



**DECISION AND STATEMENT OF REASONS OF JOSEPHINE BONNAR,
LEGAL MEMBER OF THE FIRST-TIER TRIBUNAL WITH DELEGATED
POWERS OF THE CHAMBER PRESIDENT**

**Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property
Chamber Rules of Procedure 2017 ("the Rules")**

in connection with

Craigendunton, Waterside, Kilmarnock, KA3 6JJ ("the property")

Case Reference: FTS/HPC/EV/20/1119

**Mark Baird, Craigendunton Cabin, Waterside, Kilmarnock, KA3 6JJ ("the
Applicant")**

**Joe Reid and Mrs Reid AKA Beth Barclay, Craigendunton, Waterside,
Kilmarnock, KA3 6JJ ("the Respondent")**

1. By application received on 15 April 2020 the Applicant seeks an order for recovery of possession of the property in terms of Rule 65 of the Rules. The Applicant lodged documents in support of the application including a Notice to Leave and Notice in terms of Section 11 Homelessness etc (Scotland) Act 2003. The application states that the Applicant seeks possession of the property due to rent arrears but does not specify any of the specific grounds for recovery of possession in Schedule 5 of the 1988 Act.
2. A request for further information was issued to the Applicant on 15 May 2020. The Applicant was asked to clarify the start date of the tenancy as two different dates had been provided. He was also asked to provide a copy tenancy agreement or other evidence of the existence of a tenancy, information as to how and when the notice to leave was served and a full name for the second

Respondent, described in the application form as Mrs Reid. The Applicant provided a detailed response. He stated that the Respondents have occupied the property as tenants since 2014. The arrangement was intended to be short term as they intended to purchase the property from the Applicant. No written tenancy agreement was signed. The Applicant and the Second Respondent entered into a verbal agreement whereby the Respondents would occupy the property and pay rent at the rate of £1000 per month. For the first few years rent was paid, although occasionally payments were missed. No rent has been paid since 2018. In 2018 the Applicant provided the Respondents with a private residential tenancy agreement. They did not sign it or return it to him. The Applicant is unsure of the Second respondent's name. She initially identified herself as Beth Barclay but mail going to the property appears to be addressed to Mr and Mrs Joe Reid. With regard to the Notice to leave, he advised that this was handed to the first Respondent in person on 1 March 2020.

DECISION

3. The Legal Member considered the application in terms of Rule 8 of the Chamber Procedural Rules. That Rule provides:-

“Rejection of application

8.—(1) *The Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President, must reject an application if—*

(a) they consider that the application is frivolous or vexatious;

(b) the dispute to which the application relates has been resolved;

(c) they have good reason to believe that it would not be appropriate to accept the application;

(d) they consider that the application is being made for a purpose other than a purpose specified in the application; or

(e) the applicant has previously made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, there has been no significant change in any material considerations since the identical or substantially similar application was determined.

(2) Where the Chamber President, or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, makes a decision under paragraph (1) to reject an application the First-tier Tribunal must notify the applicant and the notification must state the reason for the decision.”

- 4. After consideration of the application and documents lodged in support of same the Legal Member considers that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules.**

Reasons for Decision

5. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court*, (1998) Env LR9. He indicated at page 16 of the judgment; "*What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic*". It is that definition which the Legal Member has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success.
6. The application lodged with the Tribunal seeks recovery of possession of an assured tenancy in terms of Rule 65 and Section 18 of the Housing (Scotland) Act 1988 ("the 1988 Act"). The Applicant has confirmed that the tenancy started in 2014 although no written tenancy agreement was signed. Section 12 of the 1988 Act states " (1) A tenancy under which a house a house is let as a separate dwelling is for the purposes of this Act an assured tenancy if and so long as - (a) the tenant or, as the case may be, at least one of the joint tenants is an individual, and (b) the tenant or, as the case may be, at least one of the joint tenants, occupies the house as his only or principal home, and (c) the tenancy is not one which, by virtue of subsection 1A or 2 below, cannot be an

assured tenancy” Section 1A states “A tenancy cannot be an assured tenancy if it is granted on or after 1 December 2017.”. It therefore appears that, when the tenancy started in 2014, it was an assured tenancy in terms of the 1988 Act. The Applicant states that, in 2018 he sought to change the tenancy to a private residential tenancy in terms of the Private Housing Tenancies (Scotland) Act 2016 (“the 2016 Act”). Although he provided the Respondents with a new agreement, they declined to sign this without taking advice and it was never returned to him. In the absence of any evidence to establish that the original assured tenancy has been replaced by a Private Residential Tenancy after 1 December 2017, it appears that the tenancy continues to be an assured tenancy in terms of the 1988 Act.

