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 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/CV/19/2344

Re: Property at 9 Swanston Muir, Edinburgh, EH10 7HT ("the Property")

Parties:

Mrs Elizabeth Rae, 31A North Bridge Street, Bathgate, West Lothian, EH48 4PJ ("the Applicant")

Mr Kevin Law, Mrs Theresa-Anne Hoggan, 9 Swanston Muir, Edinburgh, EH10 7HT; 9 Swanston Muir, Edinburgh, EH10 7HT ("the Respondent")

Tribunal Members:

Neil Kinnear (Legal Member)

Decision (in absence of the First Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

This is an application for a payment order dated 25th July 2019 and brought in terms of Rule 70 (Application for civil proceedings in relation to an assured tenancy under the 1988 Act) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant sought payment of arrears in rental of £9,081.44 in relation to the Property from the Respondents, and provided with her application copies of a short assured tenancy agreement, and rent arrears statement.

The Applicant subsequently amended the amount sought in this application to the figure of £9,852.24, representing the amount owed as at 27th September 2019.

The Respondents have been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 22nd August 2019, and the Tribunal was provided with the executions of service.

The Applicant's representative and the Second Respondent's representative both lodged various written submissions clearly outlining their respective positions regarding the law in advance of the Case Management Discussion, and the Tribunal records its gratitude to them for doing so.

Case Management Discussions

A Case Management Discussion was held on 27th September 2019 at George House, 126 George Street, Edinburgh. The Applicant appeared, and was represented by Miss Donnelly, solicitor. The Second Respondent did not appear, but was represented by Mr Kavanagh, housing advisor. The First Respondent did not appear, nor was he represented. The First Respondent had not responded to this application at any stage either in writing or by any other form of communication.

The Tribunal and the parties' representatives had a helpful discussion to identify what issues were in dispute between the parties, and what issues were not. Both parties' representatives confirmed that there was no factual dispute between them, but rather a number of legal arguments concerning the validity or otherwise of the lease agreement as a short assured tenancy.

Miss Donnelly explained that the parties originally entered into a short assured tenancy agreement executed on 18th May 2017, with a commencement date of 18th May 2017 and a termination date of 17th November 2017 ("the first agreement"). A form AT5 was signed by the tenants at 11.37am on the 18th May 2017.

Thereafter, the same parties executed a new contractual short assured tenancy agreement on 18th November 2017, with a commencement date of 18th November 2017 and a termination date of 17th May 2018 ("the second agreement"). The second agreement was of the same subjects, between the same parties, and was in substantially the same terms as its predecessor.

Finally, the same parties executed a further new contractual short assured tenancy agreement on 18th May 2018, with a commencement date of 18th May 2018 and a termination date of 17th November 2018 ("the third agreement"). The third agreement was of the same subjects, between the same parties, and was in substantially the same terms as both its predecessors.

It was Miss Donnelly's submission that the first agreement was a short assured tenancy as it met with the conditions set out in section 32(1) of the *Housing (Scotland) Act 1988* ("the 1988 Act"), namely that it was an assured tenancy agreement for a term of not less than 6 months and in respect of which a form AT5 had been served.

Thereafter, the second agreement was a short assured tenancy as it was a new contractual tenancy in terms of section 32(3) of the 1988 Act, as at the *ish* of the first agreement a new contractual tenancy of the same or substantially the same premises

came into being under which the landlord and the tenant were the same as at that *ish*, whether or not it fulfilled the conditions in section 31(1)(a) and (b) of the 1988 Act.

Finally, the third agreement was also a short assured tenancy upon the same legal basis as the second agreement. Albeit that it was executed after the commencement of the new tenancy regime instituted by the *Private Housing (Tenancies) (Scotland) Act 2016*, which generally prohibits the creation of any new assured or short assured tenancies after 1st December 2017, an exception to that general principle is made under Regulation 6 of the *Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No. 3, Amendment, Saving Provision and Revocation) Regulations 2017/346* ("the 2017 Regulations") in respect of new contractual tenancies created as short assured tenancies in terms of section 32(3) of the 1988 Act.

All of that being so, the third agreement was a short assured tenancy agreement, and the provisions to bring that agreement to an end under section 33 of the 1988 Act applied.

Mr Kavanagh indicated that having considered and taken legal advice upon the 2017 Regulations, he now conceded that it was possible to create a new short assured tenancy after 1st December 2017.

