



**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**

Chamber Ref: FTS/HPC/EV/22/0980

Re: Property at 23 Coursington Place, Motherwell, ML1 1LU (“the Property”)

Parties:

**Mr Andrew Galloway, Mrs Bernadette Galloway, 14 Emily Drive, Motherwell, ML1
2SQ (“the Applicants”)**

**Ms Carol Young, Mr Donald Young, 23 Coursington Place, Motherwell, ML1
1LU (“the Respondents”)**

Tribunal Member:

Ms H Forbes (Legal Member) and Ms A Moore (Ordinary Member)

Decision

**The Tribunal decided the order for possession should not be granted as the
application is not competent.**

Background

1. This is a Rule 66 application received in the period between 4th April and 18th May 2022. The Applicants are seeking an order for possession of the Property. The Applicants’ representative lodged a copy of the tenancy agreement between the parties, purportedly a short assured tenancy that commenced on 1st August 2010, copy Notices to Quit and section 33 notices dated 24th September 2021 with associated correspondence and evidence of service, copy section 11 notice with evidence of service, Form AT5 dated 25th June 2010, and signed letter of authority from the owner of the Property dated 17th May 2022.
2. A Case Management Discussion (“CMD”) took place by telephone conference on 15th August 2022. All parties were in attendance. The Applicants were represented by Mr Alistair Buttery, Solicitor. The Respondents indicated that they were opposing the order on the grounds that it would not be reasonable to grant the order. The case was adjourned to an evidential hearing on reasonableness. A hearing was set down for 26th October 2022.

3. On 15th August 2022, the Tribunal issued a Direction requiring the Respondents to lodge a written note of defence setting out why it would not be reasonable for the Tribunal to grant an order for possession, and requiring the Applicants to lodge a response to the note of defence, and written representations setting out the reasonableness of the Applicants' position in terms of their intent to sell the Property.
4. By email dated 19th August 2022, the Respondents lodged a note of defence.
5. By email dated 2nd September 2022, the Applicants' representative lodged written representations and a second inventory of productions.
6. By email dated 5th October 2022, Ms Trudy Gill, Solicitor, informed the Tribunal that she was instructed by the Respondent, Donald Young, requesting a copy of the case papers.
7. By email dated 17th October 2022, Ms Gill lodged written representations on behalf of Mr Young, introducing competency arguments.
8. By email dated 25th October 2022, Ms Gill lodged an inventory of productions.
9. By email dated 25th October 2022, the Applicants' representative requested an adjournment of the hearing set down for the following day, to consider fully the late productions and submissions lodged on behalf of Mr Young. The adjournment was granted.
10. A further hearing was set down for 24th January 2023.

The Hearing

11. A hearing took place by telephone conference on 24th January 2023. All parties were in attendance. The Applicants were represented by Mr Alistair Buttery. Mr Young was represented by Ms Trudy Gill. Mrs Young represented herself.

Preliminary Matters

Amendment of written representations and late lodging of documents

12. Mr Buttery made a challenge in terms of Rules 13 and 14 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Procedural Rules") to the written representations lodged on behalf of Mr Young in the submission of 17th October 2022, which had introduced new matters.
13. Mr Buttery submitted that this submission engaged Rule 13(1)(a) by amending Mr Young's written submission any time up to 7 working days before the date fixed for a hearing. Thereafter, in terms of Rule 14(1), the Tribunal's consent was required to the amendment.

14. Mr Buttery submitted that the written submissions and lodging of documents on 25th October 2022 engaged Rule 13(1)(b) as the written representations were amended within 7 working days of the date of the hearing, and required the consent of the Tribunal. In terms of Rule 22, any documents must be lodged no later than 7 days prior to a hearing. To allow the late lodging, the Tribunal must be satisfied the party has a reasonable excuse.
15. Mr Buttery said the fact that the Respondents were not legally qualified was no excuse for the late amendment and late lodging of documents.
16. Ms Gill submitted that she was instructed on 10th October 2022, and the first written representations were lodged as soon as possible thereafter. In terms of the second lodging on 25th October 2022, the lease documents lodged were only received from the Respondents the previous day. It was Ms Gill's position that it would be reasonable to allow the representations to be amended and the documents to be lodged, as provided for in the Rules. It would not be just not to allow them. She understood that the Respondents had found the documents in their attic. Ms Gill said the Applicants ought to have informed their representative of the existence of additional tenancy agreements. It was the right thing to do to bring them to the attention of the Tribunal.
17. Responding to questions from the Tribunal, Mr Young said the documents had been provided to the CAB at an earlier stage and he thought his solicitor had been given them all.
18. Mr Buttery confirmed that he had been unaware of the existence of the additional leases prior to them being lodged. Mr Buttery referred to an Inner House decision and a Supreme Court decision, neither of which had been lodged. They concerned party litigants and both Courts had found that party litigants and McKenzie Friends must comply with the rules, and the Court must act even-handedly. It was Mr Buttery's position that choosing not to be represented prior to the CMD was not an excuse for a failure to comply with the rules. All documents should have been lodged prior to the CMD. If the Tribunal was to consent to the amendment and accept the late documents, the question of expenses may arise at a later date.
19. Ms Gill said it would be unjust not to allow issues of competency to be raised after a party had taken legal advice, which he was entitled to do. Issues of competency can be raised at any time. The case would be a nullity if it was found not to be competent.
20. Responding to questions from the Tribunal as to why no submissions had been made in advance on reasonableness, Ms Gill said that was because (a) the action was believed to be incompetent; and (b) the Second Respondent had submitted a note of defence which covered reasonableness. Ms Gill said she would address the Tribunal on reasonableness if required.
21. Mrs Young did not have anything to add at this point.

