



**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 26 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in relation to an application for eviction/ possession of a Rented Property in terms of Rule 66 of the Procedure Rules.**

**Chamber Ref: FTS/HPC/EV/22/3903**

**Re: The Bungalow, Alleyford, Kirkgunzeon, DG2 8LE ("the Property")**

**Parties:**

**Roger Wright residing at The Coach House, Leigh Farm, Angersleigh, Taunton, TA3 7SY ('the Applicant')**

**Megan Anderson, Anderson Strathern, Solicitors, 1 Rutland Court, Edinburgh, EH3 8EY ('the Applicant's Representative')**

**Philip McCallum residing at The Bungalow, Alleyford, Kirkgunzeon, DG2 8LE ('the Respondent')**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal')**

**Tribunal Member: Jacqui Taylor (Legal Member) Ann Moore (Ordinary Member)**

## **Background**

1. The Applicant applied to the Tribunal for eviction/ possession of the Rented Property under section 33 of the Housing (Scotland) Act 1988, in terms of Rule 66 of the Procedure Rules. The application was dated 24<sup>th</sup> October 2022 and was received by the Tribunal on the same date. The application was in the following terms:

1. The Applicant is the heritable proprietor of the property at the Bungalow, Allyford Farm, Kirkgunzeon, DG5 4HP ("the Property").

The Respondent is the tenant of the Property in terms of a Short Assured Tenancy which commenced on 1 October 2006 with the Applicant's late aunt Frances McGowan. A copy of the said Short Assured Tenancy is attached together with a copy of the AT5 dated 4 September 2006 as acknowledged by the Respondent on 8 September 2006.

2. The Applicant acquired Allyford Farm from his late aunt's estate in spring 2019. A copy of title sheet KRK12642 for the whole of Allyford Farm is attached. The Property

comprises part of Allyford Farm which also consists of some 200 acres of grass land, tumbledown farm buildings, a ruin of a redundant uninhabitable farmhouse and a derelict cottage.

3. On acquiring title to the Property, the applicant met with the Respondent in spring 2019. The Respondent advised he was planning to buy a property in the northwest of Scotland and move there for his retirement. The Applicant advised that he and his partner were intending to live in the Property to allow them to run the farm. The Respondent did not move from the Property.

4. On 30 May 2022 the Applicant's solicitor served a Notice to Quit together with a Notice in terms of Section 33 of the Housing (Scotland) Act 1988. The said Notice to Quit and Section 33 Notice were served by way of Sheriff Officers on the Respondent on 1 June 2022. Copies of the said Notice to Quit, Section 33 Notice and Execution of Service are attached. In terms of the said notices the Respondent was required to vacate the Property by 31 August 2022.

5. Despite the service of the said Notices the Respondent continues to reside in the Property.

6. The Applicant has served a Notice in terms of Section 11 of the Homelessness etc (Scotland) Act 2003 on Dumfries & Galloway Council on 24 October 2022. A copy of the said Notice together with a copy of the covering email to the Council are attached.

7. The Respondent remains in the property. This action is accordingly necessary. The Applicant is entitled to an order of possession. The Short Assured Tenancy has reached its end, tacit relocation is not operating and the Applicant has given notice in terms of Section 33 (1) (d) of the Housing (Scotland) Act 1988 as amended that he requires possession of the Property. In terms of Section 33 (1) (e) of the Housing (Scotland) Act 1988 as amended by the Coronavirus (Scotland) Act 2020 it is reasonable to evict. The Applicant and his partner require the property to live in. The Applicant wishes to run the farm directly rather than remotely. The Applicant has given the Respondent more than sufficient time in which to find alternative accommodation from spring 2019 when the Respondent indicated he was planning to buy a property. The farm has been in the Applicant's family for many years and since inheriting the farm the applicant has planned to live there. The Applicant is in the process of selling his property in Somerset with a plan to move to the Property. In all the circumstances, it is reasonable to evict. The Applicant respectfully requests that the Tribunal make an order for possession of the Property in his favour in terms of Section 33 of the Housing (Scotland) Act 1988.'

2. Documents lodged with the Tribunal were:-

2.1 The Short Assured Tenancy Agreement, which detailed the commencement date of 1<sup>st</sup> October 2006.

2.2 Form AT5 dated 4<sup>th</sup> September 2006 and signed by the Tenant on 8<sup>th</sup> September 2006.

2.3 Section 33 Notice dated 30<sup>th</sup> May 2022 giving notice to the Tenant to vacate the Property on or before 31<sup>st</sup> August 2022.

2.3 A copy of the Notice to Quit dated 30<sup>th</sup> May 2022 giving the Tenant formal notice to quit the Property by 31<sup>st</sup> August 2022.

2.4 A certificate of execution of service of notice to quit and section 33 notice by Derek Brown, sheriff officer confirming that the notices were served on the Tenant on 1<sup>st</sup> June 2022.

2.5 Section 11 Notice addressed to Dumfries and Galloway Council, with accompanying email to Dumfries and Galloway Council dated 24<sup>th</sup> October 2022.