7. Prior to making an application in terms of Rule 65 of the Rules a landlord requires to issue a tenant with a Notice to Quit and AT6 Notice. The Applicant has not issued these notices. Instead the Applicant has issued a Notice to Leave in terms of Section 50 of the 2016 Act. This is not a pre-requisite for an application in terms of Rule 65. Furthermore, the Applicant handed the Notice to the First Respondent. From the information provided, it appears that the verbal agreement was made with the Second respondent only. She is likely to be the sole tenant (or at least joint tenant) and the Notice was not issued to her. As the Applicant has issued the wrong Notice, and as this does not appear to have been issued to the tenant, or at least the joint tenant, the Notice to leave is invalid for the purposes of the application.
8. The Legal Member proceeded to consider whether the Tribunal can consider the application in terms of Rule 65 in the absence of a Notice to Quit and AT6 Notice. Section 19 of the 1988 Act states that “ (1) The First-tier Tribunal shall not entertain proceedings for possession of a house let on an assured tenancy unless – (a) the landlord (or, where there are joint landlords, any of them) has served on the tenant a notice in accordance with this section; or (b) the Tribunal considers it reasonable to dispense with the requirement of such a notice.” Section 5 states “The First-tier Tribunal may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on ground 8 in Schedule 5 to the Act”. The basis of the application is rent arrears, although the grounds are not specifically referred to in the application form. It follows that, if the Applicant seeks to rely only on grounds 11 and 12 (the discretionary rent arrears grounds) of the Schedule, and not ground 8, the Tribunal could consider whether it could dispense with service the AT6 Notice.
9. The Legal Member proceeded to consider whether the application can be considered in the absence of a Notice to Quit. In terms of the 1988 Act, an application which is not accompanied by a Notice to Quit (or is accompanied by an invalid Notice to Quit) has to proceed under section 18(6). This states

that “The First tier Tribunal shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless – (a) the ground for possession is ground 2 or ground 8 in Part 1 of Schedule 5 to the Act or any of the grounds in Part II of that schedule, other than ground 9, ground 10, ground 15 or ground 17; and (b) **the terms of the tenancy make provision for it to be brought to an end on the ground in question**”. In *Royal Bank of Scotland v Boyle* 1999 HousLR it was held that, where an invalid Notice to Quit had been served and the Pursuer sought to rely on Section 18(6) of the Act, “(1) that the essential ingredients of the grounds for recovery of possession in Schedule 5 to the 1988 Act must be referred to in the tenancy agreement, and while this could be done by an exact citation of the grounds, and maybe also by providing a summary containing the essential ingredients of the grounds, incorporation by reference would not necessarily be appropriate”. In the present application, no tenancy agreement has been provided. It follows that the Applicant cannot establish that “essential ingredients” of the grounds relied on in the application (11 and 12) are part of the agreement between the parties.. As a result the Applicant has failed to meet the requirements of section 18(6) of the Act and cannot proceed under this section. In order to raise proceedings for recovery of the property the Applicant must first bring the contractual tenancy to an end. The Applicant has not served a Notice to Quit and has therefore not brought the contractual tenancy to an end. Accordingly, the Applicant has not complied with the requirements of the legislation.

10. As the Applicant has failed to issue the Respondents with an AT6 Notice in terms of Section 19 of the 1988 Act and a Notice to Quit, the Applicant has not complied with the requirements of section 18 and 19 of the 1988 Act and the application cannot be considered in terms of Rule 65.

11. The Legal member therefore concludes that the application is frivolous, misconceived and has no prospect of success. The application is rejected on that basis.

What you should do now

If you accept the Legal Member’s decision, there is no need to reply.

If you disagree with this decision –

An applicant aggrieved by the decision of the Chamber President, or any Legal Member acting under delegated powers, 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. Information about the appeal procedure can be forwarded to you on request.

J Bonnar

Josephine Bonnar
Legal Member
2 June 2020