**Decision** 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/19/0091**

**Re: Property at 39 Saltcoats Drive, Grangemouth FK3 9JR ("the Property")**

**Parties:**

**Mrs Shona McFadyen-Mungall, c/o Sandemans, 34 Union Road, Camelon, Falkirk FK1 4PG ("the Applicant")**

represented by Stephen Dickson, Sandemans, solicitors, 34 Union Road, Camelon, Falkirk FK1 4PG

**(1) Robert Mallon, and (2) Miss Annie McCabe, both residing at 39 Saltcoats Drive, Grangemouth FK3 9JR ("the Respondents")**

**Tribunal Member:**

**David Bartos (Legal Member)**

***Summary of Discussion***

1. **A case management discussion took place on 17 April 2019 at 11.30 a.m. at Wallace House, Maxwell Place, Stirling FK8 1JU. The Applicants were represented by Stephen Dickson of Sandemans, solicitors at the case management discussion. The Respondents appeared on their own behalf. No written representations had been received by the Tribunal from the Respondents.**

2. **The following facts were not in dispute between the parties:**

(i) **The Applicant is owner of the Property under title number STG54652. The Respondents have been tenants of the Property since 2005. There has been an annual practice where the Applicant sent to each Respondent a lease for a short assured tenancy of the Property.**

(ii) **At or shortly before the beginning of August 2017 the Applicant sent to each Respondent a form headed 'Short Assured Tenancy'. The forms bore to be offers from the Respondent in question to the Applicant to rent**

the Property from the Applicant. The offers in the forms were dated 28 August 2017. The offers were stated to be on certain conditions. In condition (1) the term of the proposed tenancy was stated to be from 28 August 2017 to midnight on 27 August 2018.

(iii) In condition (7) of the forms the Respondent in question acknowledged that he or she had been given notice that the tenancy would be a short assured tenancy in terms of section 32 of the Housing (Scotland) Act 1988 and that the Applicant would require possession of the Property at the termination of the tenancy.

(iv) The First Respondent signed his form on 6 August 2017. The Second Respondent signed her form on 28 August 2017. They then sent the signed forms to the Applicant.

(v) The Respondents kept copies of the forms which they also signed.

(vi) At the end the forms they contained the statement "ACCEPTANCE: I/WE HEREBY ACCEPT THE FOREGOING OFFER". The Respondents did not receive any signed acceptance of the forms from the Applicant.

(vii) Together with the forms each Respondent had received a document with the heading "NOTICE IN TERMS OF SECTION 32 OF THE HOUSING (SCOTLAND) ACT 1988". These documents were not in the statutory AT5 Form. They were dated 28 August 2017. Acknowledgement of their receipt and understanding of their terms was given by the First Respondent's signature dated 6 August 2017 and the Second Respondent's signature dated 28 August 2017.

(viii) The Respondents sent the signed notices to the Applicant. They also kept copies of the notices which they also signed.

(ix) Prior to the receipt of the forms the rent was £ 250 per month from each Respondent, totalling £ 500 per month for the Property. This did not change following the sending of the forms.

(x) The Respondents have been resident in the Property since 2005. They continue to reside in the Property.

(xi) On 15 August 2018 the Respondents received from the Applicant an e-mail. The e-mail is referred to for its terms. It notified the Respondents that the Applicant sought to increase the rent to £ 600 per month. It also indicated that while the Applicant had expressed happiness to allow the Respondents to remain in the Property as long as it remained convenient for them, she was contemplating selling the Property.

(xii) On 21 August 2018 the Applicant's solicitors Sandemans wrote to the Respondents. Their letter is referred to for its terms. It was received by the Respondents. In their letter they reiterated the Applicant's request for a rent increase and asked for confirmation from the Respondents on

whether they intended to remain in the Property "after the tenancy expires on the 28th August this year".

(xiii) The letter also stated : "You will be aware that should you reside within the property after August 28th 2018 without a valid tenancy agreement, our client will be at liberty to take potential action to remove you from the property.".

and "We would advise that your notice of intentions need not be in writing and we would be obliged if given the limited time scale contact us [*sic*] by telephone or email.".

(xiv) On 18 October 2018 the Respondents received a notice from Applicant's solicitors Sandemans on behalf of the Applicant given under section 33(1) of the 1988 Act. The notice complied with the requirements of section 33.

(xv) On 18 October 2018 the Respondents received a notice to quit from the Applicant's solicitors Sandemans on behalf of the Applicant. It required the Respondents to remove from the Property by 19 December 2018.

