



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 of the Private Housing Tenancies Scotland Act 2016**

**Chamber Ref: FTS/HPC/EV/20/0433**

**Re: Property at 5 Moran Court, East Academy Street, Wishaw, Lanarkshire, ML2 8FB (“the Property”)**

**Parties:**

**Mr Robert Nelson, Mrs Margaret Nelson, 6 Heather Row, Carluke, Lanarkshire, ML8 5EG (“the Applicant”)**

**Mrs Karen Bradley, 5 Moran Court, East Academy Street, Wishaw, ML2 8FB (“the Respondent”)**

**Tribunal Members:**

**Jan Todd (Legal Member) and Elizabeth Dickson (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for possession should be granted**

- **Background**

1. This was a hearing to consider an application made on 10<sup>th</sup> February 2020 by the Applicants submitted under Rule 109 of the First Tier Tribunal for Scotland’s Rules of Procedure 2017 seeking an order for Repossession under a Private Residential Tenancy Agreement on the basis of Ground 12 of the Private (Tenancies) Scotland Act namely that there are over 3 months’ rent arrears.
2. A case management discussion (CMD) was held on 18<sup>th</sup> August (delayed due to the Covid-19 pandemic) with Mrs Nelson attending for the Applicants and Mr Melvin of Citizen Advice Bureau attending for the Respondent. At the CMD it was noted that the action has been raised because the Applicant advised that no rent has been paid by the Respondent for over a year with the arrears now standing at over £9000. The Applicant has obtained two orders from the Tribunal under rule 70 of the Tribunal’s rules for payment of rent outstanding.

The first order granted for £2800 on 9 December 2019 under case reference FTS/HPC/CV/19/3080 and the second one granted for another £2200 on 13<sup>th</sup> February 2020 under case reference FTS/HPC/CV/19/4058. It was noted at the CMD that there are two tenancy agreements entered into between the parties. One dated from 17<sup>th</sup> October 2017 until 16<sup>th</sup> October 2018 and the second commencing from 6<sup>th</sup> January 2020 until 5<sup>th</sup> January 2020. The Applicant had taken legal advice and was advised to treat this as a Private Residential Tenancy and as such served a Notice to Leave relying on ground 12 of Schedule 3 to the 2016 Act. The Respondent had lodged written representations confirming that her position was this was not a new Private Rented Tenancy but an extension of the original short assured tenancy agreement and accordingly notice should have been served under the Housing (Scotland) Act 1988; that as the Notices served relate to the 2016 Act they are incompetent and the application should be dismissed. It was concluded that a hearing needed to take place to establish whether or not the tenancy agreement in place between the parties is a Private Rented Tenancy and if so whether a valid Notice to Leave has been served.

3. It was confirmed at the CMD that the Respondent was waiting to be rehoused by the Council and was asked to advise the Tribunal if she left the Property before the date of the hearing.
4. An initial date for the hearing was set for 1<sup>st</sup> October 2020 but was postponed following a request from the Respondent for a postponement due to her wish to attend a funeral of a close family member.
5. A new date was set for 9<sup>th</sup> November 2020. Prior to this the Tribunal sent Direction to the Parties asking for:-
  - 1) *“A copy of the previous tenancy between the parties stated to have run from October 2017 to October 2018. In particular the Tribunal wishes to know the commencement date and initial termination or ish date on that lease and if and how it continued thereafter.*
  - 2) *Please also clarify how and when that tenancy ended as it is averred it ended in October 2018?*
  - 3) *As the application for eviction is in respect of arrears of rent please supply an up to date rent statement showing the current rent outstanding.*

*Both parties may wish to have regard to the provisions of The Private Housing (Tenancies) (Scotland) Act 2018 (Commencement) No 2 and Saving Provision) Regulations 2017 and may wish to address the Tribunal on the impact of Regulation 3 at the hearing. “*

6. The Applicant responded enclosing a copy of the original tenancy agreement entitled “Short Assured Tenancy Agreement” with an entry date of 17<sup>th</sup> October 2017 and a statement confirming :-
  - 1) A copy of the tenancy agreement is attached It shows a commencement date of 17<sup>th</sup> October and termination date of 16<sup>th</sup> October 2018. I was not continued at that point see 2
  - 2) *“At that date the tenants were behind with their payments and indeed had started missing payments from February 2018. See attached evidence A which itemises the incidence of missed or partial payments*