22. The Tribunal adjourned to consider the preliminary issues raised.
23. Upon reconvening, the Tribunal informed parties and representatives that it was prepared to consent to the amendment to the Respondents' representations made on 17th and 25th October 2022, and to the late lodging of documents on 25th October 2022. In respect of the first amendment, the Tribunal took into account that Ms Gill had received the case papers on 11th October 2022, and that she had lodged the written representations as soon as reasonably possible. Mr Young had made significant attempts to secure representation prior to instructing Ms Gill. With respect to the representations and documents lodged on 25th October 2022, the Tribunal took into account the fact that the documents had only been received by Ms Gill the previous day, which was a reasonable excuse for the late lodging. The further tenancy agreements raised important issues of competency and the Tribunal considered that a lay person would not necessarily recognise the importance of these documents. Indeed, the Applicants had, for whatever reason, failed to bring them to the attention of their representative.
24. The Tribunal considered that there was no rule that would prevent a competency issue being raised at any point during the progress of the case, taking into account that the Rules allow parties to raise a new issue during a hearing. In the absence of copies of the decision referred to by Mr Buttery, the Tribunal was unable to consider the cases, noting that they were not Tribunal applications, but court cases, which would have been subject to different rules. The Tribunal is tasked in Rule 2(b) with seeking informality and flexibility in proceedings. The Tribunal took the view it would be perverse not to allow the competency matters to be raised. The Applicants are legally represented. They have had a significant amount of time to take legal advice from their representative on these issues.

Competency points

The position for the Respondent, Mr Young

Title to Sue

25. Ms Gill submitted that the Applicants did not have title to sue. They are not the registered owners of the Property. They are not the landlords in terms of section 55 of the Housing (Scotland) Act 1988 ("the 1988 Act"). They may have interest but they do not have title to sue. They could have raised the application on behalf of the owner of the Property but they did not do so.

26. Section 55 of the 1988 Act provides:

"landlord" includes any person from time to time deriving title from the original landlord and also includes, in relation to a house, any person other than a tenant who is, or but for the existence of an assured tenancy would be, entitled to possession of the house;

Ms Gill submitted that only the owner of the Property was entitled to possession. Ms Gill said there is no case law defining a landlord in Scotland and referred to an English case which had not been lodged in advance.

27. Responding to questions from the Tribunal regarding the law of agency, Ms Gill said the Applicants could act as agents on behalf of the landlord, but they had not served the relevant notices designating themselves as agents. Asked whether an agent has to disclose a principal in Scots law, Ms Gill said the Form AT5 requires the person completing it to choose either 'landlord' or 'landlord's agent'. Scottish Government guidance states that a family member can act as an agent for the purposes of landlord registration, but they must register as an agent and not hold themselves out as the landlord. In terms of antisocial behaviour legislation, it would be a criminal offence not to disclose that they were acting as an agent. The Respondents had been unaware that the Applicants were not the owners of the Property until the application was served upon them. It was Ms Gill's position that the Applicants could not be applicants in this case unless they were making the application on behalf of the landlord.

Type of tenancy

28. Ms Gill said that the Respondent's position was that he did not receive the Form AT5 at the start of the tenancy, therefore, the tenancy was not a short-assured tenancy. Ms Gill confirmed that evidence would be heard on this point.

29. The Form AT5 did not comply with section 32(2)(b) and (c) of the 1988 Act, when the definition of 'landlord' was taken into account.

30. Ms Gill referred to the tenancy agreements lodged on 25th October 2022, namely:

1. *Copy tenancy agreement dated 1 August 2011*
2. *Copy tenancy agreement dated February 2014*
3. *Copy tenancy agreement dated August 2014*
4. *Copy tenancy agreement dated 1 April 2015*
5. *Copy tenancy agreement dated February 2016*
6. *Copy tenancy agreement dated 19 September 2019*

Ms Gill submitted that tenancy agreement 4 constituted a new tenancy agreement. If the Tribunal considered that the original tenancy agreement lodged with the application, which commenced on 1st August 2010, was validly constituted as a short assured tenancy, then the above tenancies 1, 2 and 3 could rely upon the original Form AT5, as the terms of the tenancies had not changed and they could be inferred to be a continuation of the first tenancy. Tenancy agreement 4, however, changed the terms of the tenancy, with an ish date of 1st April and 1st October, rather than 1st February and 1st August. A new Form AT5 was required and had not been served. Ms Gill referred to Evictions in Scotland, First Edition, page 48 as authority for the fact

that there are various means to terminate a tenancy agreement early and one of those is by renunciation. In this case, the parties entered into a new tenancy agreement that was materially different from the previous one. This meant the previous tenancy agreement did not continue by tacit relocation. As no Form AT5 had been served, this was an assured tenancy, and the action could not be competent as the tenancy had not been brought to a close in the required manner.

31. Responding to questions from the Tribunal as to whether tenancy agreement 4 was executed, Ms Gill said the Respondents had signed it on the last page by inserting 'C&D Young' after '*we hereby accept your offer dated...*'.
32. Ms Gill referred to tenancy agreement 6. It was her position that this constituted a private residential tenancy ("PRT"), as it was entered into in September 2019, when no new short assured tenancies could be created, in terms of the Private Housing (Tenancies) (Act) 2016, unless in terms of the savings provisions, which provided that any short assured tenancy created after the relevant date in November 2017, must continue from the previous date. That was not the case here. The document before the Tribunal had been signed by the Respondent, Mrs Young, who appeared to be agreeing to a new tenancy. The start date of the tenancy could be inferred as the signing date 12th September 2019. Responding to questions from the Tribunal as to what would be expected to form a PRT, Ms Gill said the agreement of the parties was required.
33. It was Ms Gill's position that a PRT had been agreed in September 2019, failing which, tenancy agreement 4 constituted an assured tenancy.

