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 33 of the Housing (Scotland) Act 2014**

**Chamber Ref: FTS/HPC/EV/18/3439**

**Re: Property at 25B Gourdie Street, Dundee, Angus, DD2 4RL ("the Property")**

**Parties:**

**Mr Kyle Connor, 3 Palmer Place, Birkhill, Dundee, Angus, DD2 5RB ("the Applicant")**

**Miss Jacquelyn Harrington, Mr Andrew Lambe, 25B Gourdie Street, Dundee, Angus, DD2 4RL ("the Respondent")**

**Tribunal Members:**

**Petra Hennig-McFatridge (Legal Member)**

**Decision in absence of the Respondent Jacquelyn Harrington.**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the order for possession should be made.**

**Background**

The application for an order for possession of the property was made on 11 December 2018 and accompanied by a copy of the notices under S 33 of the Housing (Scotland) Act 1988 (the Act), the Notices to Quit dated 27 September 2018 with delivery confirmation by recorded delivery tracking on 28 September 2018, copy AT5 and Short Assured Tenancy Agreement as well as the required S 11 Notice to the Local Authority. Representations on whether the matter required to be dealt with under Rule 65 or Rule 66 were made by the Applicant's legal representatives T C Young on 9 January 2019 and representations were made on behalf of the Respondents by Shelter on 14 March 2019.

A Case Management Discussion (CMD) had taken place on 19 March 2019 when a further legal issue, the matter of whether or not tacit relocation could be excluded in a Short Assured Tenancy Agreement, was raised by the Legal Member on the day and the matter continued to a further CMD to allow parties to address the Tribunal on that issue. The CMD Note of 19 March 2019 is referred to for its terms and held to be incorporated herein.

Parties had been advised that the Tribunal could make a decision at the Case Management Discussion.

**The Hearing/Case Management Discussion**
The Applicant was represented by Mullen of T C Young Solicitor. The Applicant did not attend. The Respondent Mr Lambe attended with their legal representative Sarah Wilson from Shelter. Ms Harrington did not attend.

In terms of S 33 (1) of the Housing (Scotland) Act 1988 an order for possession of the house under a Short Assured Tenancy (SAT) shall be made if the Tribunal is satisfied that:

1. The short assured tenancy has reached its ish
2. That tacit relocation is not operating
3. That no further contractual tenancy (whether a short assured tenancy or not) is for the time being in existence; and
4. That the landlord has given to the tenant notice that he requires possession of the house.

If the tests of S 33 (1) of the Housing (Scotland) Act 1988 are met there is no discretion for the Tribunal and the order must be granted. All issues were discussed at the hearing and the facts of the case were clear.

The facts of the case are not disputed. The parties entered into a Short Assured Tenancy on 29 July 2016 with a duration of 1 year to 29 July 2017. Notices to Quit and S 33 Notices were served on the Respondents on 28 September 2018 for a date of 29 November 2018. The Respondents remain in the property.

The Tribunal had initially queried whether the tenancy was now a statutory assured tenancy. The Tenancy Agreement is referred to for its terms and held to be incorporated herein. Clause 1.1 states " This lease will be for the period of 12 months from the 29 July 2016 ("start date") and will end on 29 July 2017 ("end date") Parties are agreed that tacit relocation is expressly excluded from operating under this Agreement."

Both parties had been referred by Legal Member Ewan Miller at the CMD on 19 March 2019 to the case of MacDougall v Guidi 1991 S.C.L.R. 167 (1991) and item 3-11 in Professor Robson Residential Tenancies 3rd edition and asked to make representations.

At the CMD Ms Wilson argued that tacit relocation cannot be excluded in an SAT as the law states that tenants have to receive certain information in a Notice to Quit in terms of The Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988 and thus this information would not be provided to tenants if it was possible to create a fixed term tenancy without the requirement for a Notice to Quit to end the contractual tenancy. This would be an unfair term of a tenancy.