*from February 2018 through to September when that summary was produced to try to get payments back on track. Other payment plans had been produced by the landlords to allow the tenants time to overcome their payment difficulties, None of these were working. We were not of a mind to renew the lease in these circumstances. No agreement was in place beyond the 16<sup>th</sup> October 2018 and the tenants knew we were not willing to tolerate this situation further.*

- 3) *They however were not of a mind to leave voluntarily. They stayed put but no lease was signed. They had breached the terms of their contract up to the 16<sup>th</sup> October. When we did finally get together with them after New Year 2019 they were still adamant they wanted to remain in our flat and having heard convincing arguments about a new job for Mr Bradley we eventually signed a new tenancy agreement with them on 6<sup>th</sup> January 2019. Although this was headed at the time as a Short Assured Tenancy as before and had the same wording we took legal advice at the later point when we were about to pursue eviction and were advised to treat that tenancy as a Private Residential Tenancy as it as a new agreement dated 5<sup>th</sup> January 2020."*
  - 4) The remainder of the statement confirmed the rent due now to September 2020 was £9400 including the rent awarded in the two previous cases and a further 8 months arrears since February 2020.
7. The Respondents position is as set out in a written statement to the Tribunal by Mr Melvin dated 12<sup>th</sup> August 2020 which narrates:-
- 1) The Respondent is the widow of Mr Terence Bradley with whom she first became the tenant of her home at or around October 2017. On Mr Terence Bradley's untimely death the Respondent became the sole tenant.
  - 2) It is denied the tenancy began after the 1<sup>st</sup> December 2017 and it follows that it is submitted that this is not a Residential protected Tenancy, that the Notice to Leave served on the tenant has no legal effect and that the Applicants are not entitled to an order for eviction under Rule 109.
  - 3) It is not agreed that the initial tenancy agreement came to an end at the end of its initial term. It is submitted that the agreement relocated and therefore continues to be in place in its somewhat modified form.
  - 4) It is submitted that tenancies such as the present one which began before the Act came into force will not usually become Private Residential Tenancies. Short Assured Tenancies in particular did not automatically convert to Private Residential Tenancies even if the initial or subsequent fixed term came to an end after the 1<sup>st</sup> December 2017. The Respondent refers to paragraph 1(2) and paragraph 21 of Schedule 1 of the Private Housing Tenancies Scotland Act 2016.
  - 5) Although it is acknowledged that section 31 of the Housing Scotland Act 1998 has the effect of providing for the conversion of a successor's tenancy into a Private Residential Tenancy on the death of the tenant, it is submitted that Section 31 has no effect where the successor was a joint tenant of the deceased.
  - 6) It is additionally submitted that it is open to an Assured Tenant to make an explicit written agreement with the landlord to convert the Assured tenancy into a Private Residential Tenancy (PRT) on a specified date.

(Section 46A of the Housing (Scotland) Act 1988). The “Extension to Short Assured Tenancy” agreement referred to by the landlord does not constitute such an agreement. Any reasonable construction of the words used suggests that it was not the intention of any of the parties to convert the Assured tenancy into a PRT.

- 7) It is suggested by the Applicants that paragraph 1.8 of the agreement supports the contention that the agreement entitled “extension to Short Assured Tenancy” should be understood to be a conversion into a PRT because according to the clause the agreement must follow current legislation even where it differs from the terms of that legislation. It is submitted that the Respondent’s tenancy is excluded from consideration as a PRT as a consequence of Schedule 1 of the 2016 Act (see paragraph 4 above) and therefore the Applicant’s argument does not hold because the Tenancy is an already an existing Assured tenancy.
- 8) The Respondent also asks the Tribunal to note the civil claims taken by the Applicants, 19/3080 and 19/4058. Both Applications were made using Rule 70 on the basis that the Respondents were short assured tenants. The Tribunal in 19/3080 left the nature of the tenancy an open matter but the Tribunal in 19/4058 found explicitly that the Respondent was a Short Assured Tenant after hearing from the Citizen Advice Bureau on similar terms to those set out above. Neither of those decisions supports the contention that this is a PRT tenancy.