However, he now sought to argue that the third agreement was not a short assured tenancy upon new and different legal grounds. He accepted the terms and general applicability of the 2017 Regulations, but argued that the third agreement did not fall under them for the following reasons.

Firstly, his primary submission was that none of the three agreements were sufficient to constitute a short assured tenancy agreement, as they failed to satisfy the requirements of section 32(1) of the 1988 Act.

Mr Kavanagh noted that each of the three agreements had a commencement date of the 18th day of the month in which they were created, and a termination date of the 17th day of the month falling six months later. He argued that the period of each lease was one day short of six months, and accordingly each lease could not be a short assured tenancy agreement.

Mr Kavanagh's secondary submission, in the event that the Tribunal did not uphold his primary submission, was that if the first agreement was held to have commenced at the first moment of the day on which it was signed (18th May 2017) in order to include that whole day for the purpose of rendering the period of the agreement not less than six months, then the form AT5 signed at 11.37am on that day was not served before the creation of the tenancy, and accordingly a short assured tenancy was not created.

Alternatively, he argued, if the agreement is deemed to start after 11.37am on the day it was signed in order that the form AT5 was served before the creation of the agreement, then the whole of the day of execution could not be included in the calculation of the six month period, and therefore the agreement would not be for a period of not less than six months. On that alternative analysis also, a short assured tenancy was not created.

Mr Kavanagh's tertiary submission, in the event that the Tribunal did not uphold either of his primary and secondary submissions, was that in order to create a new contractual tenancy, it must come into being at the *ish* of the existing agreement.

Mr Kavanagh argued that this meant that the second and third agreements would require to commence on the *ish* date of the first and second agreements, being the 17th day of their respective months of creation, and not on the 18th day of those months. As each agreement commenced on the 18th day of that month, they did not fall within the scope of section 33(3) of the 1988 Act, and were therefore not validly created short assured tenancies.

In response, Miss Donnelly noted that there are a number of previous case reports concerning the calculation of time in relation to whether a tenancy agreement was for a term of not less than six months, but that as she had not had prior notice of this argument, she did not have those authorities to hand in order to address the Tribunal on them today.

The Tribunal indicated that it was also aware of the existence of previous case authority on this point, and of the helpful analysis on the computation of time given in *Stair Memorial Encyclopedia, Volume 22 - Time* at paragraphs 819 to 826.

This is a complex legal issue, and it is entirely understandable that Miss Donnelly was not in a position to make detailed submissions without having had prior notice of the point, as Mr Kavanagh readily accepted.

Indeed, Mr Kavanagh indicated that he would need time to consider and take legal advice upon any such legal authorities which the Tribunal and the parties were going to consider before making his final submissions thereon, which again is entirely understandable.

The Tribunal felt it would be unjust, in particular to Mr Kavanagh, who advised that he is not legally qualified, and indeed also to Miss Donnelly, to expect them to attempt to undertake detailed and complex legal research on a complex legal issue and present legal submissions on those issues to the Tribunal later that day.

The Tribunal indicated that it would find detailed legal submissions on these issues to be of great assistance to it in reaching a decision on this complicated matter, and Miss Donnelly and Mr Kavanagh indicated that they both agreed that this was appropriate and suggested that they both tender written submissions on these issues prior to any continued Case Management Discussion.

Finally, Mr Kavanagh confirmed that the issues above-mentioned are the only ones he intended to argue, and that the Secondt Respondent accepts that if her arguments on these points are rejected by the Tribunal, then she has no further basis to resist the granting of the order sought in this application.

For these reasons, the Tribunal adjourned the Case Management Discussion to allow parties' representatives to consider the above points more fully, to identify and refer to relevant legal authorities, to prepare and submit to the Tribunal detailed written

submissions thereon, and to appear at a continued Case Management Discussion to address the Tribunal upon them.

Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal discretion on its own initiative, or on an application by a party, to adjourn a Case Management Discussion.

The Tribunal considered that to properly consider the important legal points raised in this application, it would be appropriate to continue it to a further date in order to allow further submissions to be made on the legal position.

For these reasons, the Tribunal adjourned the Case Management Discussion and set a further Case Management Discussion for further legal submissions to be made.

The Applicant subsequently intimated an amendment to the sum sought to the figure of £12,327.24, representing the amount owed as at 13th December 2019, and confirmed that she had intimated that amendment to the Respondents.