She further argued that because of the continued acceptance of rent for a significant period of time a new tenancy was entered into by the parties, which replaced the original SAT and thus a new Notice to Quit was required. A copy of chapter C

Assured tenancies from Residential Evictions by James Barrowman 2006 was submitted at the hearing by Ms Wilson with reference to item 2.95 on this point.

She further argued that if tacit relocation cannot be excluded the tenancy continues from year to year and a Notice to Quit would have to be issued for the ish date on 29 July 2019 and that the Notice to Quit is not valid as it is not issued for an ish date.

The previous argument regarding the requirement for a AT6 rather than a S 33 Notice as stated in the representations of 14 March 2019 was no longer insisted upon at the CMD.

The Applicant's solicitor submitted a copy of Juridical Review 2002 pages 201-218 by Simon Halliday on the topic of Tacit Relocation. She summarised the arguments in said publication explaining in detail the background of the development of the doctrine of tacit relocation. Under tacit relocation parties are presumed to consent to continue their contractual relationship despite the expiry of the original term of the contract. It was argued that this was particularly important if agricultural tenants remained on the land beyond the term of a lease. There appears to be no case law regarding the exclusion of tacit relocation for assured tenancies.

Ms Mullen's argument was the possibility to exclude tacit relocation sits easily with the provisions of the Act, in particular S 16, as the concept of the statutory assured tenancy provides the protection required by tacit relocation in other types of tenancies.

Referring to page 206 she went on to say that as tacit relocation is an implied agreement, a clear provision in the contract itself in terms of freedom of contract would lead to the exclusion of such an implied term. The case MacDougall v Guidi would further support this view.

Whilst Stair accepted that "some form of notice" would be required in these cases, it is suggested 40 days, in this case 2 months notice had been provided through the issued S 33 Notices.

She also argued that whilst the exclusion of tacit relocation was explicitly prevented by law in specific leases e.g. in agricultural tenancies in S 3 of the Agricultural Holdings (Scotland) Act 1991, this was not the case in the Housing (Scotland) Act 1988, which further indicates that it should be possible to exclude tacit relocation in such circumstances.

She firmly resisted the argument that a new tenancy was formed by way of accepting rent and referred in this context to the paragraph 2.95 in Residential Evictions by James Barrowman 2006 lodged by Ms Wilson, where it is stated "it would appear that it will take something more than the mere continuation of the relationship between the parties, or acceptance in rent" for a contractual tenancy to be revived. S 16 of the Act clearly provides the statutory framework regarding acceptance of rent and thus does not indicate a new contract in these circumstances.

The Tribunal asked Ms Mullen to explain the provisions of Clause 20.2 (i) as this mentions ending the tenancy by the landlord serving on tenant a Notice to Quit "to

terminate the tenancy at its end date". She was unable to provide a clear explanation as to why this provision was included in the contract.

It was agreed by parties that following the CMD the Legal Member would consider the legal submissions and arguments and then issue a decision in the matter accordingly without need for a further CMD or hearing.

**Findings in Fact:**

1. The Applicants and the Respondents entered into a Short Assured Tenancy on 29 July 2016 for the period of 12 months to 29 July 2017
2. The Tenancy Agreement excludes tacit relocation operating (clause 1.1)
3. Notice to Quit was served on the Respondents by Recorded Delivery on 28 September 2018 advising of the termination of the tenancy on the termination date of 29 November 2018
4. Notice in terms of S 33 (1) d of The Housing (Scotland) Act 1988 was served on the Respondents by Recorded Delivery on 28 September 2018 advising of the intention to repossess the premises on 29 November 2018
5. No further contractual tenancy is in existence.
6. Notice to the Local Authority was given in terms of S 11 of the Homelessness Etc (Scotland) Act 2003.
7. The Respondents had remained in the property at the date of the hearing.

