

**Housing and Property Chamber**  
First-tier Tribunal for Scotland

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

Case reference FTS/HPC/PR/24/4088

**Parties**

**David Malcolm (Applicant)**  
**Duncan Fulton, Lesley Fulton (Respondent)**

**32 Linn Drive, Glasgow, G44 3PU (“the Property”)**

**Tribunal Member: Ruth O’Hare (Legal Member) with delegated powers from the Chamber President**

**Decision**

**The Tribunal rejects the application by the Applicant received by it on 5 September 2024 under Rule 8(1)(a) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”).**

**Background**

1. The Applicant applied to the Tribunal under Rule 69 of the Rules and section 36(3) of the Housing (Scotland) Act 1988 (“the 1988 Act”) seeking an order for payment in the sum of £11,940 by way of compensation for having been misled by the Respondents to vacate the property.
2. Following review of the application the Tribunal wrote to the Applicant on 3 October 2024 requesting the following information:-
  - (i) A copy of the tenancy agreement, or as much information as the Applicant could give about the tenancy;
  - (ii) A full explanation of the circumstances in which the Applicant left the property, including copies of any notices from the Respondents; and
  - (iii) Details of the amount of damages sought based on section 37 of the 1988 Act. The Tribunal pointed out the specific criteria in section 37 for assessing the level of damages. The Applicant was asked to amend the application form to include a figure calculated in accordance with the criteria under section 37.

The Applicant was encouraged to seek legal advice regarding his application, and to provide a response no later than 17 October 2024.

3. On 10 October 2024 the Applicant emailed the Tribunal. He advised that he had moved into the property in 2008 and had complied with all of his tenancy obligations. He was settled in the property. The Respondents had sent a notice to leave which was unexpected. The ground for possession was the refurbishment of the property. The Applicant asked the Respondents if he could return to the property at a later date but was advised that they were moving back into the property. The Applicant had been told by neighbours that the Respondents never moved back in. The Applicant had since discovered that the property had been remarketed for let. The Applicant provided a copy of the tenancy agreement and the notice to leave.
4. The Tribunal wrote again to the Applicant on 15 November 2024 in the following terms:-

*“Your further information has been assessed by a Legal Member of the Tribunal with the delegated authority of the Chamber President. The Legal Member has requested the following information or documentation:*

*1. Thank you for providing a copy of the tenancy agreement, which relates to an assured tenancy. The notice to leave served upon you is not the correct notice to end an assured tenancy. Please confirm whether a private residential tenancy was agreed between the parties at any time after 1st December 2017, in which case, you may be able to proceed under Rule 110.*

*2. If this remained an assured tenancy, the legal basis for your application is not clear. It is not clear that you were unlawfully deprived of your occupation of the property by the action of the Respondent. You were served notice, which may have been an invalid notice, at which time you were not required to leave the property.*

*3. If this is an application that can proceed under Rule 69, you must comply with the previous request for information, as follows: An application under rule 69 must confirm the details of the amount of damages sought based on section 37 of the 1988 Act. Section 37 sets out specific criteria for assessing the amount of damages. This entails taking two figures, being the value of the landlord's interest in the property with, and without, a residential occupier with the same right of occupation. This can be a complex exercise however we cannot accept an application under rule 69 without this information. You have stated in section 7(c) that you are seeking a years rent in the sum of £11,940. The Tribunal cannot award damages based on rent payable. The amount of damages must be calculated in accordance with section 37. Accordingly please amend section 7(c) to include the amount of damages you are seeking based on the required criteria under section 37 of the 1988 Act.*

*4. We cannot accept a care of address for a Respondent. If this application is to proceed, you must provide a proper address for the Respondent.*

*5. As stated previously, you would be advised to take advice from a solicitor or an agency such as the CAB or Shelter Scotland on this matter.*

*Please reply to this office with the necessary information by 29 November 2024. If we do not hear from you within this time, the President may decide to reject the application.”*