- **The Hearing**

8. The Hearing took place by teleconference at 10am on 9<sup>th</sup> November 2020 and Mrs Nelson was in attendance for the Applicants and Mrs Bradley attended along with a supporter her cousin Ms MacPhee and also in attendance was Mr Melvin her representative. The Convenor made introductions and explained the purpose and order the hearing would be heard in.
9. Mrs Nelson confirmed she was seeking an order for repossession based on the substantial rent arrears that she confirmed now amounted to £9,950. She advised no further sums had been received by the Respondent.
10. Mr Melvin agreed at the end of the Tribunal that the rent arrears are not being challenged.
11. Mr Melvin had advised in an e-mail on 4<sup>th</sup> November, that Mrs Bradley had been offered a tenancy by South Lanarkshire Council and had accepted it she was due to move in on 13<sup>th</sup> November. At the start of the hearing he again confirmed that the outcome of this hearing would become academic as the Respondent was planning to move by Friday 13<sup>th</sup> and if the Tribunal and the Applicant accepted her assurance to that effect he submitted the case could be postponed without evidence. The Applicants had already responded to the written e-mail offering this assurance, by saying they wished to proceed with the hearing and Mrs Nelson confirmed once again that she wished to proceed, commenting that this was an extreme case where in her view the Respondent has obstructed their attempts to get their house back, with no rent paid for months and no communication and a refusal to allow them to inspect the house.

12. Mr Melvin then confirmed that although his client could choose not to defend this, he and she both felt it was important that the Tribunal was not asked and did not grant an eviction order against their powers.
13. Mrs Nelson then provided a summary, in response to questions from the Tribunal, of how the original tenancy began. She advised the tenants responded to an advert and paid the first month's rent and the deposit in cash in advance. Ms Nelson confirmed that she then drafted the written agreement using styles of clauses she picked up from the internet. She referred to it as a "Short Assured Tenancy Agreement" but when asked if she had sent out any prior notices in particular she said she did not. In particular she did not remember sending an AT5 notice which is required to form a Short Assured Tenancy. When asked if she knew what the Housing Scotland act 2001 covered, as this Act is referred to in her tenancy agreement and in particular mentioned in the clauses regarding terminating the tenancy, she said she did not and admitted she did not realise it referred to social housing tenancies.
14. Mrs Nelson went on to explain that payment of rent from the tenants who were originally Mr Terence Bradley and Mrs Bradley, started to become erratic and although she and her husband tried to give some leeway as she understood Mr Bradley had lost his job things became untenable and payments were not coming through. She further advised that she wrote a lot of letters and texts asking them to leave and suggesting it was in everyone's best interests if they moved on. She advised Mr Bradley became increasing more resistant. She tried to arrange meetings with Mr and Mrs Bradley, but Mr and Mrs Bradley reneged on these and advised that Mr Bradley kept saying her notices were not legal. She admitted she had not sent any notices at this point just letters. Mrs Nelson then advised that she left matters until after Christmas 2018 and stated that she and her husband went to see Mr and Mrs Bradley in their flat in the New Year. She confirmed that Mr Bradley was apologetic and said he had high hopes of a new employment and that they (he and Mrs Bradley) were keen to stay in the flat. As a result of this meeting she advised that her and her husband agreed to a new agreement from 6<sup>th</sup> January 2019 with the Respondent and her husband. She did not take legal advice before entering into the new agreement and again Mrs Nelson confirmed she just used substantially the same wording as she had done before. But she reiterated that it was made up "as a new agreement from 6<sup>th</sup> January that they wanted to redate it and start afresh"; she called it "a new start". When asked why she had used clause 1.8 referring to new legislation, Mrs Nelson stated that it seemed a reasonable thing to put in there and if there were any "warts" with it I would be bound by the legislation.
15. She advised that after she tried to evict the Respondent and the original application was rejected by the Tribunal, she went to see a solicitor and he told her which letter to use and offered to draft it for her but given the cost of that she indicated she wanted to do it herself. (Mrs Nelson was referring to the Notice to Leave). She advised that they (she and her husband) went down on the same day to deliver it by hand but did not know that Mr Bradley had died and it was only when delivering the Notice to Leave by hand that they found out from Mrs Bradley that her husband had passed away.
16. Mr Melvin then asked some questions of Mrs Nelson. Firstly he asked about when she asked to carry out inspections and in particular suggested that this could have been around the time of each civil action coming to a Tribunal. Ms