A continued Case Management Discussion was held on 13th December 2019 at Riverside House, 502 Gorgie Road, Edinburgh. The Applicant again appeared, and was again represented by Miss Donnelly, solicitor. The Second Respondent again did not appear, but was again represented by Mr Kavanagh, housing advisor. The First Respondent again did not appear, nor was he represented. The First Respondent had not responded to this application at any stage either in writing or by any other form of communication.

Miss Donnelly and Mr Kavanagh had prepared further detailed written submissions which they had submitted to the Tribunal in advance of the continued Case Management Discussion, and the Tribunal again records its appreciation for the clarity and thoroughness of those submissions which were of considerable assistance to it.

The Tribunal heard detailed and lengthy legal submissions with reference to supporting case authority from Miss Donnelly and Mr Kavanagh on the legal points identified at the previous Case Management Discussion.

Mr Kavanagh confirmed that the Second Respondent, in the event that the Tribunal did not accept his legal arguments, accepted the amended sum was due in terms of the lease agreements.

Legal submissions for the Second Respondent

With regard to his primary argument, Mr Kavanagh again drew support from the wording of section 32(2)(b) of the 1988 Act, which provides that to qualify as a short assured tenancy an AT5 notice must be given before the start of the tenancy.

He referred also to *McCabe v Wilson* 2006 Hous L.R. 86 as providing guidance on the interpretation of the term of a tenancy. He submitted this case established (a) that it is not the established position in Scots Law that a lease is deemed to commence at the very first moment of the first day; (b) that it is open to contracting parties to specify a

method of calculating time; and (c) that to include the whole of the first day, parties must have properly and clearly agreed another acceptable method of calculating time.

Mr Kavanagh argued that the lease does not state that it is for six months, and that it is not clearly stated in the lease agreement to be so.

Turning to his secondary argument, Mr Kavanagh argued that the time of signing the AT5 (11.37am) is fatal to the Applicant's position that the initial tenancy, and by implication those following, was a short assured tenancy, as either the tenancy commenced after the form was signed and therefore not at the first moment of that day (which it would have to, in order for the term to be 6 months), or if the tenancy commenced at the first moment of that day before the Respondents received the AT5, then the tenancy failed to meet the requirement of section 32(2)(b) of the 1988 Act.

If the initial tenancy was not a valid short assured tenancy, it followed that the provisions of Regulation 6 of the 2017 Regulations did not apply to the following agreements.

Finally, Mr Kavanagh turned to his tertiary submission, and argued that even if the preceding tenancies were short assured tenancies (which he did not accept), the agreement commencing 18th May 2018 could not be so. Regulation 6 of the 2017 Regulations provides that a subsequent tenancy may be short assured only if created "at the ish" of a preceding short assured tenancy. The *ish* of the preceding tenancy was 17th May 2018, and the following tenancy did not commence until the following day (the 18th May 2018).

Legal submissions for the Applicant

Miss Donnelly, in response to the primary submission, argued that the duration of the lease is defined in clause 1.8 in the following terms:
"The Lease will run from and including 18/05/2017 (hereinafter referred to as "the commencement date") up to and including 17/11/2017 (hereinafter referred to as "the termination date"), collectively this period being referred to as the Initial Term"...".

In Scots Law generally computation of time is calculated by *civilis computatio*, excluding the first day and including the last. She accepted that applying *civilis computatio* the agreement is one day short of six months. However, she submitted that the lease is for a period of six months for the following reasons.

Sheriff Pieri previously considered this issue in the Sheriff Court in *McCabe v Wilson* 2006 Hous L.R. 86. The learned sheriff was asked to determine whether a lease from 7 April 2005 – 6 October 2005 was for not less than six months and therefore a short assured tenancy.

Miss Donnelly referred to Sheriff Pieri's comments at paragraph 23 of his judgement where he states:
"The first thing to say about this is that *naturalis computatio, civilis computatio* and the brocard *dies inceptus pro completo habetur* are aids to construction. They do not prevent parties to a contract agreeing that one method of calculating time is to be

preferred over the method the law would imply where parties are silent on the matter. No one method of calculating time is prescriptive in a particular situation. There is for example, it seems to me, nothing wrong with parties to a contract opting for time limits to be calculated using *naturalis computatio* for all the general rule in that particular situation may be that time is calculated using *civilis computatio* . Where a statute is clear as to how time is to be calculated the method set out in the statute is to be followed. The same must apply where a contract is clear."

