



**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/23/3509**

**Re: Property at 22U Melvaig Place, Maryhill, Glasgow, G20 8EZ (“the Property”)**

**Parties:**

**Mr Brian MacPhail, Mrs Joanne MacPhail, Hardenbrooks, Erray Road, Tobermory, Isle of Mull; Hardenbroks Erray Road, Tobermory, Isle of Mull, PA75 6PS (“the Applicant”)**

**Mr David Carrion Aleman, Miss Paloma Rodriguez Sanchez, 22U Melvaig Place, Maryhill, Glasgow, G20 8EZ; 22U Melvaig Place, Maryhill, Glasgow, G20 8EZ (“the Respondent”)**

**Tribunal Members:**

**Graham Harding (Legal Member) and Sandra Brydon (Ordinary Member)**

**Decision**

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

**Background**

1. By application dated 26 September 2023 the Applicants’ representatives, Aberdein Considine, Solicitors, Aberdeen, applied to the Tribunal for an order for possession of the property in terms of Section 33 of the Housing (Scotland) Act 1988 (“the 1988 Act”) as the tenancy had reached its ish. The Applicants’ representatives submitted a copy lease, copy AT5, copy Notice to Quit and Section 33 Notice, a joint statement from the Applicants and a copy Section 11 Notice with evidence of service in support of the application.
2. By Notice of Acceptance dated 23 October 2023 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion (“CMD”) was assigned.

3. Intimation of the CMD was served on the Respondents by Sheriff Officers on 3 November 2023.
4. By emails dated 18 and 27 December 2023, 24 January, 26 February, 4 and 5 March 2024 the Respondents submitted written representations to the Tribunal.
5. A CMD was held by video link on 5 March 2024. The Applicants did not attend but were represented by Mrs Elder from the Applicants' representatives. Mr Aleman attended in person and represented the Respondents. The Tribunal identified the issues to be determined as:-
  - (a) Did the purported Short Assured Tenancy continue or was it replaced by a Private Residential tenancy?
  - (b) If not replaced by a Private Residential Tenancy was the Short Assured Tenancy properly constituted by service prior to execution of the tenancy agreement of an AT5?
  - (c) If procedurally valid Notices to Quit and Section 33 Notices have been served on the Respondents, is it reasonable in the circumstances to grant an order for possession?
6. The Tribunal continued the Application to an in-person hearing and issued Directions to the Applicant to provide further information as regards the costs associated with the property, the standard security over the property and any medical evidence the Applicants wished to rely on.
7. By emails dated 12 March, 1 and 24 May, 27 June, 24 July and 26 August the Respondents submitted further written representations to the Tribunal.
8. By email dated 24 April 2024 the Applicants' representatives submitted further written representations to the Tribunal in response to the Tribunal's directions.

### **The Hearing**

9. A hearing was held at Glasgow Tribunals Centre on 30 October 2024. The Applicants attended in person and were represented by Mrs Elder from the Applicants' representatives. Mr Aleman attended in person and represented the Respondents. He was supported by his son
10. Prior to the commencement of the hearing both parties submitted late productions to the Tribunal. The Tribunal agreed to accept the late productions.

### **Short Assured Tenancy/Private Residential Tenancy**

11. Mrs Elder submitted that the Short Assured tenancy remained in place and had not been replaced by a Private Residential tenancy. She said that the tenancy had been managed by Aberdein Considine from its commencement until June 2020 when the Applicants began managing the property themselves. Mrs Elder said that the Respondents did not want to deal with Aberdein Considine and that they had an issue with the company carrying out regular inspections.