2.6 A letter from Walker & Sharpe solicitors to Mrs Frances McGowan dated 18<sup>th</sup> October 2006 enclosing a copy of the short assured tenancy agreement with Mr McCallum.

### **3. The Respondent's Written Representations**

3.1 A written tenancy agreement is not essential to constitute a tenancy. The case of Gray v University of Edinburgh (1962 SC p162-163) sets out three cardinal elements for there to be a tenancy, namely the parties, the subjects and the rent. The short assured tenancy agreement produced correctly identifies the parties: Frances McGowan, landlady to 2019; Roger Wright, landlord from 2019 by acquiring for value; and Philip McCallum, tenant throughout. The leased property is the Bungalow, Alleyford Farm, Kirkgunzeon, Dumfries, DG2 8LE; Philip McCallum paid rent for the lease of the Property.

3.2 There are three essential matters necessary for a valid short assured tenancy to be created. (1) The landlord must be a registered landlord (2) In terms of section 30 of the Housing (Scotland) Act 1988 there must be a written agreement setting out the terms of the tenancy and (3) there must be a valid section 32 notice served before the creation of the agreement and before the tenant takes up the tenancy.

3.3 The Applicant, who met with Mr McCallum on 1 September 2006 before instructing Walker & Sharpe, did not supply and does not supply the landlord registration number of Frances McGowan. The landlord register did not contain it in 2016.

3.4 The Lease produced does not contain the signatures of the parties; does not correctly identify the subjects; does not correctly state the date of entry; does not correctly state the rent structure; does not standardise and regularise but restricts and obstructs the existing assured tenancy; and therefore is not a valid agreement.

3.5 The AT5 Notice is signed, on behalf of an uninformedly unregistered landlady is an offence under section 93(2) of the Antisocial Behaviour Etc (Scotland) Act 2004; Also it does not correctly identify the subjects and was served before the creation of an invalid agreement and 153 months after the tenant took up the existing assured tenancy. Consequently it is not a valid notice.

3.6 The 33<sup>rd</sup> payment of rent of £140, made on 1<sup>st</sup> October 2006, was for The Bungalow, Alleyford Farm, Kirkgunzeon, Dumfries, DG2 8LE, in terms of a continuing assured tenancy.

3.7. The Respondent is not the tenant of the property at The Bungalow, Allyford Farm, Kirkgunzeon, DG5 4HP, or of the house at The Bungalow, Allyford, Kirkgunzeon, DG5 4PH, in terms of a short assured tenancy. The postcode is incorrect.

### **4. The First Case Management Discussion**

This case called for a Case Management Discussion (CMD) Conference call at 14.00 on 17<sup>th</sup> February 2023.

The Applicant and his solicitor Megan Anderson of Anderson Strathern, Solicitors, attended the CMD.

The Respondent also attended the CMD.

4.1 Miss Anderson asked the court to grant the eviction order as the necessary notices had been served on the tenant timeously. She explained that when the

Applicant acquired the Property from the estate of his late aunt in Spring 2019 the Applicant advised the Respondent that he intended to move into the Property to enable him to be close to hand to facilitate his direct involvement with the running of the farm. At that time the Respondent advised the appellant that he intended to move to the north of Scotland. However, the Respondent has not vacated the Property and continues to reside there. The Appellant is selling his home in Somerset and needs to move into the Property. In the whole circumstances she explained that it is reasonable for the Tribunal to grant the eviction order.

She also advised that the errors in the postcode of the Property detailed in the lease and AT5 are academic and do not invalidate the documents.

Also, the fact that Mrs McCallum may have been an unregistered landlord does not invalidate any lease agreement she had entered into.

4.2 Mr McCallum advised the Tribunal that he objects to the application for the following reasons:

4.2.1 The short assured tenancy and the AT5 detail the incorrect postcode for the Property and the Property name contains a spelling mistake.

4.2.2 Francis McGowan was not a registered landlord.

4.2.3 He first rented the Property from Francis McGowan in December 1993. No written lease was signed. He had a verbal assured tenancy. It is not possible to change an assured tenancy to a short assured tenancy. He has provided a copy of a letter signed by Mrs McGowan confirming the rent charged from 1<sup>st</sup> February 2004. He confirmed that he did sign the short assured tenancy agreement and the details in the unsigned copy provided by the Appellants are correct. However it is invalid in law.

#### **4.3 The parties agreed the following facts:**

4.3.1 The Applicant is owner of the Property.

4.3.2 Mrs Frances McGowan owned the Property before the Applicant.

4.3.3 Mrs Frances McGowan was the Applicant's late aunt.

4.3.4 The Applicant acquired the Property from the estate of the late Mrs Frances McGowan.

4.3.5 The Respondent first resided in the Property before the commencement date of the short assured tenancy (1<sup>st</sup> October 2006).