Sheriff Pieri held that it was possible for the whole of the first day to be included and found that the intention of the parties was important. He stated at paragraph 27 of his judgement that "...it was perfectly legitimate for parties to enter into a lease for six months on the basis that the whole of the first day was to be deemed part of the period of let...".

Sheriff Pieri held that the lease in question was regarded as having a term of six months and therefore complied with the requirements of section 32 of the 1988 Act.

Miss Donnelly argued that the *ratio* of *McCabe v Wilson* is that parties can contract to apply any method to calculate the term of a lease agreement. *Civilis computatio* is not the only way of calculating duration.

In considering the intention of parties, Miss Donnelly noted that Sheriff Pieri looked to the wording of the term clause, which made reference to "a period of six months commencing on 7 April 2005". Notwithstanding that the lease agreement was entered into (i.e. signed) during normal office hours at some point during the day of 7April 2005, he found in paragraph 19 of his judgement that parties "intended the lease to be deemed to have commenced at the very first moment of 7 April".

Miss Donnelly referred to the AT5 in the present case. It was signed at 11.37am, and contained a declaration that "In signing this declaration I acknowledge that I have been given a copy of the preceding attached pages known as Form AT5 and understand that the tenancy being offered by you is a short assured tenancy under section 32 of the Housing (Scotland) Act 1988. I further declare that this form was issued to me in advance of signing the tenancy agreement."

The form AT5 makes several references to section 32 of the 1988 Act and to the tenancy being offered being a short assured tenancy in terms of that section.

Miss Donnelly submitted that for the above reasons, it was clear that the parties intended to create a short assured tenancy the duration of which was not less than six months.

She drew further support for her position from the decision in *Calmac Developments Limited v Murdoch* 2012 WL 3062547, where Sheriff Jamieson considered that the wording of the lease was important to determine whether the first day should be included. At paragraph 24 of his judgement he states:
"In my opinion, the specific use of the words "date of entry" in a lease must mean the tenant is contemplated to take entry on that date and accordingly this creates an exception to the general rule excluding the first date from computation of the term.".

Miss Donnelly submitted that the use of the words "commencement date" in the present case is akin to the words "date of entry". She drew the Tribunal's attention to the use of the words "from and including" in relation to the stated commencement date.

Clause 1.8 expressly states that both the commencement date and the termination date are to be included when calculating the term of the lease. This wording leads to the same finding as that in *Calmac Developments Limited v Murdoch*, in that it creates an exception to the general rule as the tenant is contemplated to take entry on that date.

In conclusion, the intention of the parties is clear, namely that they intended to create a lease which was a short assured tenancy and with a term of not less than six months. For that reason, the whole of the first day falls to be included in the term of the lease.

Turning to her response to Mr Kavanagh secondary submission, Miss Donnelly submitted that as in *McCabe v Wilson*, it is accepted that the lease was created at the point of signing the agreement in the course of the first day (i.e. 18th May 2018). However, that did not prevent the parties contractually agreeing that the whole of the first day, 18th May 2018, was to be included in the term of the lease.

Miss Donnelly drew the attention of the Tribunal to the English Court of Appeal decision in *Bedding v McCarty* (1995) 27 H.L.R. 103, which concerned the situation of service of a prescribed pre-tenancy notice in terms of section 20(2)(b) of the *Housing Act 1988*, which section is similar in its terms to section 32 of the 1988 Act.

In that case the lease ran from 18 December 1990 until 17 June 1991. It was agreed that parties had signed the tenancy agreement and the pre-tenancy notice during the morning of 18 December 1990, and that the tenant took occupation in the afternoon of 18 December 1990. Fractions of days are disregarded when computing time in English Law, and as such the term commenced at the first moment of 18 December 1990.

Nonetheless, the Court of Appeal held that the notice had been timeously served prior to the tenancy agreement being entered into. At page 106, Nolan L.J. states:
"It would seem to me clear that the tenancy was entered into when the agreement was signed. It is not the less clear that that it was entered into at that point in time because it was deemed to commence some hours earlier.".

Miss Donnelly submitted that the AT5 was validly served prior to the creation of the tenancy agreement, but that the time when the tenancy agreement is created must not be confused with the time, as a matter of law, when the tenancy is deemed to commence or what the parties have contractually agreed or can be implied to be the duration of the tenancy. These are two different issues.