Mrs Young's position

34. Mrs Young did not wish to add anything to the submissions made on behalf of Mr Young.

The Applicants' position

Title to Sue

35. Mr Buttery submitted that it was trite law that a principal can appoint an agent, and does not have to disclose that they are acting for a principal. Either the principal or agent can sue and be sued. If the principal is not disclosed, the agent has liability. It was competent for the Applicants to enter into the tenancy agreement in this case.
36. Mr Buttery referred to the definition of 'landlord' at section 55 of the 1988 Act and said it was not an exhaustive or definitive definition, due to the wording '*includes any person*'. The 1988 Act does not define who else can act as a landlord. In this case, the Applicants are the landlords and they have interest, and are entitled to make the application in terms of the Rules. Mr Buttery

submitted that Landlord Registration and Anti-social Behaviour legislation was not relevant.

Type of Tenancy

37. Mr Buttery said the Applicants' position was that the original tenancy agreement was the only valid agreement. The additional tenancy agreements lodged did not have all the essential requirements to constitute valid tenancy agreements, and this was particularly the case for tenancy agreement 6, which included no parties, no address, and no date of entry.
38. Mr Buttery said tenancy agreement 5 may have the essential requirements, however, the ish date was not clear. It may be 1st February, but it was not clear. Tenancy agreement 4 was not signed – the insertion of the Respondents' names did not constitute a signature. The original tenancy agreement bears the proper signature of Mrs Young on behalf of both Respondents.
39. Mr Buttery referred to a previous Tribunal case FTS/HPC/EV/22/316, where the Tribunal had found that the absence of a Form AT5 did not prevent them from granting an order for possession. In this case, if the Tribunal accepted that tenancy agreement 5 was properly constituted with an ish date of 1st February, the previous Form AT5 would continue and the notices served would have been served to the correct ish date.

Reasonableness

40. At this stage, the Tribunal again brought up the matter of reserving judgement on the competency points and hearing evidence on reasonableness. There was no opposition to hearing this evidence from any party or representative. Ms Gill said she would appreciate time to consider the previous Tribunal case lodged. The Tribunal adjourned for lunch.

Evidence for the Applicants

Witness – Mrs Bernadette Galloway

Evidence-in-Chief

41. Mrs Bernadette Galloway is 59 years old and a nurse. She works part-time. She lives at the address stated in the application.
42. The witness said the Property had been her family home. After her mother passed away, her father no longer wished to live there. The Applicants decided to purchase a new property for him. They had not intended to become landlords, but they required a mortgage for the new property, so they had to let the Property.

43. Mrs Young contacted the witness. They knew each other. She was interested in renting the Property. The Applicants knew and trusted her. A tenancy agreement was put in place commencing on 1st August 2010.
44. The witness said she had previously seen the Form AT5 dated 25th June 2010. Asked when it had been given to the Respondents, the witness said she thought it may have been sent to them. Her father was still in the Property until July 2010. Asked when she had sent the Form AT5 to the Respondents, the witness said she would imagine it was on 25th June 2010 but she was not entirely sure.
45. The witness said further tenancy agreements were put in place because the Applicants thought they had to do this. They didn't understand completely. A mortgage advisor said they required lease paperwork. Their plan was to sell the Property in the future, therefore, they put a short assured tenancy agreement in place. They hoped to sell the Property to help pay for Mr Galloway's retirement. They had not taken legal advice on the tenancy agreements.
46. The witness said the Applicants decided to sell the Property around two years ago. They informed the Respondents by telephone and letter. They offered the Respondents the opportunity to buy the Property. They looked into selling the Property with sitting tenants. A home report had been carried out, after discussing with a selling agent. There had been recent interest from a buy to let investor, but he had pulled out. The Applicants do not let any other properties and there is no mortgage on the Property.
47. Asked why they were selling the Property, the witness said it was to help with the Applicants' older age. Mr Galloway does not have a pension. They had both hoped to retire in their mid-50s. Their son and daughter live at home. Their daughter is moving to London to study, and the Applicants will have to pay her fees. They do not have that kind of money, so the sale of the Property would help.
48. The witness said she is suffering from anxiety and depression and is on treatment. The situation with the Property is causing her stress, and her mental health is suffering.
49. The witness said the Applicants had not heard from the local authority, social housing providers, or any private landlords regarding alternative housing for the Respondents. The Applicants had completed forms for the local authority some time ago.
50. Asked why it would be reasonable to grant the order, the witness said it was always their house. The Respondents knew it was going to be sold at some point. The Applicants were trying to be responsible by selling the Property and the witness said she found it hard to believe they were having to fight to get their property back.

Cross-examination by Ms Gill

51. The witness said her father moved into the new property on 20th July 2010. They had started looking for a property around June 2010. They had seen the mortgage adviser after viewing the new property.
52. The witness said they could sell with sitting tenants and had tried this, but it fell through.

Cross-examination by Mrs Young

53. Mrs Young did not carry out any cross-examination of the witness.

Re-examination

54. There was no re-examination of the witness.
55. The Tribunal asked the witness about tenancy agreement 6 and why the agreement was missing certain information. The witness said she was not sure what had happened there. The parties had been emailing each other. Asked if she thought they were continuing the same procedure as before when putting a new agreement in place, the witness said yes. Asked whether she was aware of PRTs, the witness said no. The witness said she was mostly responsible for the tenancy agreements, her husband being more hands-on.

