

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



**Decision the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in relation to an application for eviction/ possession of a Rented Property in terms of Rule 65 of the Procedure Rules.**

**Chamber Ref: FTS/HPC/EV/18/3007**

**Re: 5 Ayton Cocklaw, Eyemouth, Berwickshire, TD14 5RJ ("the Property")**

**Parties:**

**Norman Steel, Ayton Cocklaw, Eyemouth, Berwickshire, TD14 5RJ ("the Applicant")**

**Michael Curry, residing at 5 Ayton Cocklaw, Eyemouth, TD14 5RJ ("the Respondent")**

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

**Tribunal Member: Jacqui Taylor (Legal Member) Janine Green (Ordinary Member)**

**Background**

1. The Applicant applied to the Tribunal for eviction/ possession of the Rented Property under section 18(1) of the Housing (Scotland) Act 1988, in terms of Rule 65 of the Procedure Rules. The application was dated 7<sup>th</sup> November 2018. The application states:  
Ground 8: At least 3 months rent is in arrears both on the date on which the notice of proceedings was served and at the date of this hearing.  
Mr M Curry is liable to pay for his tenancy at the rate of £200 per month. Rent remains outstanding totalling the sum of £1200 at today's date 7<sup>th</sup> November 2018. Mr M Curry is in arrears of more than 6 months rent.  
Ground 11: Whether or not any rent is in arrears on the date on which proceedings began. Mr Curry has persistently delayed paying his full rent for more than 8 months at today's date 7/11/2018.  
Ground 12: Some rent lawfully due from the Tenant. Mr Curry has not paid his full rent for more than 8 months and is currently £1200 in arrears at today's date 7/11/2018.  
Ground 15: The Tenant has caused nuisance or annoyance to neighbours  
On 19<sup>th</sup> July 2018 as I stood at the side of the private road next to number 2 Ayton Cocklaw Cottage, Mr Curry deliberately swerved his car in my direction in

an attempt at intimidation. Later that same day, outside number 4 Ayton Cocklaw Cottage a second deliberate attempt at intimidation was actioned when Mr Curry issued a verbal threat towards me. Police Scotland Reference 1956 19 July 2018. This just happens to be the same day as sheriff officers delivered the Notice to Quit and Form AT2 to Mr Curry.

2. Initial documents lodged with the Tribunal were:-

- A statement stating that there is no written agreement for the property. Mr Curry occupied the property from 1<sup>st</sup> September 2012 until now as the sole tenant. The rent is £200 per calendar month. Mr Curry pays the utility bills and the Council Tax.
- Form AT6 dated 20<sup>th</sup> August 2018.
- Notice to Quit dated 18<sup>th</sup> July 2018 giving the Tenant formal notice to quit the Property by 31<sup>st</sup> August 2018.
- Certificate of Intimation by Walker Love, Sheriff Officers, in respect of delivery of the Notice to Quit Notice to the Tenant on 19<sup>th</sup> July 2018.
- Section 11 Notice addressed to Scottish Borders Council

### **Initial Hearing**

3. This case called for an initial hearing at 10am on 16<sup>th</sup> January 2019 at Riverside House, 502 Gorgie Road, Edinburgh.

The Applicant was present and was accompanied by his wife Karen Steel.

The Respondent was present and was accompanied by his neighbour Garry Cron.

The Respondent had been served notice by Sheriff Officers on 27<sup>th</sup> December 2018 of the case and details of the hearing. No written response had been received from the Respondent.

### **Decision Following Initial Hearing:**

#### **3.1. Requirements of Section 65 of the Procedure Rules.**

'Section 65 (a) states that the application under section 18(1) of the 1988 Act must state:

(a) (i) **the name, address and registration number of the Landlords.**

The application states that Mr Steel is the Landlord. Mrs Taylor advised Mr Steel that the Registers of Scotland search for the Property states that the owner of the Property is David Ian Liddell- Grainger. Mr Steel advised that he and his wife are joint Tenants of Ayton Cocklaw Farm. 5 Ayton Cocklaw, Eyemouth forms part of the property Ayton Cocklaw Farm. He confirmed that he will provide the Tribunal with a copy of the lease to enable the Tribunal to satisfy themselves as to the identity of the Landlords of the 5 Ayton Cocklaw, Eyemouth. Mrs Taylor also advised Mrs Steel that if the lease of Ayton Cocklaw Farm states that Mr Steel and his wife are joint tenants an amendment will be required to the Application to add Mrs Steel as joint Applicant.

