



**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/19/0565**

**Re: Property at 678 Old Dalkeith Road, Danderhall, Edinburgh, EH22 1RR (“the  
Property”)**

**Parties:**

**Drum Farm LLP, 684 Old Dalkeith Road, Edinburgh, EH22 1RR (“the  
Applicant”)**

**Mr Steven Waddell, 678 Old Dalkeith Road, Danderhall, Edinburgh, EH22 1RR  
 (“the Respondent”)**

**Tribunal Members:**

**Anne Mathie (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the  
Tribunal”) dismissed the Application dated 20 February 2019 made in terms of  
Rule 66 of the First-tier Tribunal for Scotland Housing and Property Chamber  
(Procedure) Regulations 2017.**

- **Background**

This is an application in terms of Rule 66 of the First-tier Tribunal for Scotland  
Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”).  
The applicant is seeking an order for recovery of possession of the Property in  
terms of section 33 of the Housing (Scotland) Act 1988 (“the 1988 Act”).

The Tribunal had before it the following documents:

- (i) Application dated 20 February 2019 and received by the  
Tribunal on 21 February 2019
- (ii) A covering email from the applicant’s solicitor dated 20 February  
2019 requesting that the Application be processed together with

the separate Application previously lodged in terms of Rule 65 of the Rules

- (iii) A letter of authority from the applicant dated 14 February 2019 authorising his solicitor to act in respect of this matter
- (iv) A copy tenancy agreement between the applicant and the respondent and a second tenant signed and dated 26 October 2016 for an initial term from 01/10/13 to 01/04/14
- (v) A Notice to Quit dated 16 November 2018 requesting the respondent remove from the Property on or before 1 February 2019
- (vi) A Section 33 Notice dated 16 November 2018 requesting that the respondent remove from the Property on or before 1 February 2019
- (vii) A Section 11 Notice
- (viii) A Certificate of Intimation from Sheriff Officers confirming service of the Notice to Quit, AT6 and Section 33 Notice on 16 November 2018
- (ix) An AT5 signed by the applicant and the respondent on 26 October 2016

The Tribunal wrote to the applicant's solicitor on 6 March 2019 requesting further information. The Tribunal advised that:

*'The Legal Member has reviewed this application under Rule 66 and notes that the lease purports to run from 1 October 2013 until 1 April 2014 yet is dated 26 October 2016. The AT5 is also dated 26 October 2016. On its face, the AT5 is dated long after the commencement of the tenancy, the lease documentation for which was itself executed long after the commencement of the tenancy. The applicant should provide submissions on whether the AT5 is competent in the circumstances and, if so, why. Alternatively, the applicant may wish to discontinue an application under Rule 66.,*

The letter dated the 6 March 2019 also requested further information in relation to title of the Property.

In response to the question regarding title, the applicant's solicitor provided a copy of a lease from the proprietors to the applicant dated 9 May 2008.

In response to the questions asked about the dates on the tenancy agreement and the AT5 the applicant's solicitor responded as follows:

*'It will be seen that the lease is to Mr Waddell and a Mr Eldon. Mr Eldon had been in the property, together with Mr Waddell, since 2013 but my clients did not become aware of that until 2016 which was why they drew up a new lease at that time. During the period from 2013 to 2016 Mr Waddell had paid the rent, but apparently Mr Eldson had contributed and it was thought appropriate for the lease dates to reflect that. Although the AT5 and the lease are dated on the same day I am informed that the AT5 was signed first. In the circumstances it is submitted that the lease was created after the AT5 was served and that the requirements of section 32 of the Housing (Scotland) Act 1988 are fulfilled.'*

The application was served on the respondent requesting written representations by 25 May 2019.

The respondent's solicitor lodged written representations on 31 May 2019 advising that the Respondent had lived at the Property since 2001. He had previously lived at the Property with his adoptive father, George Waddell, and his adoptive father's friend, John Cassidy. The respondent's adoptive father passed away in 2007 or 2008. The respondent continued to live at the Property with Mr Cassidy until some point in 2013 when Mr Cassidy moved out of the Property. The representations continued:

*'The Respondent's position in relation to FTS/HPC/19/0565 is that the action should be dismissed. The purported tenancy is not a valid Short Assured Tenancy in terms of s.32 of the Housing (Scotland) Act 1988 ("the 1988 Act") and therefore an eviction order cannot be competently granted in terms of s.33 of the 1988 Act. As was noted in the Tribunal's letter of the purported tenancy agreement states that it runs from 1<sup>st</sup> October 2013 until 1<sup>st</sup> April 2014 yet is dated 26<sup>th</sup> October 2016 and the AT5 is also dated 26<sup>th</sup> October 2016. Regardless of whether or not the purported tenancy agreement dated 26<sup>th</sup> October 2016 is valid as an assured tenancy, it is not a Short Assured Tenancy as the AT5 cannot have been validly served.'*

Various documents were lodged with the written representations but these were relevant to the related eviction case FTS/HPC/EV/19/0564 and were not relevant to the present application.

The applicant's solicitors responded but again the responses were relevant to the related case (as previously detailed).

#### The Case Management Discussion

The Tribunal held a Case Management Discussion on 7 June 2019. The applicant's solicitor and Sheila Johnston were present. The respondent's solicitor was present but the respondent was not well enough to attend in person. The Tribunal went through all the documents, the application and the written submissions before it. Various additional documents were lodged by both parties. Most of these related to the other related application but the applicant produced a tenancy agreement dated 7 December 2004 between a G.A. More Nisbett (Landlord) and John Cassidy and Stephen Waddell (Tenants) signed by the tenants on 18 December 2005 and purporting to be for a period from 7 December 2004 to 6 June 2005 and then to continue month to month thereafter.

- Findings in Fact

The lease between the parties signed on 26 October 2016 purports to be a Short Assured Tenancy with provision for the lease to continue on a month to month basis at the end of the initial six month period. Section 32 of the 1988 Act requires that an AT5 be served on the tenants prior to the creation of the tenancy. The start date of the tenancy between the parties is at some point before 7 December 2004, on 7 December 2004 or on 1 October 2013. This

does not require to be determined further as all three possible dates predate the AT5 which is signed by all parties on 26 October 2016.

- **Reasons for Decision**  
The requirement contained in section 32 of the 1988 Act for an AT5 to be served prior to the creation of a tenancy has not been met and therefore the applicant cannot recover possession of the Property in terms of section 33 of the 1988 Act.
- **Decision**  
The Tribunal dismissed the application for an order for recovery of possession.

### **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.**

# Ms Anne Mathie

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Legal Member/Chair

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Date 10 June 2019