Witness – Mr Andrew Galloway

Evidence-in-Chief

56. Mr Andrew Ross Galloway is 58 years old and a full-time joiner.
57. The witness said the Property was let to the Respondents from 2010, with the intention that it would be let six months at a time until the Applicants felt comfortable enough to retire. Mrs Galloway had retired two or three years ago, but had gone back to part-time work, partly because she was not ready for retiral, and partly because of the Applicants' financial position, having two children in full-time education. The Applicants required help to pay their daughter's fees. The intention had always been to sell the Property. The Applicants had bought the Property for Mrs Galloway's parents, so they could live rent-free. They decided to buy another property for Mr McGahan. They had no reason now to keep the Property. They thought of it as their nest-egg.
58. The witness said there was a problem with the heating and water system in the Property. It has an electric wet system which is now obsolete. He would like to change the heating system, but the Property requires to be empty to do so, as the pipes are likely to burst. There was no heating in the Property for a while, and the parties came to an agreement whereby the Applicants provided the Respondents with heaters and the rent was reduced by £100 per month.

The Respondents had been asked to move out of the Property to allow the heating to be replaced but they were not prepared to do so. The work could not be done while they were in the house. The house would have to be completely emptied.

59. The witness said the Applicants had a buyer who was a landlord. They were prepared to take around £15,000 less than the market value, but the sale fell through.

60. Asked about the effect the situation was having on Mrs Galloway, the witness said he felt emotional and it made him angry. He said it was hard to believe that people they thought they knew could treat them like this. Mrs Galloway had tried to help the Respondents by sending them details of available properties, but Mrs Young said she was being bullied by Mrs Galloway, but Mrs Galloway is the gentlest person.

Cross-examination by Ms Gill

61. The witness said the Respondents had never been in rent arrears. There had been disputes and problems, but they were good tenants.

62. The witness said he had taken advice on the heating system from a friend who was a gas engineer. He had gas installed to the Property, but not connected.

Cross-examination by Mrs Young

63. Mrs Young had no cross-examination for the witness.

Re-examination

64. There was no re-examination of the witness.

65. Responding to questions from the Tribunal regarding how the sale to the other landlord had come about, the witness said Mrs Galloway found a company who sell to landlords.

Evidence for the Respondents

Witness – Mr Donald Young

Evidence-in-Chief

66. Mr Donald Young is unemployed for health reasons. He lives with Mrs Young and her daughter and two children at the Property. The children are 6 and 3 years old.

67. The witness said he learned that the Property was available for let when he was working in a local pub. Mr McGahan used to come into the pub. At the

beginning of July 2010, Mr McGahan asked the witness if he knew anyone that might want to rent the Property. The witness had suggested Mrs Young.

68. The witness said Mrs Young and her daughter viewed the Property in mid-July 2010, and liked it. Mr McGahan was still living there. Asked how long it was between the initial discussion and Mr McGahan moving out, the witness said it was a couple of weeks. The witness said he had not taken anything to do with the paperwork. Mrs Young and Mrs Galloway took care of that. He did not have a lengthy discussion in the pub with Mr McGahan. It was just casual talk.
69. The witness said he had not seen the Form AT5, because Mrs Young dealt with such things. He believed it was received well after August 2010. He believed the last tenancy agreement had been in 2019 and there had been no further tenancy agreement since then. The only reason he was aware of multiple tenancy agreements was because of this application. He had not been involved, other than perhaps signing two tenancy agreements over the years.
70. The witness said he injured his toe in March 2020. He now has cellulitis, diabetes, and eye problems. He requires injections in his eyes. His skin flares up and this is caused by worry.
71. The witness said Mrs Young's daughter and children moved in with the Respondents about three years ago. The Property is a three-bedroomed, four-apartment property. His step-daughter was subjected to domestic abuse by a former partner. The police were involved, and the former partner attended at the Property. The witness described there being an injunction against the former partner, who has now moved away. Women's Aid are involved.
72. The witness said they became aware that the Applicants were planning selling the Property about two years ago, when they were given the opportunity to buy it. The Applicants had served the wrong documents on the Respondents at that time.
73. Asked whether he had taken advice when served with this application, the witness said they had gone to the CAB, who advised them to attend the CMD in October 2022 themselves.
74. The witness said they had contacted the local authority, who deal with all the housing associations, last year, and they had been told there was no available housing stock. They wish to have a four- or five-apartment property. Both of those are in short supply. They do not wish to be separated. They are concerned about the return of the former partner of Mrs Young's daughter, who has previously attended at the Property and assaulted Mrs Young, her daughter and one of the children. There was another house available across the road, but someone else got it. The Respondents were 14th on the housing list at that time.

75. The witness said he receives Universal Credit. Mrs Young is now employed after being unemployed for 18 months. Previously, the Respondents were receiving £1240 per month in benefits.
76. Environmental Health were involved due to the heating and water problems. They got in touch with the local authority and the landlords. There were eight radiators in the heating system, and the Applicants provided four or five oil-filled radiators.
77. Asked where the Respondents hoped to live, the witness said they wished to stay in the area. They have not been offered any social housing, and will not be offered anything unless they are being evicted. The local authority had told them not to move out to get the heating fixed, as they may then be considered intentionally homeless.
78. Asked why it would not be reasonable to grant the order, the witness said they had been in the Property for 12 years, and it was their home. They had taken care of the Property. His cellulitis and skin are affected by worry. He does not have money for a deposit on another property. He is having difficulty paying his credit card bills. He received £309 per month in Universal Credit.