3. The Applicant's representative submitted that the Respondents were occupying the Property by virtue of the short assured tenancies contained in the forms and that the requirements of section 33(1) of the 1988 Act for the removal of the Respondents had been satisfied.

*The Tenancies*

4. The Tribunal raised with the representative the question of whether the Respondents' offers in the forms signed and sent by the Respondents had been accepted by the Applicant.

5. Mr Dickson submitted that as the forms had been sent by the Applicant to the Respondents, upon signature by the Respondents they should be seen as acceptances by the Respondents rather than as offers by the Respondents. He was however unable to reconcile this with the wording of the forms which set them up as being Respondents' offers to the Applicant rather than the Applicant's offers to the Respondents.

6. He then sought to rely on acceptance of the forms by the Applicant through her actings. However he was unable to point to any actings by her which indicated acceptance of the Respondents' offers in the forms.

7. Mr Dickson proceeded on the basis that one way or another the signed forms represented tenancies binding on the Applicant and Respondents.

*Tacit Relocation (automatic re-lease)*

8. **Turning to section 33(1) of the 1988 Act he submitted that the ish of the tenancies was on 27 August 2018 and it had been reached. Tacit relocation was no longer operating. He submitted that the tenancies had come to an end on midnight 27 August 2018 and had not tacitly relocated on that date.**

9. **Mr Dickson accepted that to exclude tacit relocation on that date he could not rely on the Notice to Quit that had been served on 18 October 2018. Instead he relied on the e-mail dated 15 August and the letter dated 21 August both 2018.**

10. **He submitted that as a matter of law** "any overt indication by either party they he does not consent to the prolongation of the lease is sufficient to exclude tacit relocation". **This he took from a remark of Lord Justice-Clerk Gill in the decision of the Inner House of the Court of Session in *Dundee City Council v. Dundee Valuation Appeal Committee* [2011] CSIH 73 at paragraph [17].**

11. **He also relied on the case of *Smith v. Grayton Estates Limited* 1960 S.C. 349 where at page 354 Lord President Clyde said :**

    "[Tacit relocation] is the prolongation each year of the tenancy for a further year if the actings of the parties to the lease show that they are consenting to this prolongation. For as in all contracts, a tacit relocation or reletting must be based on consent. In the case of tacit relocation the law implies that consent if all parties are silent on the matter."

12. **He submitted that the e-mail from the Applicant or the letter from her solicitors indicated that the landlord was not silent on the matter of prolongation and that these documents amounted to an overt indication of a lack of consent by the Applicant to the prolongation. He submitted that the indication of lack of consent could be shown at any time up to the ish so the actions of the Applicant 6 days before the ish could suffice to exclude tacit relocation.**

13. **The Tribunal put to the Applicant's representative certain passages from Erskine's Institute of the Laws of Scotland (written in the 18th century) , namely:**

    "The consent of both parties for thus continuing the lease [by automatic prolongation on the same conditions] is, by our usage, inferred from the concurrence of these two negatives, the proprietor not executing a warning or intimation against the tenant to remove, and the tenant not renouncing or giving up the possession to his landlord in proper time; and therefore the tacit relocation is broken or interrupted, when either the proprietor warns the tenant or the tenant renounces his possession." **(Book 2, Title VI, Paragraph 35)**

    "Little ceremony was observed some centuries ago in the removing of tenants. The landlord came to the door of the tenant's house at any time of

> the year wherein the tack [tenancy] was to expire with a wand in his hand, which having broken in two as evidence of his resolution to put an end to the tack, he warned the tenant verbally to remove at the ish; and if the tenant did not then remove voluntarily, the landlord might the very next day have ejected him with his family and goods *via facti.*" **(Book 2, Title VI, Paragraph 45)**
>
> "In these [properties] e.g. dwelling-houses, that have no connection with a rural tenement [property], it is sufficient that the tenant be warned to remove forty days before the ish of the lease . . ."
> **(Book 2, Title VI, Paragraph 47)**

**14. Certain statutory provisions were also put to the Applicant's representative :**

> "No notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of this Act) as a dwelling-house shall be valid unless it is in writing and contains such information as may be prescribed and is given not less than four weeks before the date on which it is to take effect."
> **(Rent (Scotland) Act 1984, section 112)**

**He was also referred to The Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988 which set out information prescribed by virtue of section 112 that had to be included in a notice to quit from a dwellinghouse.**

