

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 1988 (“1988 Act”)**

**Chamber Ref:** FTS/HPC/EV/18/2302

**Re:** 2/L 82 Arklay Street, Dundee, DD3 7LH (“the Property”)

**Parties:**

**Mr Ben Colgan, Campbell Boath Solicitors, Bank House, Stirling Street, Dundee, DD3 6PJ (“the Applicant”)**

**Mr James Smith, 2/L 82 Arklay Street, Dundee, DD3 7LH (“the Respondent”)**

**Tribunal Members:**

**Pamela Woodman (Legal Member)**

**Present:**

The case management discussion in relation to case reference FTS/HPC/EV/18/2302 took place at 10am on Wednesday 9 January 2019 at Dundee Carers Centre, Seagate House, 132-134 Seagate, Dundee, DD1 2HB (“the CMD”). The Applicant was not present at the CMD. The Applicant was represented by Alec Campbell (“Applicant’s Representative”) of Campbell Boath Solicitors. The Respondent was present in person and was supported by his sister, Natalie Smith. The clerk to the Tribunal was Victoria Hammill.

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that:**

**BACKGROUND**

1. An application was made to the Tribunal under section 33 of the 1988 Act. The application was made in terms of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“HPC Rules”) which are set out in the schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended, (“2017 Regulations”). More specifically, the application was made in terms of rule 66 (*Application for*

*order for possession upon termination of a short assured tenancy*) of the HPC Rules.

2. The order sought was an order for possession of the Property in relation to a tenancy agreement in respect of property "2/R 82 Arkley Street, Dundee, DD3 7LH" between Ben Colgan and James Smith dated 27 September 2013 ("**Tenancy Agreement**").
3. As part of the application paperwork, a letter dated 18 June 2018 from Killean & Co., sheriff officers, ("**the SO's Letter**") was provided which stated that "All court documentation will need to specify 2/L on the address and not 2/R, as we will not be able to enforce a decree for ejection if the location is wrong."
4. A notice of acceptance of the application was issued by the Tribunal dated 20 November 2018 under rule 9 of the HPC Rules ("**Notice of Acceptance**"), which confirmed that the application paperwork had been received by the Tribunal on 30 August 2018. However, the Legal Member noted that further paperwork was provided between 30 August 2018 and 22 October 2018, which formed part of the application paperwork.
5. This decision arises out of the CMD.

## **PROCEEDINGS**

6. Whilst the Tenancy Agreement and various notices gave the address as being 2/R, 82 Arklay (or Arkley) Street, Dundee, the SO's Letter confirmed that the correct address of the Property was 2/L Arklay Street, Dundee. It was explained to the Legal Member that, when looking at the Property from the street, it was on the right hand side of the building but, when entered from the stairwell, it was on the left hand side. It was agreed by both the Respondent and the Applicant's Representative that the correct postal address of the Property was 2/L Arklay Street, Dundee.
7. The Respondent confirmed that he now only had his son living with him and so did not need a property as big as the Property. He had spoken to the local authority about finding him a smaller property to move into.
8. The Respondent confirmed that he had received all of the paperwork, including the notice to quit and section 33 notice. He confirmed that he did not have any objection to an order for possession being granted at the CMD.
9. The Legal Member noted that the party named as the Applicant and the landlord in terms of the Tenancy Agreement was Ben Colgan. However, the registered proprietor of the property registered under title number ANG2090 for property "82F, Arklay Street, Dundee DD3 7LH" was Linda Colgan. The landlord registration number given in the application form and in the section 11 notice are listed on the Scottish Landlord Register as relating to Linda Colgan.
10. The Applicant's Representative explained that the tenancy agreement had been drawn up by Downfield Property Company but that, as far as he was aware, it

was no longer involved with the Property. Accordingly, he was not aware why Ben Colgan had been named as the landlord in the tenancy agreement and he did not currently have any documentation from Linda Colgan expressly confirming that Ben Colgan was authorised to grant it (or to bring the current case). The Applicant's Representative explained that the application had been made in the name of Ben Colgan as he was named as the landlord in the Tenancy Agreement. He also explained that Ben Colgan and Linda Colgan are husband and wife.

11. The form AT5 provided narrated "David & Joanne Leighton" as the landlords of the property at "2/R 82 Arkley Street, Dundee DD3 7LH". This was the only form AT5 available to the Applicant's Representative. He noted that it had been signed by "Webster" as landlord's agent.
12. The Respondent confirmed that, when he initially took out the tenancy, he understood that it was only guaranteed for a period of 6 months. However, he also said that, after 3+ years had passed, he thought that it had turned into a long term lease.
13. The Legal Member, while not advising the Respondent, made it clear to the Respondent that the technical issues with the form AT5 and notice to quit, as noted below in the "FINDINGS OF FACT" section meant that the Applicant was not automatically entitled to an order for possession. The Legal Member explained this on more than one occasion at different stages during the CMD and was satisfied that the Respondent (and his supporter) understood this. However, the Respondent was very clear, on more than one occasion, that he was keen to have matters dealt with during the CMD and that he had no objection to an order for possession being granted.