12. Mrs McPhail said she had given Aberdein Considine notice that she would deal with the property herself. She said that Mr Aleman had said it would be quicker and easier to deal with matters. Mrs McPhail spoke of Mr Aleman showing interest in buying the property and that he had introduced her to a property company that used the property address and she thought it might have been a scam. In response to further questioning from Mrs Elder, Mrs McPhail confirmed that she had received an email dated 16 March 2020 from Mr Aleman containing a draft Private Residential tenancy agreement. Mrs McPhail said that she had not agreed to the terms of the new agreement and had not signed or returned it. Mrs Elder submitted that the document was only intended to be binding on signing and that it was not intended that a new tenancy was created until there was consensus and there was no consensus.
13. For the Respondents, Mr Aleman took issue with the suggestion that the company he had introduced to the Applicants were scammers and explained they were clients of his who needed a local address. Mr Aleman went on to refer the Tribunal to Production R3 and submitted that this indicated the tenancy agreement was finalised. He said that the Respondents had asked because they had changed the tenancy and the Applicants had not signed the new agreement. Mr Aleman said that the Respondents were unaware that the Applicants had stayed with the Short Assured tenancy. In response to a query from the Tribunal Mr Aleman said that he had not made any further enquiries with the Applicants as regards the signing of the Private Residential tenancy agreement. He said that the obligation was on the Applicants to respond and their failure was not the Respondents' fault.
14. In response to a further query from the Tribunal Mrs McPhail said she remembered receiving the Private Residential tenancy agreement but had thought that the only problem had been the visits from Aberdein Considine and that there was a perfectly useable agreement in place. Mrs McPhail also said that she had received the document during the Covid lockdown and not being a legally qualified person could not do anything about it. She also said that at that time she had no intention of selling it unless Mr Aleman wanted to buy it.
15. Mrs Elder confirmed that if a Private Residential tenancy agreement had been entered into then that would have superseded the need to terminate the Short Assured tenancy by giving two months' notice but there had been no consensus.

### **Was the Short Assured Tenancy properly constituted**

16. With regards to whether the Short Assured tenancy had been properly constituted Mrs Elder referred the Tribunal to the Form AT5 submitted with the application. She said the time of signing by the Respondents had been recorded as 15.00 on 24 November 2016 while the time of signing the lease was recorded as being at 15.06 on the same day and said that it had previously been held that signing the AT5 on the same day as the lease was acceptable. Mrs Elder also referred the Tribunal to Clause 4 of the lease where the

Respondents had acknowledged receipt of the Form AT5 prior to the execution of the lease. Mrs Elder also referred the Tribunal to the case of Key Housing Association Ltd v Cameron 1999 Hous. L. R. 47 (1988) at paragraphs 9.02 and 9.16.

17. In response Mr Aleman said he had nothing to add beyond what was in his written representations.

### **Reasonableness**

18. Mrs McPhail said that both she and her husband work full time and that the mortgage over the property was currently about £1200.00 per month. Mrs McPhail also said that the rent had never increased throughout the tenancy as the Applicants had not wished to put up the rent. Mrs McPhail confirmed that the Respondents had offered to increase the rent paid and also that the Applicants had been unable to do anything to the flat as the Respondents had refused entry. Mrs McPhail said that Mr Aleman had offered to have a leak at the property fixed and had instructed his own plumber and had then produced an invoice for £1650.00. Mrs McPhail also said that Mr Aleman had reported a problem with the door entry system that she had referred to the building factor who had instructed a contractor who had then advised the problem was internal to the property.

19. Mrs McPhail advised the Tribunal that the outstanding mortgage over the property was £71000.00 and in addition there were factors fees of £50.00 per month and landlord insurance of £230.00 per year. Mrs McPhail said that there were also regular other payments to the factor and referred the Tribunal to the documents submitted by the Applicants' representatives.

20. In response to a query from the Tribunal Mrs McPhail confirmed that there was no standard security over the property but that when the Applicant's son had started at university in Glasgow, they had purchased the flat for him to stay in and had been able to remortgage their own home to fund the purchase. She said at that time it had cost about £500.00 - £600.00 per month and had not impacted on their finances.

21. Mrs McPhail went on to say that during Covid her husband who was a self-employed plumber had been unable to work. She also said that as she worked in a pharmacy, she had continued working but that it had been a struggle financially.