Finally, responding to Mr Kavanagh's tertiary argument, Miss Donnelly submitted that the first tenancy agreement commenced at the first moment of 18th March 2017, and ran until the last moment of 17th November 2017, the *ish* date.

The first new contractual tenancy in terms of section 33 of the 1988 Act commenced at the first moment of 18th November 2017 immediately after the *ish* of the previous lease agreement at midnight on 17th November 2017.

Mr Kavanagh's submission that the new contractual tenancy would need to commence on 17th November 2017 in order to comply with section 33 of the 1988 Act is illogical. During the course of the whole of 17th November 2017 the parties were still subject to the original short assured tenancy agreement which only ended at midnight on that day. The new lease agreement came into being immediately at the last moment of the *ish* date. To find otherwise would mean parties were subject to two separate agreements at the same time.

For these reasons, Mr Kavanagh's tertiary argument falls to be rejected.

Further continuation

However, at the conclusion of these submissions, the Tribunal sought confirmation that the First Respondent had received intimation of the continued Case Management Discussion before issuing a decision and any order.

It appeared that through a misunderstanding, the Tribunal had failed to intimate the continued Case Management Discussion on the First Respondent. After enquiry, it appeared that Mr Kavanagh's colleague had quite properly sent an e-mail to the Tribunal on 17th October 2019 indicating that he was representing the Second Respondent, and attaching a mandate in that regard. That mandate, if fact, bore to be from both the First and Second Respondents, apparently obtained at a much earlier stage.

The Tribunal's administration had processed the mandate, and (erroneously) taken from it that both Respondents were being represented by Mr Kavanagh (which was not the case), and for that reason did not separately intimate this continued Case Management Discussion to the First Respondent.

Rule 17(2) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides that the Tribunal must give each party reasonable notice of the date, time and place of a case management Discussion and any changes to the date, time and place of a case management discussion.

Unfortunately, through error on the part of the Tribunal, the First Respondent was not given such notice, and was accordingly deemed unaware of this continued Case Management Discussion.

That being so, the Tribunal could not properly grant any order against the First Respondent in his absence, in circumstances where he had not been told of the continued Case Management Discussion.

Accordingly, the Tribunal required to continue this matter in order that the First Respondent was given proper notice of, and the opportunity to attend, a further Case Management Discussion before any order might be granted against him.

Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal discretion on its own initiative, or on an application by a party, to adjourn a Case Management Discussion.

In these circumstances, the Tribunal set a further continued Case Management Discussion.

The Applicant subsequently intimated an amendment to the sum sought to the figure of £13,152.24, representing the amount owed as at 6th January 2020, and confirmed that she had intimated that amendment to the Respondents.

A further continued Case Management Discussion was held on 6th January 2020 at Riverside House, 502 Gorgie Road, Edinburgh. The Applicant again appeared, and was again represented by Miss Donnelly, solicitor. The Second Respondent again did not appear, and was not represented apparently standing the indication of the Tribunal's decision in relation to the Second Respondent at the continued Case Management Discussion of 13th December 2019.

The First Respondent again did not appear, nor was he represented. The First Respondent has not responded to this application at any stage either in writing or by any other form of communication. The First Respondent has been validly served by sheriff officers with notification of the further continued Case Management Discussion on 18th December 2019, and the Tribunal was provided with the execution of service.

The Tribunal was invited by Miss Donnelly with reference to the application and papers, and to her previous submissions, to grant an order for payment of £13,152.24 with interest thereon, and confirmed that the Applicant had received no further payments from the Respondents since the last continued Case Management Discussion.

Statement of Reasons

The first question which the Tribunal must answer, is whether or not the lease agreement is a short assured tenancy as defined in section 32 of the 1988 Act. That section defines a short assured tenancy as an assured tenancy which is for a term of not less than six months, and in respect of which a notice is served as mentioned in subsection (2) below (a form AT5).

Mr Kavanagh argued that the first agreement was not a short assured tenancy agreement because it failed to comply with section 32(1)(a), as its term was not one of not less than six months.

The Tribunal is not persuaded by that argument, and accepts the argument advanced by Miss Donnelly in reply.