Cross-examination by Mr Buttery

79. The witness said he was working, so his wife dealt with the paperwork for the tenancy. Asked whether his evidence was based on discussions with his wife, the witness said yes, and the documentation they had to provide to the Tribunal. They had looked out some of the documentation 18 months ago for the CAB. They had been discussing the case for two years. This was their lives.
80. The witness said he had not seen the GP recently. He attends Hairmyres Hospital for treatment, and the records are available. He admitted he had not lodged any records as they had not been asked for by the Applicants or his lawyer. He was due to attend for an eye injection the following day.
81. The witness said they had been in touch with North Lanarkshire Council around 18 months ago. The last time they contacted the council, they were told they had lost points, then the points were increased at the time of the involvement of Environmental Health. The witness agreed that the local authority would have a record of discussions, and that it had not been lodged, as they had not thought about lodging it.
82. The witness said there was an element of Housing Benefit within the Universal Credit. He was not sure how the Universal Credit was calculated but it had been reduced due to his wife now being in employment. He was not aware of how much his wife earned.

83. Asked whether he now had a bad credit rating, the witness said yes, but the credit card companies had not asked him for the money and could not touch him as he was sick and on Universal Credit. The witness did not know whether the credit issues would be recorded against the address of the Property.

Cross-examination by Mrs Young

84. There was no cross-examination by Mrs Young.

Re-examination

85. There was no re-examination.

86. Responding to questions from the Tribunal, the witness said he receives a Personal Independent Payment of £247 per month.

Evidence of Mrs Young

87. Mrs Young said she also worked in the pub part-time in 2010 but Mr McGahan had spoken to Mr Young about the Property. He had said he was moving out as he had lost his wife. Mrs Young told him she was interested, and he advised her to speak to his daughter, Mrs Galloway, saying it was her house.

88. Mrs Young and Mrs Galloway spoke on the telephone. Mrs Young viewed the house in early July. The parties discussed a figure for the rent. No paperwork was provided at that time. Mrs Galloway was happy to take the Respondents on as tenants. They all knew one another, and Mrs Young thought everything was above board.

89. Mrs Young moved her belongings in over a weekend, before the tenancy commenced and after Mr McGahan told her she could do so. On 1st August 2010, the tenancy agreement was signed at the Property. The rent was slightly different to what had been discussed but Mrs Young had not been worried about that. Mrs Galloway had given the Respondents flowers and a card. It was Mrs Young's position that no paperwork had been provided prior to the signing of the tenancy agreement. Mrs Young said she did not check out the tenancy agreements. She understood they were for six months at a time. Mrs Galloway came every six months or so to have a new agreement signed. She would leave a copy for the Respondents. Responding to questions from the Tribunal, Mrs Young said the tenancy agreements lodged comprised all the tenancy agreements, and there were longer gaps between some of them. There had been no discussion in 2019 about the type of tenancy. The procedure had just been the same as before. There had been no further tenancy agreement since then.

90. A new kitchen had been installed at the Property, following which there was a slight increase in the rent. Then the problems with the heating had begun.

There had been a message from Mrs Galloway after the heating problems began, mention they were planning to sell the Property and stating that they had always known this time would come. She had said she was selling to a friend who was also a landlord, and the Respondents could remain as sitting tenants. Mrs Galloway had also phoned. She had said they were getting a home report carried out in February or March 2020. She then called to say they were no longer selling to their friend. The Respondents were given notice to quit. Mrs Young said there were lots of text messages sent by Mrs Galloway, and the messages were not very nice.

91. Responding to questions from the Tribunal regarding the Form AT5, Mrs Young said she did not get this before the tenancy commenced. She remembered Mrs Galloway coming with another tenancy agreement at a later date and giving her the Form AT5, stating that Mrs Young would need to keep a copy of this.
92. Mrs Young said she had not been working for almost three years, but was now working. It was her understanding that the local authority do not look favourably on people who have been in a private let. The local authority was not obliged to house them until an order was granted. There are few four-apartment properties available. They have been in touch with their local councillor about this. They had looked to speak to letting agents about private rented property but it was difficult when they were unemployed. Mrs Young is on a probation period at work until March 2023.
93. It was Mrs Young's position that they should not be made homeless. They had been tenants for 12 years. Her daughter has problems, and it would not help her or the children if they had to leave. Her husband also has health problems. They need security. The local authority is aware of Mrs Young's daughter's problems. They are not able to get an appointment with the local authority. They have to wait up to three weeks for a phone call. Womens Aid have tried to help them get housing. The Respondents are paying their rent. There is no hot water or heating. They have kept to their side of the agreement and done a lot of work in the Property. The local authority has said that there are a lot of people under-occupying their properties. The Respondents have to wait until people move out before they can be housed.
94. Responding to questions from the Tribunal as to the effect of the work probation period on obtaining private rented housing, Mrs Young said her employer would not provide a letter to show her earnings etc. until the probation period is over. She cannot seek private housing with this.

Cross-examination by Mr Buttery

95. Mrs Young said she had been told at the start that it was Mrs Galloway's house. She said she had signed the original tenancy agreement and accepted that, by signing, she was acknowledging receipt of a Form AT5, at paragraph 12 and on page 3. She said she signed despite not receiving the Form AT5 because she had not taken legal advice. She did not get the Form AT5 before

the tenancy commenced. She remembered Mrs Galloway bringing it in a poly pocket when they were signing another tenancy agreement. She did not read the tenancy agreement in full before signing it. Challenged as to the truthfulness of her statement, Mrs Young said she put her signature to it. Asked why she had not cross-examined Mrs Galloway earlier on the matter of the Form AT5, Mrs Young accepted she had the opportunity to cross-examine the witness, but said she did not think it was her place to question Mrs Galloway. She had listened to all that was being said. She was being truthful and honest in her evidence. Mrs Young said maybe Mrs Galloway had sent the Form AT5 to her, but she did not know where it had been sent to. She did not receive it. Asked whether Mrs Galloway might have brought a copy of the Form AT5 that had been sent earlier, Mrs Young said she did not know. She had not read the full tenancy agreement and did not know what a Form AT5 was. The only one she had seen was brought by Mrs Galloway.