## **FINDINGS OF FACT**

14. The application was made and the tenancy was purported to have been granted by a party (namely Ben Colgan) who is not the registered proprietor of the Property. That is not to say that Ben Colgan did not have authorisation from the registered proprietor, but evidence of that authorisation had not been provided to the Tribunal. That would be required before any order would be released to the Applicant for enforcement.
15. Whilst the form AT5 did appear to have been signed by the same person as signed the tenancy agreement, the landlords narrated in the form AT5 were neither the Applicant nor the registered proprietor, Linda Colgan. Accordingly, based on the documentation available to the Legal Member, a valid form AT5 had not been served on the Respondent as it had not been served by (or on behalf of) the Applicant or the registered proprietor (as required in terms of section 32(2)(c) of the 1988 Act). On the face of it, it had been served on behalf of David and Joanne Leighton, whom the Applicant's Representative confirmed had no involvement with the Property.
16. The document issued by the Applicant's Representatives dated 13 June 2018, whilst entitled "notice to quit" and clearly stating that the Respondent was

required to remove from the Property, did not contain the information prescribed in The Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988 and so was not a valid notice to quit in relation to the particular type of tenancy in this case.

17. The date stated in both the notice to quit and the section 33 notice (by which the Respondent was required to remove from the Property and the Applicant required possession of the Property) was 26 August 2018, which was a possible date for the tenancy. The requisite periods of notice were also given by each of those two notices.
18. Given the nature of the application, the Legal Member did not require to consider the form AT6 provided. However, the Legal Member noted that, had she been required to consider it, the form AT6 provided was not valid because it did not comply with the requirements of section 19 of the 1988 Act, including the requirement to state which of the ground or grounds for possession as set out in schedule 5 to the 1988 Act were being relied upon. The purported "ground" stated in the form AT6 provided was not one of the schedule 5 grounds. In addition, in terms of section 19(3) of the 1988 Act, there is a "prescribed form" for the form AT6 (section 19 notice). The current "prescribed form" is set out in the schedule to The Rent Regulation and Assured Tenancies (Forms) (Scotland) Regulations 2017, which came into force on 1 December 2017. The form AT6 provided with the application paperwork was not in the prescribed form.

## **REASONS FOR DECISION**

19. Given that the Respondent had confirmed that he had received the notice to quit and section 33 notice and had not raised any objection regarding the content or address of the notices (even when the technical deficiencies were highlighted to him), the Legal Member did not pursue the fact that the notices were addressed to flat 2/R, rather than flat 2/L. She did not consider that it would be consistent with the terms of the overriding objective of the Tribunal to do so.
20. Under normal circumstances, an application in terms of rule 66 of the HPC Rules may not proceed without a valid form AT5. This was because, without this, the tenancy would and could not be a short assured tenancy in terms of section 32 of the 1988 Act and so section 33 would not be applicable and the requirement of section 33(1)(a) could not be met. However, the tenancy agreement specifically referred to the Respondent having received a form AT5 (being a form prescribed by The Assured Tenancies (Forms) (Scotland) Regulations 1988) and the Respondent had confirmed that, when he entered into the tenancy agreement, he was aware that the guaranteed period of the tenancy was 6 months. Under normal circumstances, this would not be sufficient but, in light of the representations made by the Respondent himself, the Legal Member considered that the Respondent had at least believed that he had a short assured tenancy (even if that was not in fact the case).
21. The Respondent had been very clear that he wanted the case dealt with during the CMD, that he had received the notices referred to (albeit technically defective in part) and that he had no objection to the grant of an order for possession. The

Legal Member observed that the Respondent appeared to welcome the possibility of the grant of an order for possession in the particular circumstances of this case and at this particular time.

22. The Legal Member was persuaded by the representations of the Respondent and considered that it was consistent with the overriding objective of the Tribunal to grant the order for possession, there being no objection from the Respondent to her doing so.

## **DECISION**

23. The Tribunal decided to grant the order but stipulated that the order would not be released (and so would not be able to be enforced) unless the Applicant provided to the Tribunal a signed written confirmation from Linda Colgan that she was aware of the grant of the tenancy to the Respondent by the Applicant, that she consented to this tenancy and that she consents to the application for the order for possession being made and pursued, and the order being enforced, by the Applicant. This confirmation would require to be provided to the Tribunal on or before Friday 25 January 2019. The Applicant's Representative was advised of this requirement during the CMD and, by virtue of this decision, the Applicant is hereby directed to provide such confirmation if he wishes the order to be released to him on expiry of the appropriate appeal period.
24. The Tribunal decided that an order be granted against the Respondent for possession of the Property under section 33 of the 1988 Act, which order was not to be executed prior to 12 noon on Tuesday 12 February 2019.
25. The order referred to in the preceding paragraph was intimated orally to the Respondent and the Applicant's Representative by the Legal Member during the CMD.
26. If a signed confirmation is not received (as required in terms of paragraph 23 above), then the Tribunal should review this decision in accordance with rule 39 of the HPC Rules.

## **Right of Appeal**

**In terms of Section 46 of the Tribunals (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. WOODMAN

*9 January 2019*

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**Legal Member**

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**Date**