(ii) **the name and address of the Landlord's representative.**

This section had not been completed as the Applicant represented himself.

**(iii) the name and address of the Tenant.**

This section had been completed with the Respondent's details.

**(b) Section 65 (b) states that the application must be accompanied by the following documents:-**

**(i) The Tenancy Agreement (if available).**

As already stated, the Application included a statement that there is no written agreement for the property. Mr Curry occupied the property from 1<sup>st</sup> September 2012 until now as the sole tenant. The rent is £200 per calendar month. Mr Curry pays the utility bills and the Council Tax.

Mr Steel advised the Tribunal that these details are correct. Mr Curry advised the Tribunal that he was not certain if the lease specifically started on 1<sup>st</sup> September 2012 but he recalled it starting at the beginning of September 2012. He explained that he previously resided in 1 Ayton Cocklaw Cottage. The parties acknowledged that the exact start date could be confirmed by the Council Tax records.

Mrs Taylor advised the parties that for a lease that commenced in 2012 there are four essential requirements namely:- Parties, Subjects, Rent and an Ish date/end date.

Mr Steel advised that Tribunal that there was no discussion of an end date of the lease at the beginning of the Tenancy.

Mrs Taylor advised that parties that in the absence of any agreement between the parties the law deems the lease to have been granted for a year and then it would continue by tacit relocation.

**(ii) A copy of the notice of intention to raise proceedings for possession of a house let on an assured tenancy.**

A copy of form AT6 had been provided. The form was dated 20<sup>th</sup> August 2018 and stated that proceedings would not be raised before 8<sup>th</sup> September 2018. The grounds on which the Landlords were seeking possession mirrored those set out in the application.

**(iii) A copy of the Notice to Quit served by the Landlord on the Tenant (if applicable).**

A copy of the Notice to Quit dated 18<sup>th</sup> July 2018 was provided. The Notice stated that the Landlords gave notice that the Tenants had to vacate the Property by 31<sup>st</sup> August 2018.

**(iv) Evidence as the applicant has that the possession ground or grounds have been met.**

A rent statement showing transactions from 8<sup>th</sup> November 2017 to 7<sup>th</sup> November 2018 was provided. The statement showed that the Tenant's rent payment were up to date on 28<sup>th</sup> February 2018. After that date the Tenant paid £50 per month instead of £200 per month.

(c) The application form had been correctly signed and dated by the Landlord as required by Section 65(c) of the Procedure Rules.

### **3.2. Requirements of Section 18(1) of the Housing (Scotland) Act 1988**

This section states that the Tribunal will not make an order for possession of a property let on an assured tenancy except on one or more grounds set out in Schedule 5 of the Act.

The application stated that the application for the eviction/ order for possession was based on the following grounds of Schedule 5 of the 1988 Act:-

#### **Ground 8: At the date of service of the AT6 and at the date of the hearing at least three months rent due from the Tenant is in arrears.**

Mrs Taylor advised the parties of the terms of Section 18(6) of the 1988 Act which requires the tenancy agreement to make provision for the tenancy to be ended on this ground.

Mrs Taylor advised the parties that as there is no written lease and as the commencement date of the lease has not been proven the Tribunal are unable to consider Ground 8 further at this stage.

#### **Ground 11: Whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due.**

#### **Ground 12: Some rent lawfully due from the Tenant:-**

- (a) Is unpaid on the date on which proceedings for possession are begun and**
- (b) Except where subsection (1)(b) of section 19 of this Act applies, was in arrears at the date of service of the notice under that section relating to those proceedings.**

The parties confirmed that the details of the Rent Statement that had been produced were correct. Mr Curry advised that he had reduced the rent that he paid to £50 per month on 28<sup>th</sup> March 2018 due to the condition of the Property.