4.3.6 The only written lease is the short assured tenancy.

4.3.7 The Respondent signed the short assured tenancy agreement.

4.3.8 The Respondent paid rent to Mrs McGowan before the start of the short assured tenancy.

4.3.9 The Respondent resides in the Property as his principal home.

4.4 The parties agreed that the issue in dispute is whether or not the lease is an assured tenancy or a short assured tenancy.

#### **4.5 Outcome of the First Case Management Discussion.**

The Tribunal adjourned the CMD to a continued CMD on 14<sup>th</sup> April 2023 to allow the parties to provide the Tribunal with representations as to whether or not the lease is an assured or a short assured tenancy.

## **5. Further Written Representations by the Applicant.**

5.1 The short assured tenancy lodged is a properly constituted short assured tenancy in terms of section 32 of the 1988 Act. The tenancy commenced on 1 October 2006 and is for a term of not less than six months. The notice under section 32 (1) (b) of the 1988 Act, namely an AT5, is in the prescribed form under the Assured Tenancies (Forms) (Scotland) Regulations 1988. This AT5 was served on the Respondent on 4 September 2006 and signed by the Respondent on 8 September 2006, both dates prior to the creation of the short assured tenancy. The form was served by the solicitors acting on behalf of the Applicant's late aunt and clearly states that the tenancy being offered to the Respondent is a short assured tenancy.

5.2 It is a matter of admission that the Respondent signed the short assured tenancy agreement. The Respondent has also signed the AT5. This is the only written tenancy agreement before the Tribunal.

5.3 The terms of any prior unwritten arrangement between the late Frances McGowan and the Respondent are not known to the Applicant.

5.4 A tenancy agreement is simply a personal contract between two parties. All the general rules and principals of the common law of contract apply (Leases by Professor Robert Rennie, 1st Edition, 2015, page 47, para 4.01). In the Applicant's respectful submission, the status of any prior unwritten agreement between Ms McGowan and the Respondent is irrelevant where parties have entered into a subsequent written agreement. That subsequent written agreement as a matter of contract supersedes any unwritten agreement between Ms McGowan and the Respondent.

5.5 The Respondent's signing of the lease indicates that there was mutual agreement to enter into a formal written document regardless of the terms of any prior unwritten agreement. In contract, one party is entitled to rely on a written agreement. "In matters of contract a party is generally entitled to act on the assumption that the other means what he says. The question whether parties have agreed is to be decided not by proof of what each party really intended, but by considering what conclusion a reasonable person would draw from their words or acts." (Gloag and Henderson: The Law of Scotland 15th Edition, para 5.05). In the Applicant's respectful submission, a reasonable person on an objective view would conclude that the written and signed short assured tenancy is unequivocal evidence that from 1 October 2006 the relationship between the Applicant's late aunt and the Respondent was one of Landlord and Tenant under a short assured tenancy. The Respondent has paid rent to the Applicant who in turn has accepted that rent on the basis of that short assured tenancy. It is respectfully submitted that the inference which can be drawn from the facts of this case and from parties' actions is that it was parties' intention to provide accommodation to the Respondent on the basis of that short assured tenancy.

5.6 Any unwritten agreement that existed between Ms McGowan and the Respondent, which was simply a bilateral contract, has, by the actions of both parties been terminated by way of mutual consent and by their subsequent actions in the signing of the short assured tenancy.

5.7 Such voluntary termination is usually referred to as renunciation (Leases by Professor Robert Rennie, 1st Edition, 2015, page 307, para 20.02). Renunciation is the method by which a tenant gives up a lease. Renunciation may be inferred from the conduct of the parties. If parties enter into a new lease which differs materially from the previous lease, then the previous lease will be impliedly renounced (Leases by Professor Robert Rennie, 1st Edition, 2015, page 308, para 20-03). In the present case as a matter of law, the Applicant respectfully submits that by mutual consent the

parties agreed to terminate any unwritten agreement that may have existed previously and formalise their relationship under a short assured tenancy.

5.8 A short assured tenancy is a specific type of assured tenancy. It was the favoured tenancy in the private sector; the benefit to a landlord of entering into a short assured tenancy was that he had the right to recover possession of the tenancy under section 33 of the 1988 Act without having to rely on a specific ground of repossession under Schedule 5 of the 1988 Act. Since the amendments to the 1988 Act introduced by section 44 of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 the landlord also has to satisfy the Tribunal it is reasonable to evict.

5.9 The Applicant moves the Tribunal to grant the order for eviction in terms of Section 33 of the Housing (Scotland) Act 1988. The short assured tenancy has reached its end, tacit relocation is not operating by service of a valid Notice to Quit and the Applicant has given notice in terms of Section 33 (1) (d) of the Housing (Scotland) Act 1988 that he requires possession of the property.