- Nelson denied that this was the reason for the requests advising that she and her husband had not been able to inspect the Property and in particular around July 2020 she received the reminder for her landlord's insurance renewal and realised as part of that she should be able to confirm that they had visited the Property and this made her realise they needed to see it.
17. Mr Melvin then asked if she had made a previous application for eviction with the Tribunal and asked if it had been rejected. Mrs Nelson confirmed it had although she wasn't quite sure why. She mentioned that one reason was that she had not included her husband's name on the application and he was a joint landlord.
  18. Mr Melvin then asked if the new tenancy agreement was just the same one rewritten and Mrs Nelson confirmed that she had recopied some of the same clauses but had redated it to reflect the new dates.
  19. Mr Melvin then asked his client some questions. She confirmed that at first when they became tenants at the Property everything was fine and they were both working. Mr Melvin asked "what do you think they were agreeing with you – was it a permanent tenancy or just for a short period of time". Mrs Bradley replied "probably just for a short time". Mr Melvin then asked who took the lead in the tenancy arrangements and Mrs Bradley advised her husband did. He was a bus and coach driver and she advised he lost his job and started getting mental health problems.
  20. Mr Melvin asked if she remembered a meeting on 6<sup>th</sup> January to discuss the tenancy. Mrs Bradley did not remember any meeting saying that she just remembered Mr and Mrs Melvin coming to see them in August/ September 2019 when they wanted to discuss rent arrears. Mr Melvin then asked did Mrs Bradley remember getting the 2<sup>nd</sup> agreement and Mrs Bradley said "to be honest not too sure".
  21. Mrs Bradley then confirmed that her husband had suddenly and sadly died on 31<sup>st</sup> December and that Mr and Mrs Nelson came to her house on or around 9<sup>th</sup> January 2020 when she advised that Mrs Nelson had thrown a letter at her and called her a squatter. In response Mrs Bradley told Mrs Nelson that her husband had just died and Mrs Nelson did not respond to that but walked away. Mrs Bradley got upset at this point and the Tribunal adjourned for 15 minutes.
  22. When the Tribunal resumed Mr Melvin clarified with Mrs Bradley that she had difficulty paying the rent after Mr Bradley had passed away and that she had made a homeless application with South Lanarkshire council as she has connections in that area. Mrs Bradley confirmed that was correct. She advised that they put her on a homeless list and 2 weeks ago she received an offer of a tenancy which she has accepted. She advised the delay was probably due to the pandemic and moving to South Lanarkshire Council.
  23. Mrs Bradley also advised that she was asked if the landlords could visit on 6<sup>th</sup> February but she said she was in no state to go to any meeting. Mrs Bradley believes she Mrs Nelson asked again to come and do a check but stated that it is only just recently that she Mrs Bradley had started to be able to go outside and admitted she had been suffering some mental health issues. Mr Melvin ended his questions by asking if the Applicants were enforcing the orders for payment that they had got from the Tribunal. Mrs Bradley said that yes she had a letter about arrestment of her wages.

24. Mrs Bradley was asked some further questions by the Tribunal and once again denied remembering any meeting with the Applicants in January 2019 but when asked if she remembered signing the second tenancy agreement she said yes she thought so but she did not remember how she got it. She went on to say "I took it that it was just a new agreement". I got that many letters. She went on to say that it was he husband who dealt with the paperwork and she thought it might have been her husband they spoke to.