96. Mrs Young said the Respondents had made efforts to get social housing. She had spoken to Councillor Valentine. She accepted he would have had records that could have been lodged for the hearing. She said she had been told they would get a house a year after an order was granted. Mrs Young said there were Womens Aid records that could have been lodged. She said the Respondents had not refused to move out of the Property. She had received a text from Mrs Galloway telling her to empty the Property. Environmental Health, and other people, had said the Respondents should not need to move out to have the work done to the heating. Mrs Young said they were not offered any alternative accommodation while the heating was to be installed, and they did not know where they were expected to go or where they put all their belongings. She said she had not discussed this with the Applicants.

Cross-examination by Ms Gill

97. Mrs Young said there had not been a great deal of discussion with the Applicants before taking the tenancy. She went to see the Property and liked it. She told Mrs Galloway she would be happy to sign a tenancy agreement. She got the paperwork with an amended rental figure and signed it. Asked how long it was from the beginning of the discussion to moving into the Property, Mrs Young said it was a couple of weeks. Asked whether there was any discussion before 25th June 2010, Mrs Young said no. All discussions took place in July.

98. Responding to questions from the Tribunal as to where she was staying before moving to the Property, Mrs Young said she had a council tenancy. She took the keys back to the council and was asked to sign a form. She thought she gave two weeks' notice. The council tenancy was in her name. Mr Young had moved in with her. Asked whether she understood that she had security of tenure in her council property, when compared to the tenancy of the Property, Mrs Young said she did not believe she understood the difference correctly. Mrs Young said they had been told by the local authority that they would have 150 points if the order for possession was granted. They had 50 points already because of the lack of heating and hot water.

99. Responding to questions from the Tribunal regarding the Form AT5 and whether the form left at the Property by Mrs Galloway at a later date could have been another Form AT5, Mrs Young said she thought it was a copy of the original. She said she had sent it to the solicitor. At this time, Ms Gill confirmed she had not received a copy Form AT5. Asked by the Tribunal if she had any idea why the Form AT5 was signed on 25th June 2010, Mrs Young said she could not answer that question.

Submission for the Applicants

100. Mr Buttery submitted that it was reasonable to grant the order. The Tribunal should accept the Applicants' evidence as credible. The Tribunal should take into account the effect of the situation on Mrs Galloway. Mrs Galloway had been very clear about the Form AT5 and when it was signed. She had not been cross-examined on that.

101. The Respondents should be bound by the fact that Mrs Young had signed the 2010 tenancy agreement with two references therein stating that they had received a Form AT5. It was odd that Mrs Young had given up a council tenancy with just two weeks' notice and a lease in her own name, where she was obliged to pay rent. It would be odd to be freed from the lease early.

102. It was relevant that the Respondents had lodged no paperwork to evidence the efforts they claimed to have made to find alternative housing, or to support Mr Young's medical conditions. Mr Buttery would have expected medical reports, local authority records and records from Womens Aid. This had been ongoing since February 2020 and it would be reasonable to expect them to have made enquiries, and to have lodged paperwork to support their defence of the action. The Applicants had called for medical evidence in their written representations and this had not been lodged. Without this evidence, there was only verbal evidence. This casts doubt on the efforts made by the Respondents. One might take the view they did not want to leave.

103. Mr Buttery submitted that, even if the Respondents were found to be credible and reliable in their evidence, it would still be reasonable to grant the order. If it was not granted, it would compel the Applicants to keep the Property. A tenant should not stand in the way of applicants who genuinely wish to sell. The Applicants had tried to sell with sitting tenants and were prepared to take a lower offer.

104. Mr Young's medical issues will continue wherever he lives. There is an argument that, if Mrs Young's daughter's ex-partner knows where they live, it might be safer to move.

105. Mr Buttery referred the Tribunal to *Evictions in Scotland*, Second Edition, page 481 where it is stated that the vast majority of applications made to the tribunal for eviction orders under the 1988 and 2016 Acts will, if made in

the correct form and with the requisite valid documentation, compel the tribunal to grant an eviction order.

106. The Applicants will have to pay the daughter's fees. The situation is affecting Mrs Galloway's health. Mr Buttery referred to a Tribunal decision FTS/HPC/EV/21/3200 where an order was granted despite the Respondents having nowhere to go and being in genuine difficulty, as the Applicants had a genuine wish to sell.
107. Mr Buttery pointed out that the Tribunal has discretion to grant a longer period before which the order for possession can be executed. Although he had no specific instructions on that point, he expected the Applicants would be accommodating in this regard.

Submission for Mr Young

108. Ms Gill submitted that the Respondent should not be prejudiced by the failure to lodge any evidence to support reasonableness, saying she had not expected it to be dealt with at this hearing, which she had expected was only dealing with the competency issues.
109. Mr Young's evidence should be accepted. He had not taken much to do with the tenancy agreements, and had left this to Mrs Young
110. Mr Young has medical conditions. He has had difficulty getting local authority housing. He is not saying he will not move. Properties of the size required by the Respondents are few and far between.
111. If the Tribunal accepts that the Form AT5 was not competently served before the tenancy was created, the tenancy cannot be a short assured tenancy and the application is a nullity. It is quite usual for people to sign the tenancy agreement with the clauses stating they have received the Form AT5. Mrs Young had not taken legal advice on this.
112. If the Tribunal accepts that tenancy agreement 4 is the correct agreement, the tenancy cannot be a short assured tenancy as no new Form AT5 was served. The legislation is clear that a Form AT5 would be required if the ish date of the tenancy changed.
113. Ms Gill relied on her earlier submissions in regard to agency. The 1988 Act is clear in interpreting 'landlord'.
114. Responding to questions from the Tribunal, Ms Gill said allowing extra time before any order could be executed would allow the local authority more time to help find accommodation.

