



Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) concerning application at the request of the Applicant to review a decision made by it dated 21st August 2020, which application is made in terms of Rule 30 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended

Chamber Ref: FTS/HPC/TE/19/4016

Re: Property at Allanaha Cottage, Cawdor Road, Nairn, IV12 5QU (“the Property”)

Parties:

Miss Violet Jane Mackay, Allanaha Cottage, Cawdor Road, Nairn, IV12 5QU (“the Applicant”)

Mrs Margaret Lyle, Wester Delnies Farmhouse, Ardersier Road, Nairn (“the Respondent”)

Tribunal Members:

Neil Kinnear (Legal Member)

Decision

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

Background

This was an application dated 25th December 2019 brought in terms of Rule 105 (Application to draw up terms of tenancy) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The application was made in terms of section 14 of the *Private Housing (Tenancies) (Scotland) Act 2016* (“the 2016 Act”).

The Applicant stated that there is “No clarity as to exact nature of tenancy and conflicting dates on second tenancy agreement”. She asserted that there was a first

tenancy agreement provided on occupation at 20th June 2016 which “was not official”, and a subsequent lease agreement of 8th November 2018.

The Applicant provided with her application copies of an undated informal tenancy agreement, a subsequent formal tenancy agreement, rent books with deposit receipt and various other documents.

The Respondent had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal, and a Case Management Discussion was set for 19th March 2020.

That Case Management Discussion had to be cancelled as a result of the coronavirus pandemic, and the lockdown imposed in the United Kingdom as a consequence thereof. The Parties’ representatives were subsequently notified with the details of a Tele-Conference and provided with dial-in details.

A Case Management Discussion was held at 10.00 on 9th July 2020 by Tele-Conference. The Applicant did not participate, and nor did her representative, Ms Pierce of Nairn Citizens Advice Bureau. The Respondent participated, and was represented by Mr Swarbrick, solicitor.

The Tribunal made enquiries with Nairn Citizens Advice Bureau when Ms Pierce did not dial-in. The receptionist advised that Ms Pierce was engaged in another matter, but that an attempt would be made to let her know about the Tele-Conference Case Management Discussion. By 10.30, the Tribunal commenced the Case Management Discussion in Ms Pierce’s absence, after giving her a reasonable period in which to participate.

The Tribunal explained the position to the Respondent and Mr Swarbrick. Mr Swarbrick was anxious that matters be dealt with in order to resolve the issues in this application, but he fairly accepted that in light of the ongoing difficulties caused by the coronavirus pandemic to ordinary business administration, it might be unfair not to allow Ms Pierce and the Applicant one further opportunity to participate.

Mr Swarbrick helpfully confirmed that the Respondent’s position is that there was a short assured tenancy agreement entered into in June 2016, as evidenced by the undated informal letter lodged by the Applicant. Subsequently, that agreement was reduced to writing in the later lease agreement of 8th November 2018, which document narrates a date of commencement of 20th June 2016.

Mr Swarbrick advised the Tribunal that no copy of any form AT5 can be located, and as a result, the lease agreement should be characterised legally as an assured tenancy agreement in terms of the *Housing (Scotland) Act 1988*.

That being so, he argued that this application is inappropriate, as it relates to private residential tenancies in terms of the 2016 Act.

Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal discretion on its own initiative to adjourn a hearing.

The Tribunal decided that it was in the interests of justice to continue this application for one further occasion to allow the Applicant and/or her representative to participate. It did so with reluctance, but in light of the business and administrative difficulties faced by many as a result of the coronavirus pandemic, concluded that it was appropriate to do so.

The Case Management Discussion note of 9th July 2020 specifically stated that the Applicant should be aware that if she or someone on her behalf did not participate at the continued Case Management Discussion, then the Tribunal might dismiss this application.

In these circumstances, the Tribunal set a continued Case Management Discussion to be conducted by Tele-Conference in this application, at a date and time to be confirmed to the Parties' representatives by the Tribunal in writing.

By e-mail to the Tribunal of 30th July 2020, Ms Pierce indicated that the Applicant would dial in and represent herself at the continued Case Management Discussion set for 21st August 2020, and that she was forwarding the details to the Respondent that day.

A continued Case Management Discussion was held at 10.00 on 21st August 2020 by Tele-Conference. The Applicant did not participate, and nor did her representative, Ms Pierce of Nairn Citizens Advice Bureau. The Respondent participated, and was represented by Mr Swarbrick, solicitor.