### **Findings in Fact**

1. The Applicants and Mrs Bradley the Respondent along with her late husband Mr Terence Bradley, entered into a lease of the Property which commenced on 17<sup>th</sup> October 2017 and was due to end on 16<sup>th</sup> October 2018
2. The Rent due in terms of the lease was £550 per calendar month payable in advance.
3. The lease was not brought to an end on 16<sup>th</sup> October 2018 but continued by tacit relocation until it was replaced by a new written agreement.
4. A new written agreement was entered into between the Applicants and the Respondent and Mr Bradley commencing on 6<sup>th</sup> January 2019.
5. The new agreement which is entitled "Extension to Short Assured Tenancy Agreement" was drafted by Mrs Nelson and has a commencement date of 6<sup>th</sup> January and end date of 5<sup>th</sup> January 2020.
6. The Rent is £550 per calendar month payable on or before 17<sup>th</sup> of each month and this did not alter in the new tenancy.
7. The Respondent is still living in the Property
8. The Rent is in arrears and as at September 2020 the total sum due was £9400. There is one more month due since then bringing the current rent arrears to £9950.
9. The Rent arrears are not disputed.
10. A Notice to leave was served by the Applicants by hand on the Respondent on 9<sup>th</sup> January 2020. The Notice to leave is addressed to Mr Terence Bradley and Mrs Karen Bradley. Mr Bradley had died on 31<sup>st</sup> December and Mr and Mrs Nelson discovered this when they served the Notice to Leave on Mrs Bradley.
11. The Notice to Leave refers to the Landlord relying on Ground 12 of Schedule 3 of the 2016 Act as the ground for eviction. Ground 12 is that there were over 3 months' rent outstanding at the date of service of the Notice to Leave. The Notice to Leave records that the rent outstanding at the date of the Notice to Leave is £4450 and that the arrears at September 2019 were £2800 which is the sum granted in the civil case brought by the Applicant under FTS/HPC/CV/19/3080.
12. The rent outstanding today is over £9,950, which is over 3 months' rent.
13. A notice to leave was served on the Respondent on 2020 by hand confirming that no proceedings would be raised before 10<sup>th</sup> February 2020.
14. These proceedings were raised on 10<sup>th</sup> February 2020 and the application included a copy of the Notice to Leave which specified Ground 12.

15. The arrears are not wholly or partly due to a delay or failure in payment of a relevant benefit.
16. A s11 Notice in terms of the Homelessness (Scotland) Act 2003 was sent to North Lanarkshire Council on 3<sup>rd</sup> February 2020

### **17. Reasons for Decision**

18. Most of the facts in this case are not in dispute. Both parties agree that the late Mr Bradley and Mrs Bradley entered into a tenancy of the Property from the Applicants which started on 17<sup>th</sup> October 2017 and was for a period of one year. The Applicant advised she did think it ended at the end of the initial period but the tenants did not leave despite Mr and Mrs Nelson making it clear that they wished them to do so as rent arrears had accrued and this was very frustrating for them.
19. Mrs Bradley is not challenging the fact that there are rent arrears. She agrees the rent is due and owing and her representative agreed that the only matter being challenged is the way the Applicants have chosen to try and remove Mrs Bradley as he and his client feel that the Applicants have mistakenly used the wrong legislation to apply for eviction of the Respondent. Their position is that the tenancy was entered into in 17<sup>th</sup> October 2017 and continued by tacit relocation after the initial period ended on 16<sup>th</sup> October 2018, that the issue by Mrs Nelson of a fresh tenancy agreement which was then signed by both Mr and Mrs Bradley was just a restatement of the same conditions and has not changed the nature or type of tenancy which Mr Melvin originally argued was a short assured tenancy. Mr Melvin has accepted that it was (in the absence of an AT5 form being served prior to the creation of the originally tenancy which is a prerequisite for a short assured tenancy) not a short assured tenancy but was an assured tenancy.
20. The question for the Tribunal is a factual and legal one of whether the second tenancy agreement is a new tenancy created after December 2017 so would be a Private Rented Tenancy (PRT) under the 2016 Act or a continuation of the original tenancy agreement which would then not be a PRT as that is excluded in terms of Schedule 1 Paragraph 21(1) (2) of the 2016 Act which expressly excludes certain tenancies from being private residential tenancies. Paragraph 1 (d) states "A tenancy cannot be a private residential tenancy if it is ...d) an assured tenancy (including a statutory assured tenancy) within the meaning of the Housing (Scotland) Act 1988
21. The Tribunal accepts that the first tenancy agreement despite being entitled "Short Assured Tenancy Agreement" is not in fact a short assured tenancy agreement. It is an assured tenancy because it is a tenancy of a private house created between two sets of private individuals after the coming into force of the Housing (Scotland) Act 1988 and before the coming into force of the replacement legislation the 2016 Act. Mrs Nelson admitted she drafted the lease herself using styles of clauses she found on the internet. The lease contains a mixture of clauses and phrases some of which apply to a social tenancy such as references to Housing (Scotland) Act 2001 which is clearly not relevant or appropriate to an assured tenancy. It is accepted that a second tenancy agreement was entered into after the 2016 Act came into force and again Mrs Nelson has used similar language to draft an agreement she called "Extension to Short Assured Tenancy". The Tribunal notes the



name of each agreement is not determinative of the type of tenancy it is. It is clearly not a short assured tenancy, which the Respondent accepts. It has been drafted by a lay person who openly admits she found and used concepts on the internet and has not been sure what she was using.