**Reasons for the Decision:**

In this case there was not dispute that the tenancy is a short assured tenancy which had reached its original ish on 29 July 2017. The landlord had served on the Respondents a notice in terms of S 33 (1) d of the Housing (Scotland) Act 1988 with the required 2 months notice period.

I refer to the arguments made by both parties as set out above.

The Tribunal has to decide the following issues:

1. Can tacit relocation be excluded in a residential tenancy?
2. Was it excluded in this tenancy?
3. If so and the contractual tenancy has come to an end, what replaced it?
4. Was the documentation issued sufficient to allow an order to be granted?

Relevant sections of the Housing (Scotland ) Act 1988 are:

**16Security of tenure**

(1)After the termination of a contractual tenancy which was an assured tenancy the person who, immediately before that termination, was the tenant, so long as he retains possession of the house without

being entitled to do so under a contractual tenancy shall, subject to section 12 above and sections 18 and 32 to 35 below—

(a)continue to have the assured tenancy of the house; and

(b)observe and be entitled to the benefits of all the terms and conditions of the original contract of tenancy so far as they are consistent with this Act but excluding any—

(i)which makes provision for the termination of the tenancy by the landlord or the tenant; or

(ii)which makes provision for an increase in rent (including provision whereby the rent for a particular period will or may be greater than that for an earlier period) otherwise than by an amount specified in [F1or fixed by reference to factors specified in] that contract or by a percentage there specified [F1or fixed by reference to factors there specified,] of an amount of rent payable under the tenancy,

and references in this Part of this Act to a "statutory assured tenancy" are references to an assured tenancy which a person is continuing to have by virtue of this subsection, subsection (1) of section 31 below, or section 3A of the M1Rent (Scotland) Act 1984.

[F2(1A)The factors referred to in subsection (1)(b)(ii) above must be—

(a)factors which, once specified, are not wholly within the control of the landlord; and

(b)such as will enable the tenant at all material times to ascertain without undue difficulty any amount or percentage falling to be fixed by reference to them.]

(2)A statutory assured tenancy cannot be brought to an end by the landlord except by obtaining an order of the [F3First-tier Tribunal] in accordance with the following provisions of this Part of this Act.

(3)Notwithstanding anything in the terms and conditions of tenancy of a house being a statutory assured tenancy, a landlord who obtains an order for possession of the house as against the tenant shall not be required to give him any notice to quit.

**33 Recovery of possession on termination of a short assured tenancy.**

(1)Without prejudice to any right of the landlord under a short assured tenancy to recover possession of the house let on the tenancy in accordance with sections 12 to 31 of this Act, the [F1First-tier Tribunal] shall make an order for possession of the house if [F2the Tribunal] is satisfied—

(a)that the short assured tenancy has reached its finish;

(b)that tacit relocation is not operating; [F3and]

F4(c). . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

(d)that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house.

(2)The period of notice to be given under subsection (1)(d) above shall be—

(i)if the terms of the tenancy provide, in relation to such notice, for a period of more than two months, that period;

(ii)in any other case, two months.

(3)A notice under paragraph (d) of subsection (1) above may be served before, at or after the termination of the tenancy to which it relates.

(4)Where the **[F5**First-tier Tribunal**]** makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that finish shall end (without further notice) on the day on which the order takes effect.

**[F6**(5)For the avoidance of doubt, sections 18 and 19 do not apply for the purpose of a landlord seeking to recover possession of the house under this section.**]**

1. Can tacit relocation be excluded in a residential tenancy?

Having considered the arguments and in particular the detailed discussion of Tacit Relocation in the Juridical Review 2002 I agree with the arguments set out by Ms Mullen in principle. I consider it persuasive that tacit relocation has to be seen as a protective mechanism for tenants e.g. in agricultural tenancies, which is not as necessary in the context of assured tenancies because of S 16 of the Act, which sets out the rights and obligations of parties to a contractual assured tenancy specifically after said contractual tenancy comes to an end. In my view this is further indicated as, whereas S 3 of the Agricultural Holdings (Scotland) Act 1991 explicitly prevents tacit relocation being excluded, this is not the case in the 1988 Act, which provides instead a replacement regime of the expired contractual relationship in S 16. If the Act provides a regime regulating what provisions, duties and rights apply once the contractual relationship has ended, it is not essential that an implied term of the contract determines these rights and obligations.