5.10 In terms of Section 33 (1) (e) of the Housing (Scotland) Act 1988 it is reasonable to evict. On acquiring the farm in 2019, of which the Property forms part, the Applicant met with the Respondent. The Applicant recalls the Respondent saying he had inherited money from his late mother, that he was intending to buy a property in the northwest of Scotland and move there for his retirement. The Applicant advised the Respondent that he and his partner were intending to live in the Property for the long term/for life to allow them to run the farm directly rather than remotely. The Applicant has given the Respondent time in which to find alternative accommodation. The Applicant is empathetic towards the Respondent. If the Tribunal is minded to grant an Order in his favour, the Applicant is willing to agree a date for removal with the Respondent to give him further time to find alternative accommodation. The Property and farm have been in the Applicant's family for many years. The Applicant spent many years at the farm when younger. The Applicant has always been associated with farming. Farming is his passion and although the farm can be loosely managed from a distance it cannot be run effectively while he and his partner, who is also a farmer, are not there. They are some 385 miles away. The Applicant wants to live on the farm, manage and farm it, enjoy it and improve it over a number of years. The Applicant and his partner will be hands on when there and will farm their own livestock (building up numbers) which requires a daily presence. To date the Applicant and his partner have already made significant investment into drainage, fencing/dyking and re-seeding of old pasture to allow a more productive unit to be built. Further investment is still required. As soon as the Property is recovered either the Applicant or his partner will move into the Property allowing the other to deal with the sale of their property in Somerset. The delay to date has already had an adverse financial impact on the Applicant in that value of their property in Somerset has reduced due to the financial climate.

## **6. Amendment of the Application.**

The Applicant's solicitor sent the Tribunal administration an email dated 30<sup>th</sup> March 2023 requesting to amend the application as follows:

6.1 In paragraphs 1 and 2 of the Paper Apart relative to the Application the word Allyford is amended to Alleyford.

6.2 In paragraph 1 of the Paper Apart relative to the Application the postcode DG5 4HP is amended to DG2 8LE.

## **7. Further Written Representations by the Respondent.**

7.1. The lease of the Property is an assured tenancy.

7.2 The Housing (Scotland) Act 1988 applies to tenancies entered into from 2 January 1989 to 30 November 2017.

7.3 Defined in Section 12, an assured tenancy is, among other things, a tenancy under which a house is let as a separate dwelling, the tenant is an individual and occupies the house as his only or principal home, and is a tenancy which does not fall within any paragraph of Schedule 4.

7.4 Defined in Section 55(2), the beginning of a tenancy is a reference to the day when the lease of the house let on the tenancy commences.

7.5 Defined in Section 18 and Schedule 5, the end of an assured tenancy is determined by the Tribunal, and formerly by the sheriff.

7.6 On 13 November 1993 the Respondent entered into a verbal assured tenancy agreement with Frances McGowan. On 27 November 1993 the Respondent took up residence in the Property, part of the heritable property in Registers of Scotland Title Sheet KRK12642. On 1 December 1993 the Respondent made the first monthly payment of rent of £110, the beginning, or creation, of an assured tenancy of the Property which has not ended.

7.7 The lease of the Property is not a short assured tenancy.

7.8 Defined in Section 32, a short assured tenancy is, among other things, an assured tenancy in respect of which a notice in such form as may be prescribed is served before the creation of the assured tenancy by the person who is to be the landlord on the person who is to be the tenant. The Form AT5 dated 04.09.2006 does not refer to the Property, and was not served before the creation of the assured tenancy.

7.9 Defined in Section 30, a written assured tenancy document is, among other things, a document stating the terms of the tenancy and so drawn up and executed that it is probative or holograph of the parties. The Short Assured Tenancy Agreement does not refer to the Property, or the rent, of the assured tenancy, and is not probative or holograph of either party.

7.10 On 11 September 2006 Walker & Sharpe, without having terminated the assured tenancy agreement nor having ended the assured tenancy of the Property, accepted an offer, drawn up by them as instructed by the Applicant on 4 September 2006, to let the dwelling house known as The Bungalow, Allyford, Kirkgunzeon, DG5 4PH, which is not heritable property and has no title, and they sent copies of the offer and acceptance to the Applicant and to the Respondent. On 18 October 2006 a further copy was sent to Frances McGowan. On 11 September 2006 the Respondent did not enter into a short assured tenancy agreement. 1 October 2006 was not the beginning, or creation, of a short assured tenancy of the Property.

7.11. If, in spite of the foregoing, the Short Assured Tenancy Agreement is deemed to be lawful, The Antisocial Behaviour etc. (Scotland) Act 2004, in force from 30 April 2006, then applies.

7.12 Section 93(2) states, among other things, that where a relevant person is not registered by a local authority and in relation to a house that the relevant person owns in the area of the authority communicates with another person with a view to entering into a lease by virtue of which a person who is not a member of the family of the relevant person may use the house as a dwelling the relevant person shall be guilty of an offence.

7.13 The Applicant acting in the name of the relevant person, and Walker & Sharpe acting on the instruction of the Applicant, committed the offence by failing to register Frances McGowan and the Property before communicating with the Respondent. The Short Assured Tenancy Agreement, a part of the communication, if not otherwise null and void, is illegal.

