Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 (as amended) ("Regulations")

Chamber Ref: FTS/HPC/EV/19/0364

Re: Property at Howe, Harray, Orkney, KW17 2JR ("the Property")

Parties:

Mr Graham Henry, Ms Alexis Henry, Howe Farm, Harray, Orkney ("the Applicant")

Aegis Archeology Limited, Ms Marie-Claire Rackham-Mann, 16 Manor Road, Folkeston, Kent, CT20 2SA; Howe, Harray, Orkney, KW17 2JR ("the Respondent")

Tribunal Members:

Alan Strain (Legal Member) and Angus Lamont (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Tribunal Decision of 25 June 2019 stands.

Background

This was a Review Hearing following the Tribunal's Decision (in absence of the Respondent) to grant the order for recovery of possession and eviction under Section 33 of the **Housing (Scotland) Act 1988 (Act)** and Rule 66 of the Regulations.

It had come to the Tribunal's attention that the notification for the Hearing on 25 June 2019 had been served on the Respondent's agents and that she may not have received notification.

The Tribunal accordingly advised Parties by email of 2 July 2019 that it proposed to Review its Decision of 25 June 2019 under Rule 39 and invited Parties comments on this.

Written responses were received by both Parties in the form of emails of 2 and 3 July 2019 from the Applicant and emails of 3 July 2019 from the Respondent.

The Applicant's position was that (a) no review should take place as the Respondent's agents had notification and ought to have passed this to her; and (b) the Respondent's defence was that Mr Henry gave evidence that he did not agree to extend the tenancy and accordingly the Decision would not have been different even if the Respondent had attended. In so far as the Respondent's position stated now that it was Mrs Henry who agreed to extend the tenancy this was denied and reference was made to the Respondent having stated at the Case Management Discussion (**CMD**) on 1 May 2019 that it was Mr Henry.

The Respondent's position was that she had not received notification from her former agents and that she had informed the Tribunal administration that she was representing herself. She wished the opportunity to put her case forward. She also restated arguments that she had advanced previously about the validity of the lease given the ish date had been incorrectly stated as 4 March 2016 (instead of 2017). She stated that the Section 33 Notice and Notice to Quit could not have validly terminated the tenancy.

The Respondent further submitted that it was Mrs Henry who had given verbal agreement to continue the tenancy.

Having considered the respective representations the Tribunal agreed to fix a Review Hearing to consider the position.

Hearing

The case called for a Review Hearing on 16 August 2019 by conference call. The Applicants participated and were represented by their Solicitor. The Respondent participated herself.

The Tribunal had regard to the Parties Written Representations and the papers it had at the original Hearing on 25 June 2019 as detailed in the Written Decision. It also had regard to the CMD Note dated 1 May 2019.

The Respondent's position was that the Review should be granted on the following basis:

1. She had not received notification of the Hearing;
2. She had a defence to the application on the basis of the validity of the tenancy (4 March 2016 having been stated instead on 4 March 2017);
3. The ish date would have been 4 September 2018 and the Section 33 Notice and Notice to Quit had not validly terminated the tenancy as they were served 16 July 2018;
4. In any event the tenancy had been continued by Mrs Henry's agreement.

The Tribunal referred the Respondent to Clause Three of the tenancy which stated that the tenancy "shall continue month to month thereafter". The Respondent did not have a copy of the tenancy to hand so the Tribunal read out the provisions of Clause

Three to her. Her position was that the tenancy was invalid given the fact Clause Three stated that the period of the tenancy was to be from 4 September 2016 to 4 March 2016.

The Tribunal explained to her what the requirements of section 33 were and that, if established, the Tribunal had no discretion other than to grant the order sought as this was a mandatory ground. The Respondent stated this had never been explained to her before. The Tribunal drew her attention to the CMD Note paragraph 8 at which it was noted that the Legal Member had explained the effect of Section 33 to her. The Respondent denied that this had been explained to her.

The Tribunal referred her also to the defence put forward at the CMD that it was Mr Henry who had agreed to the continuation of the tenancy after 4 October 2018. She stated this was also incorrect and that she had said it was Mrs Henry. The CMD Note was incorrect according to the Respondent.

The Tribunal asked the Respondent when, where and what had been said by Mrs Henry to lead her to believe that the tenancy was to be continued beyond 4 October 2018. The Respondent informed the tribunal that Mrs Henry had not said anything to her about the termination of the tenancy after 4 October 2018 and that had led her to believe that the tenancy was continuing.

The Tribunal then heard from the Applicant's solicitor who informed them that the CMD Note paragraph 8 was correct. The Legal Member had explained the effect of section 33 to the Respondent and the Respondent had said that Mr Henry had agreed to continue the tenancy after 4 October 2018. Mrs Henry in any event denied having agreed to continue the tenancy and by the Respondent's own admission Mrs Henry had not said anything after 4 October 2018 to the effect that the tenancy was to continue.

Both Parties were afforded the opportunity to say anything further in conclusion and then the Tribunal adjourned to consider its Decision.

Decision and Reasons

The position under section 33 of the Act is clear. A Short Assured Tenancy (**SAT**) once terminated and tacit relocation not operating then the Tribunal has no discretion other than to grant the order sought.

In this instance the clearly typographical error in the dates of the SAT do not render it invalid. The ish date was clearly intended to be 4 March 2017.

Clause Three of the tenancy provided that the tenancy continued month to month thereafter. Accordingly the ish date would be the 4th day of a calendar month provided appropriate notice had been given. The Section 33 Notice and Notice to Quit had both been validly served on 16 July 2018 and gave in excess of 2 months' notice of termination on 4 October 2018. The Notices correctly terminated the tenancy on 4 October 2018.

The Tribunal then considered the submission made by the Respondent that the tenancy had been continued by agreement after 4 October 2018 by Mrs Henry. Her position was that the fact Mrs Henry had said nothing about the termination of the tenancy constituted an agreement to continue it.

The Respondent's position was erroneous as a matter of law. The facts and circumstances put forward by her (even if proved) could not constitute an agreement to continue the tenancy after 4 October 2018.

The Tribunal determined that the Respondent had no stateable defence to the application under section 33 and accordingly decided that the original Decision to grant the order should stand.

Alan Strain

Legal Member/Chair

16 August 2019

Date