5. The Applicant emailed the Tribunal on 19 November 2024. He advised that there was no private residential tenancy in place. He had not been able to take advice but believed the application could proceed under Rule 110. The Respondents had misled the Applicant into vacating the property. This had caused significant stress to the Applicant and his family. The Respondents had acted in bad faith and had increased the rent for the property by over 100%. The Applicant was unable to provide evidence from a surveyor to support the calculation required under section 37 but provided some figures based on market values from local estate agents.
6. On 18 December 2024 the Tribunal wrote again to the Applicant. The Tribunal pointed out that Rule 110 could not apply to assured tenancies. The Applicant was referred again to sections 36 and 37 of the 1988 Act. For an application under Rule 69 he would require to establish that section 36 applied. The Applicant was asked to explain if there had been any behaviour on the part of the Respondents beyond bad faith and the invalid notice that he could rely upon. The Applicant was also asked to explain why he had not taken advice or challenged the notice to leave, as he would have been entitled to remain in the property until such time as the Respondents obtained an eviction order. The Applicant was again asked to provide an address for the Respondents. Finally the Tribunal advised that a valuation in compliance with the requirements of section 37 would be required. The Applicant was advised to consult a suitably qualified surveyor. The Tribunal requested a response by 1 January 2025, failing which the application would be rejected.
7. On 7 January 2025 the Tribunal received an email from the Applicant requesting confirmation as to whether the application had been rejected. The Applicant reiterated that the notice to leave had come out of the blue and he and his family had been good tenants, always paying rent on time. The Respondents had lied about moving back into the property. No legal challenge had been made to the notice to leave as the owner was moving back into the property. The Applicant understood this was one of the grounds for possession. The Applicant provided an address for the Respondents and advised that he would be unable to obtain a valuation report as he no longer had access to the property. The Applicant acknowledged that in the absence of this information the application would have to be rejected.

### **Reasons for Decision**

8. 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".

9. I consider that this application is frivolous or vexatious and has no reasonable prospect of success in its current form. The Applicant has applied under Rule 69 for damages for unlawful eviction under section 36 of the 1988 Act. Section 36 states:-

*"36 Damages for unlawful eviction.*

*(1) This section applies if, at any time after 3rd December 1987, a landlord or any person acting on his behalf unlawfully deprives the residential occupier of any premises of his occupation of the whole or part of the premises.*

*(2) This section also applies if, at any time after 6th July 1988, a landlord or any person acting on his behalf—*

*(a) attempts unlawfully to deprive the residential occupier of any premises of his occupation of the whole or part of the premises; or*

*(b) knowingly or having reasonable cause to believe that the conduct is likely to cause the residential occupier of any premises—*

*(i) to give up his occupation of the premises or any part thereof; or*

*(ii) to refrain from exercising any right or pursuing any remedy in respect of the premises or part thereof,*

*does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence,*

*and, as a result, the residential occupier gives up his occupation of the premises as a residence.*

*(3) Subject to the following provisions of this section, where this section applies, the landlord shall, by virtue of this section, be liable to pay to the former residential occupier, in respect of his loss of the right to occupy the premises in question as his residence, damages assessed on the basis set out in section 37 below.*

*(4) Any liability arising by virtue of subsection (3) above—*

*(a) shall be in the nature of a liability in delict; and*

*(b) subject to subsection (5) below, shall be in addition to any liability arising apart from this section (whether in delict, contract or otherwise).*

*(4A) Any action to enforce liability arising from this section must be raised in the First-tier Tribunal unless the residential occupant's claim is founded on the premises in question being subject to a Scottish secure tenancy or to a short Scottish secure tenancy (within the meaning of the Housing (Scotland) Act 2001 (asp 10)).*

*(5) Nothing in this section affects the right of a residential occupier to enforce any liability which arises apart from this section in respect of his loss of the right to occupy premises as his residence; but damages shall not be awarded both in respect of such a liability and in respect of a liability arising by virtue of this section on account of the same loss.*

*(6) No liability shall arise by virtue of subsection (3) above if—*

*(a) before the date on which the proceedings to enforce the liability are finally decided, the former residential occupier is reinstated in the premises in question in such circumstances that he becomes again the residential occupier of them; or*