7.14 The lease of the Property still is not a short assured tenancy

## **8. Continued Case Management Discussion**

This case called for a Continued Case Management Discussion (CMD) Conference call at 10.00 on 14<sup>th</sup> February 2023.

The Applicant and his solicitor Sinead Sandham of Anderson Strathern, Solicitors, attended the CMD.

The Respondent also attended the CMD.

8.1 Miss Sandham referred the Tribunal to the written representations that had been provided and advised the Tribunal as follows:

8.1.1 The spelling mistake in the name of the Property and the error in the postcode of the Property do not invalidate the lease or the AT5. The Property is readily identifiable.

8.1.2 She accepted that Mrs McGowan was not a registered landlord in October 2006 but this does not invalidate the lease.

8.1.3 She emphasised that Mr McCallum did not need to sign either the AT5 or the short assured tenancy agreement but he did.

8.1.4 On 1<sup>st</sup> October 2006 the rent due by Mr McCallum was £140 per month and this is the rent figure that is detailed in the short assured tenancy.

8.1.5 Solicitors must act on instructions of their clients. For Mr McCallum to suggest that Walker and Sharpe did not take instructions from Mrs McGowan is preposterous.

8.1.6 In connection with whether or not it is reasonable for the Tribunal to grant the eviction she emphasised that Mr Wright first told Mr McCallum that he wished to move into the farm in 2019. The Notice to quit required that he vacate the Property on 31<sup>st</sup> August 2022. The Tenant has had ample opportunity to make alternative arrangements and it is reasonable for the Tribunal to grant the order for eviction.

8.1.7 She asked the Tribunal to agree to the application being amended as detailed in the email of 30<sup>th</sup> March 2023, namely: In paragraphs 1 and 2 of the Paper Apart relative to the Application the word Allyford is amended to Alleyford and in paragraph 1 of the Paper Apart relative to the Application the postcode DG5 4HP is amended to DG2 8LE.

8.2 Mr McCallum also referred the Tribunal to the written representations that had been provided and advised the Tribunal as follows:

8.2.1 Alleyford is the name of the farm and there is only one farm called Alleyford within Kirkgunzeon. He occupies the Bungalow at Alleyford farm.

8.2.2 He confirmed that he signed the AT5 but only for the purpose of acknowledging it was an invalid AT5. It is invalid as the address is incorrect. The address contains a spelling mistake and the postcode is wrong.

8.2.3 Mrs McGowan was not a registered landlord and this fact also invalidates the short assured tenancy.

8.2.4 The AT5 was not served on him before the commencement of his initial assured tenancy.



8.2.5 Section 30 of the Housing (Scotland) Act 1988 requires an assured tenancy to be probative or holograph. The short assured tenancy was not signed by Mrs McGowan and did not meet this requirement.

8.2.6 Mr McCallum paid rent to Mrs McGowan in person and she never mentioned the short assured tenancy to him. Mr Wright contacted him and said that he would be contacted by a solicitor. He agreed rent increases with Mrs McGowan in 1997 as she wanted a long term let. The agreed rent was:

1993- 1997 £110 per month

1997 -2003 £130 per month

2003- 2009 £140 per month

2009-present £160 per month

The rent was not increased in 2015 as Mrs McGowan was not well.

The short assured tenancy agreement correctly stated that the rent was £140 per month in 2006. The short assured tenancy agreement did not set out the agreement that he had reached with Mrs McGowan regarding the rent increase.

8.2.7 He believes that Mr Wright was imposing the short assured tenancy on Mrs McGowan.

8.2.8 He received a letter from Walker and Sharpe solicitors in September 2006 inviting him to sign the short assured tenancy. The agreement detailed the start date as 15<sup>th</sup> October 2006. He went into the office of Walker and Sharpe and had the start date corrected to 1<sup>st</sup> October 2006 and then signed the offer to take the short assured tenancy. He did not ask them to correct the Property address. He believed they were tricking him into signing the short assured tenancy and he wanted to trick them into thinking they had succeeded.

8.2.9 He only signed the AT5 and the lease because he knew they were invalid. He did not want to disturb or upset Mrs McGowan.

8.2.10 He has ascertained that Mr Wright is a director or a property development company based in England. Mr Wright is not a farmer he is a property developer.

8.2.11 Mr Wright has started to refurbish the farm house. He will live there and will not need the Bungalow. Mr Wright has owned the farm for four years and has had ample time to renovate the farm house. There is also a farm cottage that could be renovated. Both properties are currently empty.

8.2.12 Mr McCallum confirmed that he lives alone in the Bungalow and the Property is not adapted for his needs.

8.2.13 He is concerned that he could be evicted from a property when he has an assured tenancy which he agreed with Mrs McGowan in good faith. His tenancy should last until 30<sup>th</sup> November 2033. Mr Wright set up the short assured tenancy without Mrs McGowan's agreement or consent.