Submission by Mrs Young

115. Mrs Young said she had nothing to add to what had been said.

116. Responding to questions from the Tribunal, Ms Young said allowing extra time before any order could be executed would be useful for the Respondents, as it was nigh impossible to get accommodation.

Expenses

117. There was some discussion about the position should expenses be claimed. It was agreed that this could be dealt with by written submissions if any party was minded to move for expenses.

Request for Cases

118. On 6th February 2023, the Tribunal requested copies of cases referred to during the hearing by the parties' representatives. Copies of the cases were lodged on the same day by parties' representatives.

Findings in Fact and Law

119.

- (i) Mr Peter McGahan is the heritable proprietor of the Property which is registered on the Land Register for Scotland under Title Number LAN170171.
- (ii) Mr Peter McGahan is the father of the Applicant, Mrs Bernadette Galloway.
- (iii) In or around 2003, the Applicants provided the funds for Mr McGahan and the late Mrs McGahan to purchase the Property.
- (iv) In terms of a survivorship destination clause within the title, Mr McGahan became the sole proprietor of the Property when his wife passed away.
- (v) In 2010, Mr McGahan authorised and instructed the Applicants to enter into a tenancy agreement as his agents with the Respondents in respect of the Property. The tenancy commenced on 1st August 2010.
- (vi) The tenancy agreement purported to be a short assured tenancy enduring for six months from the date of entry.
- (vii) The Applicants did not disclose that they were acting as agents for a principal.
- (viii) The Applicants acted within the scope of their authority as agents in entering into the tenancy agreement with the Respondents.

- (ix) The Respondents looked to the Applicants to perform the landlord duties in terms of the contract between the parties.
- (x) The Respondent, Mrs Young, signed the tenancy agreement on behalf of the Respondents.
- (xi) A further tenancy agreement was provided by the Applicants to the Respondents with a date of entry of 1st August 2011. It was signed on behalf of the Applicants and was not signed on behalf of the Respondents.
- (xii) A further tenancy agreement was provided by the Applicants to the Respondents in February 2014. The agreement was signed on 9th February 2014. The date of entry was stated as 'February 2014 – Aug 2014'. It was signed on behalf of both parties.
- (xiii) A further tenancy agreement was provided by the Applicants to the Respondents in August 2014. It was signed on behalf of the Applicants and was not signed on behalf of the Respondents. The date of entry was stated as 'Aug 2014 - February 2015'.
- (xiv) A further tenancy agreement was provided by the Applicants to the Respondents with a date of entry of 1st April 2015. It was signed on behalf of the Applicants and was not formally executed on behalf of the Respondents, although they inserted 'C&D Young' and the date 1st April 2015 at the acceptance of offer.
- (xv) A further tenancy agreement was provided by the Applicants to the Respondents with a date of entry stated as 'Feb '16'. It was signed on behalf of both parties.
- (xvi) A further tenancy agreement was provided by the Applicants to the Respondents and signed on behalf of the Respondent on 12th September 2019. The document did not show the subjects of lease, the parties, or the date of entry, and it was not signed on behalf of the Applicants.
- (xvii) The relevant tenancy agreement between the parties is the tenancy created on 1st August 2010.
- (xviii) At some unknown time, the Applicants drafted a Form AT5 dated 25th June 2010. This was not issued to the Respondents prior to the commencement of the tenancy.
- (xix) The tenancy, therefore, is an assured tenancy.
- (xx) A Notice to Quit dated 24th September 2021 and served upon the Respondents on 25th September 2021, ended the contractual tenancy between the parties on 31st March 2022.

Reasons for the Decision

120. The Tribunal found all witnesses to be credible in their evidence. The Tribunal considered that the passage of time had the effect of rendering certain evidence unreliable, as set out below.

Agent/Principal

121. The Tribunal considered that the Applicants were entitled to act as agents for the principal, Mr McGahey, in terms of the express instruction and authority given by the principal. In terms of Scots law, an agent may act for an undisclosed principal, as was the case here. The Applicants acted within the scope of their authority as agents in entering into the tenancy agreement with the Respondents. Thereafter, the Respondents looked to the Applicants to perform the landlord duties in terms of the contract between the parties.

122. The Tribunal considered the case of Barrow and Amey -v- Kazim and others (2018) EWCA Civ 2414. The English Court of Appeal held that a section 21 notice cannot be served by a superior landlord during the term of a mesne tenancy, as the superior landlord was not the direct landlord. The Court held that only the direct landlord could serve the notice. The Tribunal distinguished this case as the facts of the case were different to the application before the Tribunal, in that the Respondents in the English case were not the landlords at the date of serving the notice, but became landlords before the date of the hearing.

123. The Tribunal considered that the definition of 'landlord' in section 55 of the 1988 Act is not exclusive, due to the insertion of the word 'includes'. The Tribunal was satisfied that the Applicants were entitled to enter into the tenancy agreement, serve notices, and make the application to the Tribunal, in their capacity as agents acting for an undisclosed principal.

The relevant tenancy agreement

124. The Tribunal found that the original tenancy agreement entered into on 1st August 2010 is the relevant and extant tenancy agreement for the purposes of the application. None of the subsequent tenancy agreements contain the essential requirements to constitute valid tenancy agreements.