*(b) at the request of the former residential occupier, the sheriff or First-tier Tribunal makes an order as a result of which he is reinstated as mentioned in paragraph (a) above.*

*(6A) For the purposes of subsection (6)(a) above, proceedings to enforce a liability are finally decided—*

*(a) if no appeal may be made against the decision in these proceedings;*

*(b) if an appeal may be made against the decision with leave and the time limit for applications for leave expires and either no application has been made or leave has been refused;*

*(c) if leave to appeal against the decision is granted or is not required and no appeal is made within the time limit for appeals; or*

*(d) if an appeal is made but is abandoned before it is determined.*

*(6B) If, in proceedings to enforce a liability arising by virtue of subsection (3) above, it appears to the court or, as the case may be, the First-tier Tribunal —*

*(a) that, prior to the event which gave rise to the liability, the conduct of the former residential occupier or any person living with him in the premises concerned was such that it is reasonable to mitigate the damages for which the landlord would otherwise be liable, or*

*(b)that, before the proceedings were begun, the landlord offered to reinstate the former residential occupier in the premises in question and either it was unreasonable of the former residential occupier to refuse that offer or, if he had obtained alternative accommodation before the offer was made, it would have been unreasonable of him to refuse that offer if he had not obtained that accommodation,*

*the court or, as the case may be, the First-tier Tribunal may reduce the amount of damages which would otherwise be payable to such amount as it thinks appropriate.*

*(7)In proceedings to enforce a liability arising by virtue of subsection (3) above, it shall be a defence for the defender to prove that he believed, and had reasonable cause to believe—*

*(a)that the residential occupier had ceased to reside in the premises in question at the time when he was deprived of occupation as mentioned in subsection (1) above or, as the case may be, when the attempt was made or the acts were done as a result of which he gave up his occupation of those premises; or*

*(b)that, where the liability would otherwise arise by virtue only of the doing of acts or the withdrawal or withholding of services, he had reasonable grounds for doing the acts or withdrawing or withholding the services in question.*

*(8)In this section—*

*(a)“residential occupier”, in relation to any premises, means a person occupying the premises as a residence whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises;*

*(b)“the right to occupy”, in relation to a residential occupier, includes any restriction on the right of another person to recover possession of the premises in question;*

*(c)“former residential occupier”, in relation to any premises, means the person who was the residential occupier until he was deprived of or gave up his occupation as mentioned in subsection (1) or subsection (2) above (and, in relation to a former residential occupier, “the right to occupy” and “landlord” shall be construed accordingly).”*

10. In order to establish a claim for damages under section 36, the Applicant must be able to show that the Respondents unlawfully deprived him of his occupation

or the property or behaved in such a way so that the Applicant had no option but to leave. This goes beyond simply sending the Applicant a notice to leave. The Respondents must have displayed conduct that deliberately deprived the Applicant of his occupation of the property, whether by changing the locks without an eviction order, or by exhibiting threatening or intimidating conduct in order to force the Applicant out. In this case the Applicant was given a notice to leave and left the property voluntarily, having believed the notice to be valid. The Applicant's remedy would have been to challenge the notice to leave and remain in the property. Whilst I accept the Applicant may have a case that he was misled to leave the property by the Respondents I am satisfied based on the information provided that he cannot establish a basis for an application under Rule 69. It is further noted that the Applicant has stated he is unable to provide the evidence required for damages to be calculated under section 37 of the Act which is a requirement for an application under Rule 69.

11. The Applicant has made reference to Rule 110 as an alternative. Rule 110 applies to applications for wrongful termination orders in relation to private residential tenancies under the Private Housing (Tenancies) (Scotland) Act 2016. The tenancy between the parties in this case is an assured tenancy under the 1988 Act. The Applicant cannot therefore make an application under Rule 110.
12. I have therefore concluded that the application is futile as the Applicant cannot establish the grounds for a claim for damages under section 36 of the Act, and cannot rely instead upon rule 110. The application is therefore rejected as frivolous under Rule 8(1)(a).

**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.

## Ruth O'Hare

**Ruth O'Hare, Legal Member**

**10 February 2025**