Although I did consider that there was some merit in the argument that this may lead to tenants loosing the protection of required information having to be included in a Notice to Quit in terms of The Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988, this in itself is not sufficient to suggest that tacit relocation could not be excluded on that basis. The 1988 Act envisages circumstances in S 18 (6) of the Act where no Notice to Quit is required before an order for possession can be made. There is thus clearly no absolute requirement for this information to be available to tenants.

I have further had regard to the case law referred to and consider that nothing in the case Mac Dougall v Guidi specifically deals with the issue relevant for this case. The case deals with a lease for business premises. However, I did not find anything in the case providing an argument why exclusion of tacit relocation should not be possible for residential tenancies. The comment by Stewart Brymer referred to in the previous CMD note again provides no argument that tacit relocation cannot be excluded in the circumstances.

I thus conclude that the legislation provides a specific regime for assured tenancies after the contractual relationship is brought to an end. The information to be provided to tenants with a Notice to Quit is clearly not required for every end of an assured tenancy as shown in S 18 (6) of the Act and there is no provision specifically preventing tacit relocation to be excluded. Given the implied nature of the doctrine of tacit relocation and the legal framework for tenancies in terms of the Housing (Scotland) Act 1988 in post contract I agree with Ms Mullen that there is no reason why tacit relocation in principle cannot be excluded for assured tenancies, for which short assured tenancies are a sub group.

2. Was it excluded in this tenancy?

Clause 1.1 explicitly excludes the operation of tacit relocation in this lease. I did ultimately not consider that the mere mention of the option to terminate the tenancy in terms of Clause 20. 2 (i) overrides the clear statement in Clause 1.1 of the lease. Clause 20.2 (i) is not a clear contradiction of Clause 1.1.

3. If so and the contractual tenancy has come to an end, what replaced it?

I find that the contractual tenancy came to an end on 29 July 2017 and was replaced in terms of S 16 of the Act by a statutory short assured tenancy. S 16 (1) makes explicit reference to S 32-35 in this context and S 33 (4) of the Act makes explicit mention of a statutory assured tenancy in the context of a SAT.

4. Was the documentation issued sufficient to allow an order to be granted?

I was not persuaded at all by the argument made on behalf of the Respondents that the acceptance of rent would have created a new contract between the parties even if the original contract had come to an end. In my view the argument on behalf of the Applicant is correct, that acceptance of rent is merely the continued operation of the obligations and rights under S 16 (1) (b) of the Act.

The contractual tenancy had expired and tacit relocation was not operating. There cannot thus be a requirement for a further Notice to Quit.

I agree with the argument of Ms Mullen that the S 33 notice giving 2 months notice is sufficient in this case. A statutory assured tenancy had arisen in terms of S 16 of the 1988 Act. S 16 (3) of the Act specifically excludes the need for a further Notice to Quit having to be issued. The requirement of S 33 (1) (d) of the Act still continues. Such a Notice had been issued and with the required notice period of 2 months.

I am thus satisfied that as stated in S 33 of the Act

1. The short assured tenancy has reached its ish
2. tacit relocation is not operating
3. no further contractual tenancy (whether a short assured tenancy or not) is for the time being in existence; and
4. the landlord has given to the tenant notice that he requires possession of the house.

The Tribunal has no discretion in the matter. The conditions for an order for possession in terms of S 33 (1) of the Housing (Scotland) Act 1988 are fulfilled.

**Decision:**
The Tribunal grants the order for possession as per 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.**

P Hennig-McFatridge

**Legal Member/Chair**

8.5.18

**Date**