22. Mrs McPhail went on to explain that her son was not well and that was causing stress. She also said that her husband had a heart condition and was being treated for high blood pressure and stress was not good for his health. Mrs McPhail went on to say that Mr McPhail's income paid for the household bills. Mrs McPhail also explained that whilst she was currently well, she had suffered from breast cancer in 2020 and had undergone radiotherapy and surgery and was currently taking medication to reduce the chance of recurrence and that this had focussed her mind on matters.

23. Mrs McPhail went on to say that her son suffered from Graves disease and had not been responding to medication. Mrs McPhail said that the prospect for surgery was not good because of the risk of haemorrhaging and that radioiodine treatment was being proposed but that this required him to remain in isolation for 27 days and they could not afford to put him up in a hotel. Mrs McPhail said her son had been working but that his immune system was compromised. Mrs McPhail went on to say that on 11 November her son was having a teleconference with his doctor to see if there was some way of transporting him from Glasgow to Mull after the treatment so that he could isolate at home. Mrs McPhail also advised the Tribunal that her father had died four weeks prior to the hearing.
24. Mrs Elder concluded the Applicants' case by submitting that the relationship between the Applicant and the Respondents had broken down. The Respondent had refused to allow the Applicants to carry out inspections of the property. Mrs Elder also submitted that a Section 11 Notice had been served on the local authority and that it was reasonable to grant an order for possession in terms of Section 33 of the 1988 Act.
25. Mr Aleman advised the Tribunal that the Respondents had applied for other accommodation and would move to any suitable property but that they had been unable to obtain another property. Mr Aleman spoke of people hanging up when they heard the Respondents' accents. Mr Aleman went on to say that he had asked that Aberdein Considine let him know if they had any suitable property for rent but had heard nothing from them in six months.
26. Mr Aleman acknowledged that the Applicants had health conditions but also referred the Tribunal to his own health issues detailed in his written representations.
27. Mr Aleman referred to the bank statements provided by the Applicants and queried the Applicants expenditure and use of credit cards. Mr Aleman queried the Applicants submission that there was still £71000.00 outstanding on the mortgage for the property given its purchase price and the date of purchase.
28. Mr Aleman denied that the Respondents refused to allow people to visit the property but that they did not want people who damaged the property.
29. In response to a query from the Tribunal Mr Aleman confirmed he had been in contact with Maryhill Housing Association and had also contacted private letting agents.
30. Mr Aleman advised the Tribunal that his son was attending Glasgow University and would complete his degree in March 2026. He said that at that time it was the Respondents intention to return to Spain. He explained that he currently earned about £30000.00 per year from his business as a Spanish lawyer in Scotland and that his wife was not working. He said that because of the Respondents low income his son in addition to having his university fees paid

also had a bursary. Mr Aleman said this would not continue if the Respondents returned to Spain. Mr Aleman also said that he owned a property in Spain that was currently let. He said it produced rental income of 750 euros per month and that there was a 40000.00-euro loan over the property.

31. Mr Aleman submitted that the Respondents be allowed to remain in the property until March 2026 and that the Applicants could increase the rent for the property.
32. Following the conclusion of evidence the Tribunal requested that the Applicants provide the Applicants most recent mortgage statements and by email dated 4 November the Applicants representatives submitted copies of the Applicants Halifax mortgage statements for the years to 31 March 2022 and 31 March 2023.

### **Findings in Fact**

33. The Respondents entered into a Short Assured tenancy that commenced on 24 November 2016 and endured until 25 May 2017 and continued from month to month thereafter.
34. The Respondents acknowledged in terms of Clause 4 of the tenancy agreement that they had received a Form AT5 prior to signing the lease.
35. The Respondents were served with Notices to Quit and Section 33 Notices dated 17 July 2023 by recorded delivery post.
36. The rent for the property has never been increased and is £550.00 per calendar month.
37. Glasgow City Council was given notice of the proceedings by way of a Section 11 Notice by email dated 26 September 2023.
38. There is no standard security registered over the property.
39. The Applicants purchased the property in 2011 at a price of £77950.00.
40. The Applicants remortgaged their family home to finance the purchase of the property.
41. The Applicants owed £71155.27 on their mortgage as at 31 March 2024.
42. The Applicants had assumed management of the property from their previous letting agents, Aberdein Considine in June 2020.
43. Mr Aleman sent a draft Private Residential tenancy agreement to Mrs McPhail by email dated 16 March 2020.

