, that her intention had been to help Mrs Gumbrell and to keep her home at an affordable rent.

The Committee therefore took the view that the original assured tenancy had been neither terminated nor surrendered, and thus continued to exist. The assured shorthold tenancy was invalid and of no effect. Moreover, in any event, the anti-avoidance

provisions applied, so that the purported agreement signed between Mrs Gumbrell and Ms Urwin-Mann, as landlord and assured tenant, could not take effect as an assured shorthold tenancy.

In summary, for these reasons the Committee decided that Ms Urwin-Mann remained a weekly periodic assured tenant under the assured tenancy entered into in August 1996, and that the rent day was a Monday.

(b) Jurisdiction under SS.13 and 14 Housing Act 1988

In accordance with the terms of S.13 Housing Act 1988, the Committee then had to decide whether it had jurisdiction to make a determination on the market rent. To make this decision, the Committee considered the validity of the Notice served by the landlord, and concluded that it was defective, for the reasons set out below.

Section 13(2) permits the landlord to secure an increase of rent under an assured tenancy within S.13(1) by serving a Notice on the tenant in a prescribed form, proposing a new rent to take effect at the beginning of a new period of the tenancy specified in the Notice. Where there is a weekly periodic tenancy, which is the case here, the effective date of the proposed increase must not be earlier than one month after the service of the Notice.

The Notice must specify the new rent and the date from which it is to take effect, which must be the beginning of a new period of the tenancy. In this case, of a weekly periodic assured tenancy, with the rent day being Monday, the date from which the new rent is to take effect must also be a Monday.

The Committee noted that the Notice in this case is dated 10/07/2004, specifying the new rent to take effect from 18/08/2004. This is consistent with the landlord's reliance on the purported assured shorthold tenancy, where the period of the tenancy begins on the 18th of each month. However, 18th August 2004 was a Wednesday, and the Committee having decided that the rent day of the assured tenancy was a Monday, the proposed effective date of increase of rent is incorrect, as 18/08/2004 is not the beginning of a new period of the tenancy. The Notice is therefore defective.

(c) Market rent

It therefore follows that, because of the Committee's conclusions on the tenancy status and the invalidity of the S.13 Notice, it did not have jurisdiction in this case, and was unable to proceed further to determine the market rent for the property under S.14 Housing Act 1988.

As a result, unless or until the landlord serves a valid Notice complying with the requirements of S.13, as explained above, the Notice dated 10/07/2004 is of no effect and the proposed new rent sought by the landlord is irrecoverable. The rent therefore remains at the current level of £100.00 per week.

Chairman

J. T. O'Neil

Dated

23/11/04

This document contains a full statement of the reasons for the Rent Assessment Committee's decision. If either party requires extended reasons to be given, they will be provided following a request to the committee clerk which must be made within 21 days from the date of issue of this document.