22. If the name of the Agreement is not conclusive as to what type of tenancy it is, the Tribunal has to look at the intentions of the parties and what they have actually agreed to in terms of the agreement itself.
23. The Tribunal found both parties credible in their evidence. Mrs Nelson was open about how frustrated she was with the lack of rental payments and how she wrote and asked the tenants on several occasions to leave but admits she did not serve any formal notice (which for an assured tenancy should have been a notice to quit and a notice under S19 of the Housing (Scotland Act.) However she was very clear in her evidence that she and her husband went to visit the Respondent and Mr Bradley just after Christmas 2018 as she said “ and at that visit which was to discuss the rent arrears she advised and when they could leave they were persuaded by Mr Bradley that he had the opportunity of a new job and would be able to start paying the rent. She then stated clearly and emphatically that she wanted to start afresh with a new tenancy agreement and that they agreed it would start from those dates namely 6 January and would end a year later. Ms Nelson had used a similar document because that is the one she had used before but under questions from Mr Melvin she was clear this was meant to represent a fresh start and that is why she put in the current date as the start and end dates. She also said she used the clause about current legislation because “ if it had warts in it this would cover it”. Mrs Nelson thought that no agreement was in place after October 2018 until January 2019 when the new agreement was signed.
24. Mrs Bradley was also credible in the evidence she gave. She was clearly and understandably upset talking about her late husband but after a break came back and was able to answer questions from Mr Melvin and the Tribunal. She advised that she did not remember a meeting with Mr and Mrs Nelson in or around January 2018 but admitted that Mr Bradley dealt with most of the tenancy issues. She does not remember signing the new tenancy agreement dated 6th January but did not deny or challenge in any way that a new agreement had been signed by herself and the late Mr Bradley. She agreed that she thought the first tenancy agreement was for short period not a continuing period.
25. Mrs Bradley via her representative is not challenging that there are rent arrears merely that the action is incompetent as it is based on incorrect legislation. The Tribunal accepts the evidence of Mrs Nelson that there was a meeting between at least Mr and Mrs Nelson and Mr Bradley that at that meeting it was agreed a new tenancy would be entered into and that the intention was to have a fresh start.
26. Had the tenancy agreement flowed on from the previous one namely started at the ish date of the first agreement which was 16<sup>th</sup> October then the Tribunal would have agreed this was probably and more likely a continuation of an assured tenancy which has to be ended in the way set out by the 1988 Act. The Tribunal however accepts that this was meant to be a fresh start that the parties had chosen to enter into a new written agreement with a new start date and end date written into this. This confirms their intention that it is a different and separate agreement to the first one, not just a continuation of it.

The fact the written agreement does not use the terminology of the 2016 Act is not surprising. Mrs Nelson is not a lawyer. She does not profess to have a knowledge of Housing Law and just repeated a lot of clauses she had used before that were not even appropriate to the 1988 Act. She did however use a clause to try and ensure that even if what she said was not correct it would be sorted by clause 1.8 which refers to the parties being bound by the correct legislation. The Respondent and her husband signed this agreement. They did not sign it with Mr and Mrs Nelson but afterwards and so had time to look at it, read and accept the clauses. It is noted that the Mr and Mrs Nelson have dated their signature as 6<sup>th</sup> January there is not date against the signature of Mr and Mrs Bradley but from the evidence it is clear it was not signed together.