8.2.14 He referred the Tribunal to the letter he has produced from Walker and Sharpe solicitor addressed to Mr Wright dated 11<sup>th</sup> September 2006, in the following terms:

'I refer to our telephone conversation last week and am delighted to advise that Mr McCallum has committed to a new Short Assured Tenancy. I had to revise the date of entry at the office because he states that he pays rent at the beginning of the month. I therefore commenced the lease as of 1<sup>st</sup> October 2006 and did this of my own initiative without instruction from you because he was in the office and ready to commit. I took the view that it was better to have him commit than send him away and then have to deal with the matter after the event.

A full copy of the offer together with the acceptance is enclosed for information.

If you wish to take steps to remove Mr McCallum for anything other than natural termination of the lease then I must know around April/May 2008 so that we can raise the relevant notices within the correct timeframe.

Finally there will naturally be an account rendered in respect of this matter. Do you want me to send this to you or Mrs McGowan?’

He explained that this letter is evidence of the fact that the instructions to progress the short assured tenancy were those of Mr Wright and not Mrs McGowan.

8.3 Mr Wright advised the Tribunal as follows:

8.3.1 The farmhouse and the cottage are both dilapidated. He does not pay council tax for either property due to their dilapidated condition. The only property that can be lived in is the Bungalow.

8.3.2 He improved one wing of the farmhouse to stop further deterioration of the fabric of the building.

8.3.3 He is happy to give Mr McCallum an additional couple of months to vacate the Property.

8.3.4 Walker and Sharpe solicitors were instructed by his aunt Mrs McGowan. They would not take instructions from him. Mrs McGowan was hard of hearing so she spoke to her solicitor on his aunt’s behalf.

## **9 Outcome**

### **9.1 The Tribunal made the following findings in fact, which had been accepted by the parties:**

9.1.1 The Applicant is owner of the Property.

9.1.2 Mrs Frances McGowan owned the Property before the Applicant.

9.1.3 Mrs Frances McGowan was the Applicant’s late aunt.

9.1.4 The Applicant acquired the Property from the estate of the late Mrs Frances McGowan.

9.1.5 The Respondent first resided in the Property before the commencement date of the short assured tenancy (1<sup>st</sup> October 2006).

9.1.6 The only written lease is the short assured tenancy.

9.1.7 The Respondent signed the short assured tenancy agreement.

9.1.8 The Respondent paid rent to Mrs McGowan before the start of the short assured tenancy.

9.1.9 The Respondent resides in the Property as his principal home.

### **9.2 The Tribunal made the following additional findings in fact:**

9.2.1 The Respondent signed the AT5 on 8<sup>th</sup> September 2006.

9.2.2 The AT5 was addressed to the Respondent.

9.2.3 The AT5 was by Walker and Sharpe as agents for the Landlord.

9.2.4 The AT5 states that the tenancy is a short assured tenancy.

9.2.5 The Property detailed in the AT5 is ‘The Bungalow, Allyford, Kirkgunzeon, DG5 4PH.

9.2.6 The AT5 includes a statement above where Mr McCallum signed headed ‘SPECIAL NOTE FOR EXISTING TENANTS’. Point 3 of that statement states: ‘If you are an existing tenant and are uncertain about accepting the proposed short assured tenancy you are strongly advised to consult a solicitor or any organisation which gives advice on housing matters.’

9.2.7 Note 3 of the AT5 also includes the following statement (in capitals):

A LANDLORD OF A SHORT ASSURED TENANCY HAS SPECIAL RIGHTS TO REPOSSESS THE HOUSE. IF THE LANDLORD TERMINATES THE TENANCY BY ISSUING A VALID NOTICE TO QUIT AND GIVES THE TENANT AT LEAST TWO MONTHS NOTICE.... OF HIS INTENTION TO REPOSSESS THE HOUSE THE COURT MUST GRANT THE LANDLORD AN ORDER ALLOWING HIM TO EVICT THE TENANT IF HE APPLIES FOR ONE AT THE END OF THE PERIOD SET OUT IN THE TENANCY AGREEMENT.

9.2.8 The unsigned offer to take a short assured tenancy produced includes the following details :

9.2.8.1 The offer is by the Respondent.

9.2.8.2 The offer is addressed to Frances McGowan care of Walker & Sharpe, 37, George Street, Dumfries, DG1 1EB.

9.2.8.3 The Property description is 'The Bungalow, Allyford, Kirkgunzeon, DG54PH'.

9.2.8.4 The Commencement date is 1<sup>st</sup> October 2006.

9.2.8.5 The ish date is 31<sup>st</sup> September 2008 and the lease continues thereafter from month to month.

9.2.8.6 The rent is £140 per calendar month.

9.2.9 The AT5 was signed by and served on the Respondent before 1<sup>st</sup> October 2006, the commencement date of the short assured tenancy.

9.2.10 The Farmhouse and the Cottage at Alleyford are both dilapidated.

9.3 The Tribunal agreed to the application being amended in terms of the email from the Appellant's solicitor dated 30<sup>th</sup> March 2023.

10. Decision.

10.1 The Tribunal considered the parties representations as to whether the lease between the parties is an assured or a short assured tenancy.