44. The Applicants did not respond to the email of 16 March 2020.
45. The relationship between the parties has broken down.
46. The Applicants are in full time employment.
47. The Applicants wish to reduce the amount of time they spend working.
48. Mr McPhail suffers from persistent atrial fibrillation, hypertension, obstructive sleep apnoea, high cholesterol and diabetes. He is required to exercise regularly and avoid stress.
49. Mrs McPhail was treated for breast cancer in 2020 and continues to take oral hormonal treatment to reduce the risk of recurrence.
50. The Applicant's son suffers from Graves disease and is awaiting treatment. This is a source of worry and stress for the Applicants.
51. Mr Aleman is awaiting cataract surgery on his left eye.
52. The Respondents' son, Ricardo, is in third year at Glasgow University. He is due to graduate in the summer of 2026.
53. Ricardo is in receipt of tuition fees and a bursary from SAAS.
54. The Respondents have applied without success for private rental accommodation.
55. The Respondents have applied to Maryhill Housing Association for accommodation.
56. The Respondents have paid their rent timeously other than on three occasions when rent was not paid but used to pay for repairs to the property.

### **Reasons for Decision**

57. The Tribunal was satisfied from the written representations and documents together with the oral submissions that the parties entered into a Short Assured tenancy that commenced on 24 November 2016 and endured until 25 May 2017 and from month to month thereafter. The Tribunal was satisfied that the Respondents were given a Form AT5 prior to signing the tenancy agreement and the Respondents had acknowledged this when signing the tenancy agreement.
58. The Tribunal was also satisfied that the Short Assured tenancy had not been replaced by a Private Residential tenancy. Although Mr Aleman had prepared a draft Private Residential tenancy agreement and sent this to Mrs McPhail for approval, the Applicants did not sign it nor did they give any indication to the

Respondents that the terms of the draft agreement had been accepted. The subsequent email from Mrs McPhail to Mr Aleman in June 2020 was simply confirmation that Aberdeen Considine were no longer managing the property and was not confirming that the Short Assured tenancy had been terminated.

59. The Tribunal was satisfied from the documents produced and the written representations and oral submissions that the Respondents were properly served with Notices to Quit and Section 33 Notices and that Glasgow City Council had been given intimation of the proceedings by way of a Section 11 Notice.
60. Section 44(5) of the Coronavirus (Recovery and Reform) (Scotland) Act modified Section 33(1) of the 1988 Act by providing that the granting of an order for possession by the Tribunal be discretionary rather than mandatory and that it should be granted if it is reasonable to make an order for possession. In one of the leading English cases, *Cumming v Danson*, Lord Greene MR said “*In considering reasonableness ..... it is, in my opinion, perfectly clear that as the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I call a broad commonsense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which ought to be taken into account.*” In reaching its decision it is fair to say that the Tribunal has found merit on both sides’ arguments.
61. The Tribunal can understand why the Applicants given their health issues may wish to reduce their working hours and if an order for possession was granted that would potentially allow the Applicants to sell the property and use the sale proceeds to clear their outstanding mortgage. With rent at its current level that might leave the Applicants about £700.00 per month better off or they could choose to reduce the amount they work. However, the Tribunal did have some concerns about the way in which the Applicants evidence as regards their financial affairs was presented. No information was provided to the Tribunal as regards Mr McPhail’s income, only that his income paid for the household bills although it appeared from Mrs McPhail’s bank statement that she also contributed to the household bills. The evidence did not provide a clear picture of the income and expenditure relating solely to the Property. Matters are further complicated as when looking at Mr McPhail’s medical records submitted to the Tribunal these give Mr McPhail as being registered with a medical practice in Newcastle Upon Tyne and living at an address in Killingworth. The Applicants made no mention of this in their evidence. The Tribunal also noted that the rent had not increased throughout the duration of the lease and it was accepted that it was below the market rent for properties in the area. The Tribunal acknowledges that when interest rates were lower it may not have been so important to the Applicants to regularly increase the rent and the Tribunal also acknowledges that there was a rent freeze imposed on landlords during Covid. Nevertheless, an increase in rent to the current market rent would substantially reduce the monthly shortfall as will any reduction in the mortgage variable rate.