**15. The Applicant's representative submitted that the Applicant had executed a warning or intimation to the Respondents in the e-mail or letter form August. At that time tacit relocation had been broken. He accepted that both e-mail and letter were sent within 2 weeks before the ish. He accepted that this was less than 40 days before the ish and indeed less than 4 weeks before the ish. He also accepted that neither document had included the prescribed information under the 1988 regulations.**

**16. Accepting these facts, nevertheless he submitted that in effect the 40 day period and section 112 of the 1984 Act were overridden by the observations in the *Dundee City Council* and *Smith* cases. He did this while accepting that in *Dundee City Council* the tacit relocation had been apparently excluded by the tenant removing from the property at the ish and in the *Smith* case it had been excluded by one of two tenants serving a notice of renunciation (intention to quit) ahead of the 40 day period and in valid form.**

**17. The Respondents heard the discussion between the Tribunal and the Applicant's representative but had no further submission to make on the issue of tacit relocation.**

**18. The Tribunal found that it was able to make sufficient findings in fact and that to do so was not contrary to the interests of the parties. It was**

therefore able to decide the case at the case management discussion without a hearing.

19. The Tribunal assumed, without deciding, that there were two non-exclusive short assured tenancies between the Applicant and the Respondents in terms of the forms that they had signed and sent in 2017. On this basis the Tribunal assumed, without deciding, that the ish in the tenancies was 27 August 2018.

20. On the basis of the passages in Erskine quoted above, for tacit relocation at the ish to occur, two negatives must occur, namely :
    (1) A landlord not executing a warning or intimation against the tenant to remove; and
    (2) the tenant not renouncing the tenancy at the proper time and not removing from the let property at the proper time.

    For a residential tenancy a landlord's warning or intimation must be one executed 40 clear days before the ish date, must be in writing, and must contain the information prescribed in the 1988 Regulations. The "notice to quit" reference in section 112 of the 1984 Act was a reference to the warning or intimation to remove. The two concepts are the same.

    Put the other way, if a landlord executes the warning in the appropriate form and in the appropriate time or a tenant removes at the ish, or the tenant gives a notice of renunciation (intention to quit) in the appropriate form and time, tacit relocation is broken and the tenancy comes to an end at the ish.

21. In *Dundee City Council*, it appeared that the tenant had removed at the ish. On that event tacit relocation appeared to be broken. In *Smith* one of two tenants had given notice of intention to quit timeously and in proper form. Again tacit relocation appeared to be broken. The observations of the judges must be seen in the context of the facts in those cases. The "overt indication by either party" of Lord Justice-Clerk Gill must be understood as meaning the absence of any one of the Erskine's negatives as read with any modern legislation. Equally the "silence of all parties" of Lord President Clyde is to the presence of all of those negatives.

22. In neither case when their observations are read in context did either of these judges cast doubt on the propositions of law put forward by Erskine, nor on the subsequent statutory requirements in the 1984 Act and 1988 Regulations relating to residential tenancies. If the Applicant's submission made in the present case had been made to them, there is little doubt that it would have been rejected.

23. Applying the law for the break of tacit relocation to the facts of the current case, and assuming the ish to be 27 August 2018, the Tribunal took the view that the arguments by the Applicant founding on the e-mail or the letter to break tacit relocation were simply not tenable.

24. The e-mail did not even require the Respondents to leave the Property. It did not amount to a warning or notice to quit at all. Even had it amounted to a warning it had not been executed 40 clear days before the ish. It did not break the "silence". Nor did it amount to the necessary "overt indication" to break tacit relocation in this case.

25. The letter could be interpreted as imposing a warning to or notification on the Respondents to leave the Property at the ish. However it did not contain the provisions required by the 1988 Regulations. In its terms it did not amount to a valid notice to quit. In addition it had been sent by post a mere 4 clear days before the ish, never mind the 40 clear days required. Again the letter did not break the "silence" to prevent tacit relocation.

26. It followed that the Applicant would not be able to satisfy one of the requirements for repossession in section 33(1)(b) namely that tacit relocation was not operating. For that reason, and leaving aside the question of whether the 2017 forms represented the tenancy agreements between the parties, the Tribunal refused the application. It could see no benefit to be gained from a further case management discussion which would only cause further delay.

*Outcome*

The First-tier Tribunal for Scotland (Housing and Property Chamber) refused the application reference number FTS/HPC/EV/19/0091.

*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 this decision was sent to them.

NOTE: This document is not confidential and will be made available to other First-tier Tribunal for Scotland (Housing and Property Chamber) staff, as well as issued to tribunal members in relation to any future proceedings on unresolved issues.

Mr David Bartos

17 April 2019

Legal Member Date