125. The Tribunal took the view that the manner in which the Respondents' names had been inserted into tenancy agreement 4 did not constitute proper execution.

126. The Tribunal considered that tenancy agreement 6 did not constitute a PRT. There does not appear to have been agreement of parties to enter into a PRT. The document fails to identify the subjects, the parties, and the entry date, and it is not signed on behalf of the Applicants.

Type of tenancy

127. The Tribunal found, on the balance of probabilities, that the Form AT5 was not served upon the Respondents prior to the commencement of the tenancy on 1st August 2010 as required by section 32(2)(b) of the 1988 Act. In reaching its decision, the Tribunal took into account the evidence of all the parties. Asked when the Form AT5 had been given to the parties, Mrs Galloway said she thought it may have been sent to them, and that she would imagine it was sent on 25th June 2010, but she was not sure.
128. Mr Young thought the Form AT5 had been served at a later date, however, the Tribunal took into account that he, by his own admission, took little to do with the tenancy paperwork. Mrs Young was more certain in her evidence and said no paperwork was provided prior to the signing of the tenancy agreement on 1st August 2010, and that the Form AT5 was provided at a later unknown date by Mrs Galloway in person, along with another tenancy agreement. The Tribunal noted that Mrs Young said Mrs Galloway would not have known where to send the Form AT5, and if it was sent, she did not receive it.
129. Mr Young said that discussion concerning the tenancy did not commence until July 2010, and that the Property was viewed by Mrs Young and her daughter in mid-July. Mrs Young said she viewed the Property in early July 2010. Both Respondents stated that the time between the initial discussion regarding the tenancy and Mr McGahan moving out was a couple of weeks.
130. The Tribunal took into account the passage of time, and the effect it would undoubtedly have on the memories of all concerned. It was not inconceivable that discussions and viewing took place in late June rather than early July 2010. While it would seem unusual to draw up the Form AT5 at that early stage, rather than closer to the entry date, Mrs Galloway may well have done so. However, the Tribunal was satisfied, on the balance of probabilities, having taken into account Mrs Galloway's uncertainty over the method and timing of service, and Mrs Young's evidence regarding the late service of the Form AT5, that the Form AT5 was not served as required by the legislation.
131. The Tribunal considered the fact that Mrs Galloway had not been cross-examined on her evidence regarding the Form AT5, and whether it was bound to accept the witness's evidence as credible and reliable on that point, and, as a consequence, reject the evidence of the Respondents on the same point. The Tribunal considered that there is not an absolute rule in this regard, and that the witness's evidence on the point of service of the Form AT5 had such a degree of uncertainty that it was impossible to accept the evidence as reliable. The Tribunal considered it was entitled to prefer the evidence of the Respondents, and, particularly, Mrs Young.
132. The Tribunal did not consider the fact that Mrs Young had signed a tenancy agreement stating she had received the Form AT5 to be persuasive

on this point. The Tribunal accepted the evidence of Mrs Young that she signed without reading the document in full, or understanding the significance of the Form AT5. That all parties were in the habit of signing incomplete and inaccurate tenancy agreements in a manner that suggested a lack of care and understanding of the importance of the agreement, was borne out by the evidence before the Tribunal in respect of the additional tenancy agreements.

133. Consequently, the tenancy cannot be a short-assured tenancy, and falls to be an assured tenancy. The tenancy has not been brought to an end in the correct manner for an assured tenancy, therefore the application is not competent.

Observations of the Tribunal

Case Law for the Applicants

134. Although the Tribunal had already ruled on this point, it requested the cases referred to on behalf of the Applicants for the sake of completeness. It would have been open to the Tribunal to have reviewed its own decision on this matter. Having considered the cases, the Tribunal found no reason to review its own decision on this point, having distinguished the cases from the application before it.
135. *Aslam -v- Royal Bank of Scotland* [2018] CSIH 47 is an Inner House decision on an application for permission to appeal a Sheriff Appeal Court decision. Following a debate and the dismissal of the action on the basis that it was irrelevant and lacking in specification, a party litigant lodged a minute of amendment, seeking to amend his pleadings. An application for permission to appeal was heard by the Inner House, who refused the application on the basis that there was no important point of principle or practice concerning adequate notice of an appeal hearing, both generally and in the case of a party litigant, and referring to the case of *Barton -v- Wright Hassall LLP*, where it was held that a party litigant should not be given special indulgence, and that he must comply with the rules.
136. *Barton -v- Wright Hassall LLP* [2018] 1 WLR 1119 is a Supreme Court decision where a party litigant had failed to competently serve a claim form on the agent of the other party. The relevant Civil Procedure Rules (“CPR”) allow a court to validate service retrospectively. The Supreme Court dismissed the appeal and opined that, although a lack of representation will often justify making allowances in making case management decisions and in conducting hearings, it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules.
137. The Tribunal noted that CPR rule 1.1 provides that the overriding objective enables the court to deal with cases justly and at proportionate cost, and this includes, among other things, Rule 1.1(1)(f) (f), namely *enforcing*

compliance with rules, practice directions and orders. The Tribunal noted that there is no corresponding provision within the equivalent overriding objective as set out in the Procedural Rules. Furthermore, Rules 13 and 14 specifically refer to amendments made orally during a hearing. In short, the Respondents did not fail to adhere to the Rules.

Reasonableness

138. The Tribunal was not required to make any findings on the matter of reasonableness having found that the application was not competent.

Decision

139. The order for possession of the Property is refused.

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.

H Forbes

Legal Member/Chair

15th February 2023
Date