



**Decision with Statement of Reasons of Alan Strain, Legal Member of the First-tier Tribunal with delegated powers of the Chamber President of the First-tier Tribunal for Scotland (Housing and Property Chamber)**

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

**Chamber Ref: FTS/HPC/EV/25/0590**

## **Parties**

**Mr Malcolm McGowan, Mrs Eilidh McGowan (Applicant)**

**Taylor & Henderson LLP (Applicant's Representative)**

**92 Mountcastle Wynd, Kilwinning, KA13 6DH ("the Property")**

**Tribunal Member:**

**Alan Strain (Legal Member)**

## **Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined 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.**

## **Background**

1. The application was received by the Tribunal under Rule 66 on 11 February 2025. The grounds for possession/eviction were stated to be termination of a short assured tenancy under the Housing (Scotland) Act 1988 (**Act**). The application enclosed and relied upon a Short Assured Tenancy (**SAT**) which purported to run from 13 August 2022 to 13 August 2023.

2. The application was considered by the Tribunal and further information was requested by letter of 15 March 2025. In particular the Applicant was requested to provide the following further information:

*“Your application seeks an eviction order on the basis that the tenancy is a short assured tenancy. The initial tenancy bears to run from 13 August 2022 to 13 August 2023. The provisions of the Private Housing (Tenancies) (Scotland) Act 2016 came into force on 1 December 2017. Since that date it has not been possible to create any new assured or short assured tenancies we would refer you in particular to the provisions of section 1 and schedule 5 of that Act. A tenancy which started on 13 August 2022 must by default be private residential tenancy governed by the 2016 Act. It would appear impossible for this tenancy to be a short assured tenancy? The notices which you have served can therefore be of no effect and this application would appear to be incompetent. If you agree please confirm that you wish to withdraw this application. If not please explain the basis upon which the application can proceed with appropriate reference to relevant legislation and case law?. Upon receipt of the above information, a final decision can then be taken on whether the application is valid and whether it should be accepted and referred to the tribunal for full determination. Please respond to this letter within the next two weeks. If you fail to respond to this letter then the tribunal may reject your application. You should be aware that the Tribunal has the power to reject applications on grounds set out in rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. Please reply to this office with the necessary information by 29 March 2025.”*

3. The Applicant's Representatives replied by email of 24 March 2025 in the following terms (in so far as was relevant to the Decision):

*“We refer to the above matter and your letter dated 15th March 2025. We confirm we have discussed the content of same with our clients. We have now taken our clients' further instructions. We confirm that we had not provided the full details of this matter within our paper apart to the Form E. We are instructed that the tenancy agreement between the Applicants and the Respondent began on or around August 2007 and this was through a letting agency known as Clyde Properties Ltd. The Applicants tell us they were living in Australia at the time the tenancy agreement was entered into. We are instructed the Applicants moved back to Scotland on or around August 2008 and no longer required the assistance of Clyde Properties Ltd. The Applicants and Respondent allowed the tenancy to continue running by way of tacit relocation. The Applicants tell us that tacit relocation has been operating for around 16 years. We are instructed that the Applicants became aware of the new legislation in respect of Private Housing (Tenancies) (Scotland) Act 2016 that came into force on 1 December 2017. At this time, the Applicants did not have the benefit of legal advice. We are instructed that the Applicants assumed that the new legislation would make the current tenancy agreement null and void. The Applicants and Respondent therefore decided to draft and sign the “Assured Shorthold Tenancy Agreement” as at 13th August 2022. We understand that it is not possible to enter into any further Short-Assured tenancy agreements and the tenancy agreement attached in our application would be void. We are instructed that the Applicants no longer have a copy of the initial tenancy agreement that was entered into on or around August 2007. The Applicant have contacted Clyde Properties to ascertain if they still hold a copy of the said tenancy agreement, but they have had no response. We understand the Applicants had*

*proposed to the Respondent on or around August 2024 about transferring the current tenancy agreement to a Private Residential Tenancy. The Applicants had also proposed a very small rent increase within the said email. The Applicants have told us that the Respondent was opposed to converting the tenancy agreement, and the rent increase. The Short Assured tenancy agreement therefore presently remains in place. In the circumstances, the Applicants have been unable to complete a Notice to Leave on the basis that there is technically still a Short-Assured tenancy in force, albeit the tenancy agreement provided in our application would not be accurate and reflect the position. Therefore, we have completed a Notice to Quit and accompanying papers in line with giving sufficient notice to the Respondent. In the circumstances, we would be grateful if this letter could be considered alongside the above application prior to a final decision being made."*

### **Reasons for Decision**

4. The Tribunal 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;·*
- (c) they have good reason to believe that it would not be appropriate to accept the application;*

*(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."*

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. 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".*

6. The application seeks to proceed under Rule 66. In order to rely upon these Grounds the Applicant must have had a valid SAT created prior to the commencement of the **Private Housing (Tenancies) (Scotland) Act 2016** which came into force on 1 December 2017 and have validly terminated the SAT. The Applicant is unable to provide a copy of the original SAT and AT5 or confirm its original term. The Applicant has accepted that the SAT upon which the application relies is both null and void.

7. As the Applicant has not provided evidence to establish that an SAT was created and continued subsequent to the commencement of the **Private Housing (Tenancies) (Scotland) Act 2016** and that such tenancy has been validly terminated the Tribunal cannot grant the order sought. Applying the test identified by Lord Justice Bingham in the case of ***R v North West Suffolk (Mildenhall) Magistrates Court***

(cited above) the application is frivolous, misconceived and has no prospect of success.

### **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.**

# Alan Strain

15 April 2025

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**Legal Member/Chair**

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**Date**