27. The original tenancy agreement in clause 4 entitled Ending the Tenancy sets out that the tenancy can be ended in one of the following ways and one of those ways is – “By written agreement between you and us”. The Tribunal finds that by entering into a new written agreement the parties have decided to end the existing agreement and enter a new one. Therefore the provisions of paragraph 21(d) of the 2016 Act do not apply as this is not a continued statutory assured tenancy but a new contractual tenancy.
28. The fact that the new tenancy agreement has a wholly different start and end or ish date is also in the Tribunal’s view conclusive that this is a new agreement that replaces the old one and not a continuation or extension of it. As it is not a continuation of the assured tenancy then it must be a private residential tenancy within the meaning of the 2016 Act as it has been entered into after that Act came into force on 1<sup>st</sup> December 2017.
29. The Respondent submitted that it is highly persuasive that two legal members of the Tribunal accepted and granted orders or payment against the Respondent in applications that were brought under Rule 70 of the Tribunal’s rules and that this Rule applies to civil actions raised in relation to assured tenancies under the 1988 Act. The Applicant points out that in the first of those cases the legal member specifically stated he was choosing to deal with the application under that rule out of convenience as it had been raised that way and as the matter under dispute was a question of rent arrears based on a breach of contract it was not wholly relevant which rule was used. The second application for an order for payment came before a different legal member who appears to accept that the tenancy is a short assured tenancy but does not address, nor would he need to as he was also dealing with a breach of a contract which breach was not disputed, why he believed it was a short assured tenancy. As has already been conceded by the Respondent the original tenancy agreement was not and could not have been a short assured tenancy agreement it was an assured tenancy. In addition the Tribunal notes the terms of The Private Housing (Tenancies) Scotland Act 2016 commencement) No 2 and Saving Provision) Regulations 2017 section 3 specifically says that “despite the amendment of sections 32 and 33 of the Housing (Scotland) Act 1988 by section 75 and paragraph 2 of schedule 5 of the Act those sections have effect on and after December 2017 as they had effect immediately before that date but only in relation to  
a) a short assured tenancy within the meaning of S32 of the 1988 Act) which was created before 1<sup>st</sup> December 2017 and continues in existence on that date

b) a new contractual tenancy within the meaning given in section 32(3) (b) of the 1988 Act which came in to being before 1<sup>st</sup> December 2017 and continues in existence on that date and

**c) a new contractual tenancy (within the meaning of section 32(3) (b) of the 1988 Act which comes into being after 1<sup>st</sup> December 2017 at the ish of the short assured tenancy which is a short assured tenancy in a case mentioned in paragraph (a) or (b).**

These regulations clearly show that Parliament intended that new agreements that were entered into immediately on the ish of the original agreement would enjoy the same protection as the 1988 Act afforded but that new agreements that did not come into force at the ish date of the previous agreement would not.

The second written agreement in this case clearly does not come into being at the ish of the first agreement. The Tribunal does not accept therefore that this is a continuation of an assured tenancy.

30. As the Tribunal has found that the tenancy agreement currently in place is the one dated 6<sup>th</sup> January and is a private residential tenancy then the requirements to terminate that tenancy are those set out in Chapter 3 of the 2016 Act.
31. The Tribunal was satisfied that the Respondent had been served with a valid Notice to Leave under S52 (3) of the 2016 Act specifying Ground 12 of Schedule 3 of the Act as the relevant ground of eviction.
32. The Notice to Leave was also accompanied by evidence of how the ground was met namely specifying that the rent was in arrears and referring to one tribunal case that had already been heard and an order granted and a second one which had been applied for.
33. The Notice also set out the relevant notice period which expired on 10<sup>th</sup> February 2020.
34. The Application was lodged within 6 months from the date of the expiry of the notice period and therefor complies with Section 55 of the Act.
35. Ground 12 of Schedule 3 of the Act states  
“It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.  
The First Tier Tribunal must find that the ground named by sub-paragraph (1) applies if
  - a. At the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits the tenant is
  - b. in arrears of rent by an amount equal to or greater than the amount which would be payable as one month’s rent under the tenancy on that day and
  - c. has been in arrears of rent (by any amount) for a continuous period up to and including that day of three or more consecutive months and
  - d. The Tribunal is satisfied that the tenant’s being in arrears of rent over that period is not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.”
36. The Tribunal accepted the verbal averments and the written statement of rent arrears from the Applicant who was wholly credible in all of her evidence of the Respondent having failed to pay the full rent due since April 2019

37. The rent outstanding as at today's date amounts to more than one month's rent and arrears have been due and owing for more than 3 months.
38. The Respondent accepts the rent arrears.
39. The Tribunal is satisfied in terms of S 51 (1) of the Act that one of the eviction grounds named in Schedule 3 of the Act, namely Ground 12, is met, the Tribunal has no discretion as the Notice to Leave is served before the coming into force of the Coronavirus Scotland Act 2020 and therefore determined that the order for eviction sought by the Applicant should be granted.
- Decision
  - An order for possession is granted.

### **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.**



Jan Todd  
**Legal Member/Chair**

16<sup>th</sup> November 2020  
**Date**