Though the decision of Sheriff Pieri in the Sheriff Court in *McCabe v Wilson* 2006 Hous L.R. 86 is not binding upon the Tribunal, the learned sheriff's analysis and reasoning is highly persuasive, and the Tribunal agrees with it.

Similarly, the Tribunal is not bound by the decision of Sheriff Jamieson in *Calmac Developments Limited v Murdoch*, but again finds the sheriff's analysis and legal reasoning highly persuasive, and the Tribunal agrees with it too.

The situation in both *McCabe v Wilson* and *Calmac Developments Limited v Murdoch* with regard to the term of a short assured tenancy is on all fours with the situation in the present case.

There is a helpful analysis on the computation of time given in *Stair Memorial Encyclopedia, Volume 22 – "Time"* at paragraphs 819 to 826. Sheriff Pieri refers to paragraph 823 in his judgement.

Importantly, paragraph 822 notes the following:
"In *civilis computatio* fractions of a day are ignored and the general rule is that the day from which the period runs is excluded, the period being deemed to commence at midnight on that day... However, when interpreting such words regard must always be had to the context in which they are employed, which may have the effect of negating the general rule."

It is to this important qualification to the general rule that Sheriff Pieri appears to be referring at paragraphs 23 and 27 of his judgement, where he highlights the importance of the intention of the parties in interpreting the wording used.

The Tribunal accepts the submissions made by Miss Donnelly with regard to the form AT5, which indicates a clear intention by the parties, and acceptance by the Respondents, of entering into a short assured tenancy agreement as defined in section 32 of the 1988 Act.

It also accepts the submissions made by Miss Donnelly regarding the correct interpretation of the wording used in clause 1.8 of the lease. In particular, the Tribunal attaches particular weight to the fact that the words used are that it will run from *and including* (emphasis added) 18/05/2017 up to *and including* (emphasis added) 17/11/2017. It appears to the Tribunal that the use of the qualifying words "and including" removes any ambiguity as to whether both days are to be included as part of the term of the lease.

Further, the first page of the tenancy agreement is headed "Short Assured Tenancy Agreement", and clause 1.1 states:
"A notice by way of Form AT5 must be used to inform the prospective tenant that the tenancy being offered by the prospective landlord, to which this agreement relates, is a Short Assured Tenancy as under section 32 of the Housing (Scotland) Act 1988 and that the landlord may require possession of the premises at the termination of the tenancy".

These factors all indicate a clear intention by the parties to enter into a short assured tenancy, as defined by section 32 of the 1988 Act, and accordingly as a result indicate an intention that the first day (18th May 2017, the commencement date) was to be included in the term.

That being so, and following the reasoning contained in both *McCabe v Wilson* and *Calmac Developments Limited v Murdoch*, the Tribunal concludes that the term of the agreement is not less than six months, and accordingly that the agreement is a short assured tenancy in terms of section 32 of the 1988 Act.

The second question the Tribunal must answer, is whether that conclusion is affected by the argument advanced by Mr Kavanagh that the time of signing the AT5 (11.37am) is fatal to the Applicant's position that the initial tenancy, and by implication those following, was a short assured tenancy, as either the tenancy commenced after the form was signed and therefore not at the first moment of that day (which it would have to, in order for the term to be 6 months), or if the tenancy commenced at the first moment of that day before the Respondents received the AT5, then the tenancy failed to meet the requirement of section 32(2)(b) of the 1988 Act.

Again, the Tribunal rejects this argument, and prefers the argument advanced by Miss Donnelly in response.

The English case of *Bedding v McCarty* (1995) 27 H.L.R. 103 concerned the situation of service of a prescribed pre-tenancy notice in terms of section 20(2)(b) of the *Housing Act 1988*.

Such notices require to be served to create an assured shorthold tenancy, which is apparently a form of English assured tenancy.

The wording of section 20(2)(b) provides that the notice "is served before the assured tenancy is entered into", which is very similar to the provision contained in section 32(2)(b) of the 1988 Act which uses the words "is served before the creation of the assured tenancy".

The Tribunal, though not technically bound by the case, finds the reasoning contained in the decision very persuasive. The short assured tenancy in this case was undoubtedly created when the tenancy agreement was signed. However, the question of when the short assured tenancy was created is not the same as that of interpreting the terms of that short assured tenancy agreement, including the term specifying the term of the agreement.