Section 32 of the Housing (Scotland) Act 1988 details the requirements of a short assured tenancy:

*'S.32 (1) A short assured tenancy is an assured tenancy—*

*(a) which is for a term of not less than six months; and*

*(b) in respect of which a notice is served as mentioned in subsection (2) below.*

*(2) The notice referred to in subsection (1)(b) above is one which—*

*(a) is in such form as may be prescribed;*

*(b) is served before the creation of the assured tenancy;*

*(c) is served by the person who is to be the landlord under the assured tenancy (or, where there are to be joint landlords under the tenancy, is served by a person who is to be one of them) on the person who is to be the tenant under that tenancy; and*

*(d)states that the assured tenancy to which it relates is to be a short assured tenancy.'*

The Respondent's position is that the offer to take the short assured tenancy and the AT 5 are invalid as there is a spelling mistake in the name of the Property and there is also an error in the postcode of the Property. In addition, the lease is not probative or holograph.

The Tribunal do not accept the Respondent's position that the lease and AT5 are invalid due to the error in the spelling of the Property name and the error in the postcode. The errors are not material errors. There is only one Alleyford farm at Kirkgunzeon and there is only one Bungalow at Alleyford farm. The Respondent resides in the Bungalow at Alleyford farm and has paid rent in respect of his tenancy. These errors are minor.

The Tribunal do not accept Mr McCallum's evidence that he signed the AT5 and offer to take the short assured tenancy knowing that they are invalid so he could trick Mrs McCallum and Mr Wright.

The AT5 gave Mr McCallum clear prior notification of the legal implications and the importance of the proposed Short Assured Tenancy.

Note 3 of the AT5 states (in capitals):

A LANDLORD OF A SHORT ASSURED TENANCY HAS SPECIAL RIGHTSTO REPOSSESS THE HOUSE.IF THE LANDLORD TERMINATES THE TENANCY BY ISSUING A VALID NOTICE TO QUIT AND GIVES THE TENANT AT LEAST TWO MONTHS NOTICE.... OF HIS INTENTION TO REPOSSESS THE HOUSE THE COURT MUST GRANT THE LANDLORD AN ORDER ALLOWING HIM TO EVICT THE TENANT IF HE APPLIES FOR ONE AT THE END OF THE PERIOD SET OUT IN THE TENANCY AGREEMENT.

The final section of the AT5 is headed 'Special Notes for Existing Tenants.

Paragraph 3 states: 'If you are an existing tenant and are uncertain about accepting the proposed short assured tenancy you are strongly advised to consult a solicitor or any organisation which gives advice on housing matters.'

The Tribunal do not accept that Mr McCallum signed the AT5 Notice and Short Assured Tenancy in the knowledge that they were wrong and in the belief that they could be reduced due to the errors. Mr McCallum insisted that his perceived error in the commencement date of the short assured tenancy was corrected before he signed the offer to take the short assured tenancy. If Mr McCallum had wanted to found on the errors in the short assured tenancy agreement at a later date he would not have

insisted that his perceived error of the date of entry be corrected before he signed the offer. The Tribunal are of the view that Mr McCallum is trying to reinvent the facts.

The Tribunal accepts the submission by the Appellant's solicitor that in matters of contract a party is generally entitled to act on the assumption that the other means what he says and the question whether parties have agreed is to be decided not by proof of what each party really intended, but by considering what conclusion a reasonable person would draw from their words or acts. (Gloag and Henderson: The Law of Scotland 15th Edition, para 5.05). The Tribunal accept that a reasonable person on an objective view would conclude that the written and signed short assured tenancy is unequivocal evidence that from 1 October 2006 the relationship between the Applicant's late aunt and the Respondent was one of Landlord and Tenant under a short assured tenancy.

The Tribunal do not accept Mr McCallum's position that the lease and AT5 are invalid due to the lease not being probative or holograph. Section 30 of the Housing (Scotland) Act 1988 places a duty on a landlord of an assured tenancy to provide a written lease. Section 30 does not detail prerequisites for a short assured tenancy. These are set out in section 32 of the Act.

In any event, section 2 of the Requirements of Writing Act (Scotland) Act 1995 requires a lease of a year or more to be subscribed by the landlord and the tenant. The initial term of the lease was one year and it continued thereafter on a month by month basis. The signed lease has not been produced to the Tribunal. However the Respondent accepted that he had signed the offer to lease and the copy he signed was the same as the unsigned copy produced for the Tribunal. The letter from Walker and Sharpe solicitors addressed to Mrs Frances McGowan dated 18th October 2006 states that the Respondent has committed to a short assured tenancy agreement and a photocopy was enclosed together with the firm's fee note. The Tribunal find, on a balance of probabilities, that the acceptance of the offer to take the short assured tenancy was signed by Walker and Sharpe as agents for Mrs McGowan.

The Tribunal determine that the lease is a short assured tenancy as the requirements of section 32 of the Housing (Scotland) Act 1988 have been met.