The Tribunal was satisfied that the requirements of giving notice had been duly complied with, and proceeded with the application in terms of Rules 17 and 29 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

Mr Swarbrick confirmed that his position remained that there was a short assured tenancy agreement entered into in June 2016, as evidenced by the undated informal letter lodged by the Applicant. Subsequently, that agreement was reduced to writing in the later lease agreement of 8th November 2018, which document narrates a date of commencement of 20th June 2016.

In the absence of a copy of any form AT5, the lease agreement should be characterised legally as an assured tenancy agreement in terms of the *Housing (Scotland) Act 1988*.

That being so, he argued that this application is inappropriate, as it relates to private residential tenancies in terms of the 2016 Act. The lease here is an assured tenancy under the *Housing (Scotland) Act 1988*.

On 21st August 2020, the Tribunal, after conducting the Case Management Discussion, issued a Decision with Statement of Reasons which dismissed the application.

Application for Recall at the Request of the Applicant

By letter dated 2nd September 2020, the Applicant in the Application (and the Applicant here) applied to the Tribunal for recall of its decision of 21st August 2020.

The application is timeous in terms of Rule 30(4) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant narrates with regard to her non-appearance that she had become confused between the dates set for this application and another which she has to the Tribunal which was postponed.

Thereafter, she largely repeats the submissions contained in her previous written representations to the Tribunal dated 17th December 2019, which submissions the Tribunal considered and took account of before making its decision.

The main thrust of those representations is that the undated informal letter of lease commencing in about June 2016 was an assured tenancy. The later lease agreement of 8th November 2018, which narrates a date of commencement of 20th June 2016, purports to be a short assured tenancy. She concludes that the later agreement of 8th November 2018 is therefore legally a different type of lease agreement, and therefore must be a new agreement. A new agreement at that time would be a private residential tenancy agreement.

By e-mail dated 8th September 2020, the Respondent's representative opposed recall, and set out his reasons for doing so. He noted that the Applicant had failed to attend on two occasions in this application, that her explanation for doing so was unsatisfactory, that none of her legal arguments are new, and that it would be unfair for the Respondent to have to incur further legal costs in the event that the recall was granted.

Reasons for Decision

Rule 30(9) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides that the Tribunal after considering the application and any statement of objections may grant the application, refuse it, or order the parties to appear at a case management discussion.

The Tribunal considers that this application is without merit for the following reasons, and will accordingly refuse the application.

The explanation for non-attendance is unsatisfactory. The Applicant had failed to appear at the first Case Management Discussion. The Tribunal afforded her a further

opportunity to do so by continuing it. It specifically noted in the Case Management Discussion note provided to the Applicant and her representative that the Applicant should be aware that if she or someone on her behalf did not participate at the continued Case Management Discussion, then the Tribunal might dismiss this application.

The Applicant's representative responded to the Tribunal indicating that the Applicant would dial in and represent herself at the continued Case Management Discussion set for 21st August 2020, and that she was forwarding the details to the Respondent that day.

In these circumstances the Applicant's explanation for her non-attendance due to confusing this application with another is entirely unsatisfactory.

The legal arguments advanced by the Applicant are essentially the same as those previously put to the Tribunal in the Applicant's written representations of 17th December 2019, which the Tribunal fully considered in making its decision of 21st August 2020.

The Applicant's reasoning is legally flawed. If the informal written agreement of 2016 is deemed to be a short assured tenancy agreement, then the subsequent formal written short assured tenancy agreement dated 8th November 2018 which narrates a commencement date for the lease of 20th June 2016 is simply setting out more fully the terms of the agreement entered into in June 2016.

Alternatively, if through the absence of the serving of a form AT5 before the lease is created, the informal written agreement of June 2016 is deemed an assured tenancy (as the Applicant contends), then the subsequent formal written short assured tenancy agreement dated 8th November 2018 which narrates a commencement date for the lease of 20th June 2016 must also be deemed an assured tenancy agreement for the same reason (the absence of the serving of a form AT5 before its creation).

Accordingly, on either analysis, the tenancy falls within the scope of the *Housing (Scotland) Act 1988*, and accordingly this application cannot be brought under Rule 105 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended which concerns application made under the 2016 Act.

Decision

For the foregoing reasons, the Tribunal will refuse the application.

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

**Neil Kinnear
Legal Member/Chair**

**18 September 2020
Date**