62. The Tribunal fully understands why the Applicants are concerned about their son's health and that this will be a source of worry for them. It did appear from the evidence however that it is hoped that some way will be found to transport Mr McPhail Jnr from the mainland to Arran once his treatment has been completed in order that he can isolate at home for the required 27 days.
63. Although the Applicants submitted in their application that they were concerned that the Respondents were going to accrue rent arrears it would appear that other than three months' rent retained by the Respondents and used to pay a contractor for repairs to the property the Respondents have continued to pay their rent timeously.
64. Mr Aleman was reluctant to rely upon the services of the local authority to provide accommodation but did confirm he had applied to a local housing association but had not been offered accommodation. He also suggested that the Respondents had been the subject of discrimination when it came to applying for private rented accommodation and that despite applying to local letting agents for properties, he was always unsuccessful with people sometimes just hanging up when they heard his accent. On the whole the Tribunal found Mr Aleman to be a credible witness and have no reason to doubt his evidence in this regard. Nevertheless, if an order was granted the local authority would no doubt try to find accommodation for him and his family but given that there is a shortage of local authority housing the Respondents may only be offered temporary accommodation.
65. Mr Aleman made it clear that his principal reason for remaining in the property was in the interests of his son who was in his third year at Glasgow University and would graduate in the summer of 2026. Mr Aleman explained that he and his wife could not return to Spain until their son finished his course at university and the Tribunal understood that this was because of the financial arrangements that were in place that provided Ricardo with payment of his tuition fees and a SAAS bursary.
66. In reaching a determination of the application the Tribunal considers that matters are quite finely balanced. However, the Tribunal has felt that there has been a lack of candour on the part of the Applicants to fully disclose their circumstances to the Tribunal and that does not help their case. In their written statement submitted with their application they said there was a mortgage over the property when there was not, they have not provided any financial information about Mr McPhail nor have they explained why his address is apparently different from that in the application. On the other hand, it is clear that at the current level of rent and even allowing for some of the mortgage payments to be for debt unrelated to the property that it is understandable that the Applicants may wish to give up being landlords and sell the property particularly given the strained relationship with the Respondents. The Tribunal can also understand that they have health concerns that would also add to their wish to stop being landlords. They could however once again employ a letting agent to manage the property and they could substantially increase the rent.

67. Given the Respondents willingness to pay an increased rent the Tribunal concluded that if the Respondents had been able to obtain another property on being served with the Notice to Quit it is likely that they would have moved out. The Tribunal was satisfied that the Respondents primary aim for remaining in Scotland was so that their son could finish his university education and that this required them to be resident here. The Tribunal considers that this is a quite compelling reason for refusing to grant the order sought. The Respondents' son is in his junior honours year and being made homeless at this time could well have a significant impact upon him. The Tribunal did consider whether it would be appropriate to grant the order but suspend enforcement until the summer of 2025 to give the Respondents time to find alternative accommodation but given that they have been unable to find other accommodation in over a year and have confirmed they will leave the property by March 2026 the Tribunal has determined that the application should be refused. In reaching this decision the Tribunal has taken account of the impact that it will have on the Applicants who clearly do not wish to remain as landlords however they can take steps to mitigate any financial loss by increasing the rent and will be able to recover the property in about sixteen months' time. The Tribunal would hope that the parties can put their differences aside and reach an agreement that the Respondents pay a substantially increased rent for the remainder of time they live in the property and that the Respondents agree to remove themselves from the property without the Applicants having to raise further proceedings in 2026.

### **Decision**

68. The Tribunal having carefully considered the documents and evidence before it both oral and written refuses the application.

### **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.**

Graham Harding

**Graham Harding  
Legal Member/Chair**

**10 November 2024  
Date**