As Nolan L.J. observed at page 106, slightly before the passage quoted by Miss Donnelly, Mr Kavanagh's argument, like that of counsel for the appellant in *Bedding v McCarty* "...seems...to confuse the time when the tenancy is entered into with the time when, as a matter of law, it is deemed to commence".

For that reason Mr Kavanagh's secondary argument falls to be rejected.

Finally, that leaves the final question which the Tribunal must answer, which is the assertion that even if the preceding tenancies were short assured tenancies (which he did not accept), the agreement commencing 18th May 2018 could not be so, on the basis that Regulation 6 of the 2017 Regulations provides that a subsequent tenancy may be short assured only if created "at the ish" of a preceding short assured tenancy. The *ish* of the preceding tenancy was 17th May 2018, and therefore the following tenancy did not commence until the following day (the 18th May 2018).

The Tribunal was persuaded by Miss Donnelly's argument that during the course of the whole of 17th November 2017 the parties were still subject to the original short assured tenancy agreement which only ended at midnight on that day, and that the new lease agreement came into being immediately at the last moment of the *ish* date.

However, it was not persuaded that to find otherwise would mean parties were subject to two separate agreements at the same time. It might, in certain circumstances, be that the new agreement was a novation of the earlier one and superseded it.

The result of the Tribunal's conclusions, is that as the first agreement ended at the last moment of the 17th November 2017, and the second agreement started at the first moment of the 18th November 2017, this situation complies with the version of section 3(b) of the 1988 Act in force as at 18th November 2017 which provided for the creation of a new contractual tenancy "at the ish of a short assured tenancy".

Similarly, applying the saving provision contained in Regulation 6 of the 2017 Regulations, the second agreement ended at the last moment of the 17th May 2018, and the third agreement started at the first moment of the 18th May 2018. Thereafter, the short assured tenancy was ended by the service of a notice to quit dated 12th July 2018, which ended the tenancy at the *ish* of 17th November 2018. The landlord then served a section 33 notice seeking recovery of possession.

It appears to the Tribunal that if the *ish* is the final moment of the date of termination, then if a replacement lease commences at the very first moment of the following day, then that new contractual tenancy is created at the *ish* of the preceding agreement, as there is no time gap between the end of the previous agreement and the start of the new one. The previous agreement and the succeeding one abut each other, with no time gaps, such that there is an interrupted possession by the tenant of the let property.

For that reason Mr Kavanagh's tertiary argument falls to be rejected.

All of that being so, Mr Kavanagh accepted that in the event that the Tribunal rejected his three legal arguments, as it has done, then he was not in a position to oppose the granting of the order sought.

Section 16 of the *Housing (Scotland) Act 2014* provides as follows:

"16. Regulated and assured tenancies etc.
(1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal -

(a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),

(b) a Part VII contract (within the meaning of section 63 of that Act),

(c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).

(2)But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

(3)Part 1 of schedule 1 makes minor and consequential amendments."

Accordingly, the Tribunal now has jurisdiction in relation to claims by a landlord (such as the Applicant) for payment of unpaid rental against a tenant (such as the Respondents) under a short assured tenancy such as this.

The Tribunal considered the terms of the short assured tenancy agreement, the copy rent arrears statements provided, and Miss Donnelly's submissions, and was satisfied that this disclosed an outstanding balance of rent arrears in the sum of £13,152.24. Accordingly, the Tribunal shall make an order for payment of that sum.

The Applicant also seeks interest on that amount in terms of Rule 41A of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

In terms of that rule, the Tribunal may include interest at the rate either stated in the tenancy agreement, or ordered by the Tribunal.

Miss Donnelly submitted that it is for the Tribunal to order what rate to apply.

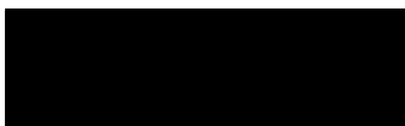
In the absence of any guidance on this matter, it appears to the Tribunal to be just to award interest at a rate representing the investment or borrowing rate of lending banks for short term loans, which is currently approximately 3% per annum, and the Tribunal will accordingly do so. Miss Donnelly indicted that she was content with that approach.

Decision

In these circumstances, the Tribunal will make an order for payment by the Respondents jointly and severally to the Applicant of the sum of £13,152.24 with interest thereon at the rate of three per cent per annum from the date of the decision of the Tribunal until payment.

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.



06/01/20

Legal Member/Chair **Date**