

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision Under Rule 8(1)(a) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”) by a Legal Member with delegated powers from the Chamber President

Case reference FTS/HPC/EV/24/3358

Parties

Eric Findlay (Applicant)

Lorna Findlay (Applicant’s representative)

Christopher Horsburgh, Natasha Horsburgh (Respondent)

129 Dunearn Drive, Kirkcaldy, KY2 6LB (House)

1. By application to the Tribunal dated 25 July 2024 the Applicant sought an eviction order under Rule 65 of the First Tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”). In support of the application the Applicant provided a Form AT5, Form AT6 citing ground 2 and a notice to quit dated 20 February 2024 and 4 July 2024 terminating the tenancy as at 31 July 2024.

2. On 4 September 2024 the Tribunal wrote to the Applicant requesting further information regarding the application as follows:-

“1. You have asked why you need to apply to the tribunal. The simple answer is that it is illegal to remove a tenant without a court or tribunal order.

2. You have applied on behalf of Eric Finlay. Please have Eric Finlay provide a letter authorising you to act on his behalf.

3. We note that Eric Finlay is the registered landlord and that the Forms AT5 and AT6 bear his name. You have not provided a copy of the tenancy agreement. This is required to show that there is a tenancy and to show the terms and conditions of the tenancy.

4. We note that you are the owner of the Property. We require you to confirm that you consent to the tenancy and to the application to evict.

5. With regard to the AT6, section 19 Notice, this Notice states that the Ground for serving the Notice is Ground 2. Ground 2 applies where the mortgage provider is calling –up the secured loan to sell the property. This does not appear to be the case here. There is no Ground for termination of short assured tenancies for the landlord to sell the property.

6. *The Notice to Quit and the AT6 are both dated 20 February 2024 and 4 July 2024. Can you explain why there are two dates, please?*

7. *The Notice to Quit states that the tenancy ends on 31 July 2024. This would appear to be insufficient notice. The tenancy agreement will require to be lodged to show that the tenancy has been ended on a contractual end date and that sufficient notice has been given.*

8. *Case law, the Housing (Scotland) Act 1988 and regulations require Notices to be "served". This means they must be delivered by recorded delivery or by sheriff officer. The tenancy agreement might also set out further conditions on how Notices are to be served. Proof of proper service must be lodged with the application. An email from the tenant is not sufficient.*

9. *Notice must be served on the relevant local authority in terms of Section 11 of the Homelessness etc., (Scotland) Act 2003. Proof of service on the local authority and proof of their receipt must be lodged with the application."*

3. On 19 September 2024 the Tribunal received an email from the Applicant's representative in response in the following terms:-

"I have enclosed attachments for:

1. *Tenancy agreement AT6, which I believe I sent previously, which is a periodic short assured tenancy as it was taken out prior to December 2017, which is the tenancy agreement. I believe we only need to serve a section 33 notice and give 2 months notice to quit. The AT5/6 were the only tenancy agreements we used in 2017. I do not have any other admin in this respect.*
2. *Authorisation of Eric Findlay the owner and Landlord of 129 Dunearn Drive, Kirkcaldy. I only do the admin for him for his flat and with regards to his mortgage too.*
3. *The notice to quit and AT6 have the dates in February and July as we informed the tenants in February by text that we were going to sell the property and July in writing delivered in person when we became aware of the legal requirement for a written notice. We did not realise they had to be delivered by recorded delivery. The tenants had already told us they were separating and were looking for alternative accommodation.*
4. *The Notice to quit was dated 31 July 2024 as we had informed the tenants in February so by now they have had over 7 months notice without realising the law had changed since we last sold a property we had.*
5. *I believe I sent to evidence of the notice given to the local authority but will attach this again also."*

The Applicant's representative provided a copy of a tenancy agreement between the parties dated 16 Jun 2017, a letter from Eric Findlay authorising

the Applicant's representative to act on his behalf, and an email from the Applicant's representative to the local authority with the notice to quit dated 4 July 2024.

4. Rule 8(1)(a) of the Rules allows an application to be rejected by the Chamber President if "they consider that an application is vexatious or frivolous". "Frivolous" in the context of legal proceedings is defined by Lord Justice Bingham in R-v- North West Suffolk (Mildenhall) Magistrates Court (1998) Env.L.R.9. At page 16 he states:- "What the expression means in this context is, in my view, that the court considers the application to be futile , misconceived, hopeless or academic".
5. I consider that this application is frivolous and has no reasonable prospect of success in its current form. There are several fundamental issues with the application that means it does not meet the requirements for an application under rule 65.
6. Rule 65 applies to possession of assured tenancies on any of the grounds under Schedule 5 of the Housing (Scotland) Act 1988. The Applicant has stated the ground for possession in the AT6 as ground 2. Ground 2 applies to applications by a mortgage lender for recovery of possession of the let property where the landlord is in default. That does not apply in this case. The Applicant has instead stated the reason for the ground as his intention to sell. The AT6 does not therefore specify a valid ground for possession.
7. In terms of section 18(6) of the Housing (Scotland) Act 1988, the Tribunal cannot make an order for possession where a contractual assured tenancy is still in place between the parties, unless the tenancy agreement provides for the tenancy to be terminated on the ground relied upon. In this case the grounds for possession under Schedule 5 are not explicitly set out in the tenancy agreement. The Applicant would therefore require to terminate the contractual assured tenancy by serving the Respondents with a valid notice to quit before applying to the Tribunal for an eviction order.
8. The Applicant has produced a notice to quit which was given to the Respondents on or around 4 July 2024, purporting to terminate the tenancy as at 31st July 2024. A notice to quit must terminate the tenancy at the end of the tenancy term, known as the "ish" date. The term of the tenancy according to the tenancy agreement produced by the Applicant is six months beginning on 16 June 2017. In the absence of explicit provision to the contrary, the tenancy agreement has continued by tacit relocation on a six monthly basis. The 31st July 2024 is therefore not a valid ish date. Furthermore a tenant must be given a minimum notice period of 40 days for a notice to quit. On the basis that the Applicant's representative has confirmed that the notices were given to the Respondents in July the notice to quit does not provide the tenant with sufficient notice.
9. Accordingly I have concluded that the application has no prospects of success in its current form. It must therefore be rejected. I would however strongly encourage the Applicant to take independent legal advice if he requires to apply

again to the Tribunal in future in order to ensure he can meet the legal requirements for an application under rule 65.

NOTE: What you should do now.

If you accept this decision there is no need to reply. If you disagree with this decision you should note the following: An Applicant aggrieved by this 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 seek permission to appeal within 30 days of the date the decision was sent them. Information about the appeal procedure can be forwarded on request.

R.O'Hare

22 October 2024