The term of the lease agreement is more than six months.

A valid AT5 Notice was served on the Respondent before the commencement of the short assured tenancy. The purpose of the AT5 is to give the tenant notice that the lease about to be entered into is a short assured tenancy. The Tribunal do not accept

the Respondent's submission that the AT5 should have been served on him before the assured tenancy commenced. The requirement is for the AT5 to be served before the commencement of the new short assured tenancy.

#### **10.2. Requirements of Section 66 of the Procedure Rules.**

**(a)** The Tribunal confirmed that the application correctly detailed the requirements of section 66 of the Procedure Rules namely:-

- (i) the name, address and registration number of the Landlord.
- (ii) the name and address of the Landlord's representative.
- (iii) the name and address of the Tenants.

**(b)** The Tribunal confirmed that the application had been accompanied by the documents specified in Section 66(b) of the Procedure Rules:

- (i) The Tenancy Agreement.
- (ii) The Notice that the tenancy is a short assured tenancy.
- (iii) The notice given to the tenant under section 33(1)(d) of the 1988 Act.
- (iv) The notice to quit served by the Landlord on the Tenant.
- (v) The required notice giving Dumfries and Galloway Council notice of the proceedings under section 11 of the Homelessness etc Scotland Act 2003.
- (vi) The certificate of execution of service of notice to quit and section 33 notice by Derek Brown, sheriff officer confirming that the notices were served on the Tenant on 1<sup>st</sup> June 2022.

**(c)** The Tribunal confirmed that the application form had been correctly signed and dated by the Landlords as required by Section 66(c) of the Procedure Rules.

#### **10.3 Requirements of Section 33 of the Housing (Scotland) Act 1988**

10.3.1 The Tribunal accept the submission by the Appellant's solicitor that the actings of Mrs McGowan (through her solicitors Walker and Sharpe) and Mr McCallum by entering into the Short Assured Tenancy terminated the earlier unwritten assured tenancy. There is no further contractual tenancy agreement between the parties.

10.3.2 The lease states that the tenancy will run from 1<sup>st</sup> October 2006 until 31<sup>st</sup> September 2008 and thereafter will continue from month to month and may be terminated by either party giving two months notice in writing to the other. The Notice to Quit and Section 33 notice had been served on the Tenant by sheriff officer on 1<sup>st</sup> June 2022. Both documents required the Tenant to vacate the Property on 31<sup>st</sup> August 2022, being the ish of the tenancy. The required two months period of notice had been provided.

10.3.3 The Tribunal were satisfied that the requirements of section 33 have been met, namely that:

- (i) The Short assured Tenancy has reached its ish.
- (ii) That tacit relocation is not operating.
- (iii) That no further contractual tenancy is in existence.

- (iv) That the Landlord has given to the Tenants notice stating that he requires possession of the Property. In terms of section 33(2) the period of notice is two months.

10.4 The Tribunal considered the parties' representations as to whether it was reasonable to grant the Eviction Order. The Tribunal were mindful of the decision of Lord Greene in the case of *Cummings v Dawson* (1942) 2 All ER 653 on matters to consider when determining reasonableness:

*'In considering reasonableness... it is my opinion, perfectly clear that the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, common sense way as a man of the world, and to come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or more weight, others may be decisive.'*

The Tribunal weighed the respective positions of the parties. They found that it was reasonable for the eviction order to be granted due to the following facts:

- (i) Mr McCallum had entered into the short assured tenancy in the knowledge that the Landlord was entitled to repossess the Property on giving the Tenant two months prior notice. The AT5 advised him of this fact.
- (ii) Mr Wright had advised Mr McCallum in 2019 that he intended to reside in the Property and Mr McCallum was served Notice to Quit requiring him to vacate the Property on 31<sup>st</sup> August 2022 which is almost seven months ago. Mr McCallum has been given a lengthy period of notice. In addition Mr Wright has agreed to grant additional time to allow Mr McCallum to find alternative accommodation.
- (iii) Mr Wright needs to reside in the Property to enable him to develop the farm.
- (iv) Mr McCallum does not have any special needs that are met by his residing in the Property.
- (v) The Tribunal did not accept Mr McCallum's suggestion that Mr Wright could reside in either the Farmhouse or the Cottage as both properties are dilapidated and they are consequently not in a condition they could be lived in.

**10.5 The Tribunal determined that the requirements of section 33(1) of the Housing (Scotland Act) 1988 had been complied with and made an order for possession of the Property and in the whole circumstances they determined that it was reasonable to extend the date the Respondent has to vacate the Property to 30<sup>th</sup> July 2023.**

11. The Tribunal noted that the provisions of the Cost of Living (Tenant Protection)(Scotland) Act 2022 in relation to delaying evictions do not apply to this application as the Notice to Leave was served on the Respondent before 6<sup>th</sup> September 2022 and the application was received by the Tribunal before 28<sup>th</sup>

October 2022.

## **12. 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.**

# J. Taylor

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**Legal Member**

**17<sup>th</sup> April 2023**