Mr Steel advised that there is a separate application before the Tribunal under case no 18/2233 which is an application that the Property does not meet the Repairing Standard. The inspection and hearing relative to that application took place on 27<sup>th</sup> November 2018. The Decision relative to that application has still to be issued. The parties advised that they expect a RSEO to be issued. Mr Curry explained that he has had no heating in the Property since 24<sup>th</sup> January 2018 due to a problem with the open fire. The Fire Brigade were called to the Property and removed the fire place as they considered it to be a fire hazard. Mr Steel explained that he was frustrated that the Mr Curry had not contacted him prior to the incident on 24<sup>th</sup> January 2018 and asked for the baby bricks around the fire place to be pointed. He also advised that he had offered to install central heating in the Property but Mr Curry did not reply to this offer until 27<sup>th</sup> November 2018. Mr Curry stated that he had advised Mr Steel in April 2018 that he would like central heating to be installed in the Property. Mr Curry advised that he still has the retained rent in his bank account. The parties agreed that the outstanding rent amounts to £1500. Mr Curry showed the

Tribunal his online account on his phone which showed that the balance of the account was more than the amount of the outstanding rent. Mr Steel advised the Tribunal that he believed that Mr Curry had the rent in his account and he did not need to look at the online statement. Mr Curry advised the Tribunal that he has been out of pocket since January 2018 as he has incurred higher electricity bills as he had to use an electric immersion heater for hot water and also electric convector heaters to heat the Property.

Mr Curry advised the Tribunal that the arrears of rent are not due to any housing benefit application.

**Ground 15: Nuisance/ Annoyance/ Anti-social behaviour.**

Mr Steel advised that he was withdrawing this ground as he had no evidence.'

The Tribunal directed the hearing to be continued to 8<sup>th</sup> March 2019.

#### **4. Direction**

4.1 The Tribunal issued a Direction dated 16<sup>th</sup> January 2019 in the following terms:

'The Applicant is required to provide the Tribunal with:-

1. A copy of his lease from the heritable proprietor of the Property in his favour, demonstrating that he is Landlord of the Property in terms of the verbal lease in favour of the Tenant.
2. Evidence to demonstrate the start date of the verbal Tenancy in favour of the Tenant, such as a council tax statement.
3. The Repairing Standard Enforcement Order and relative Tribunal Decision in respect of the Property, which it is understood will be issued shortly (if it has been issued).

The Tenant is required to provide the Tribunal with:-

1. Evidence to justify his rent retention, such as electricity bills before and after 28<sup>th</sup> March 2018, being the first date he paid reduced rent to the Landlord.'

4.2 In response to the Direction the Applicant lodged the following documents with the Tribunal:

- 4.2.1 An abbreviated copy of the lease of the Lands and Farm of Cocklaw.
- 4.2.2 An assignation of the lease which evidenced the fact that the proprietors of the Property are the Applicant and his wife Mrs Karen Anne Steel.
- 4.2.3 A copy of the Decision of the First -tier Tribunal (FTS/HPC/RP/18/2233) in relation to a Repairing Standard Application.
- 4.2.4 A copy of the Repairing Standard Enforcement Order dated 15<sup>th</sup> January 2019 which requires the Landlord to carry out the following works:
  - (a) *Carry out redecoration works to the water damaged areas in the upstairs bedroom and bathroom.*
  - (b) *To repair or replace the fireplace and back boiler system in the Property or otherwise to install an appropriate central heating system compliant with the repairing standard.*

- (c) *To carry out appropriate pointing works to the exterior and chimney of the Property sufficient to render it compliant with the repairing standard.*
- (d) *To replace the kitchen sink and surrounding unit to a standard compliant with the repairing standard.*
- (e) *To clear the external drain to ensure it is in proper working order and compliant with the repairing standard.*
- (f) *To replace the cracked paving slabs to the side of the Property.*
- (g) *To carry out repairs to the potholes at the end of the driveway leading to the Property sufficient to render it compliant with the repairing standard.*
- (h) *To repair the holes in the wall and floor surrounding the existing fireplace.*
- (i) *To repoint the steps at the back door of the Property to render it secure.*
- (j) *In the event of a new fire/ back boiler being installed at the Property to ensure that the cold water tank overflow pipe is not blocked.*

The RSEO specified that the works had to be carried out within a period of three months.

4.2.5 A copy of an email from Scottish Borders Council dated 23<sup>rd</sup> January 2019 which confirmed that Michael Curry took the tenancy from 1<sup>st</sup> September 2012.

## **5. Continued Hearing**

5.1. This case called for a continued hearing at 10am on 8<sup>th</sup> March 2019 at George House, George Street, Edinburgh.

The Applicant was present and was accompanied by his wife Karen Steel.

The Respondent was present and was accompanied by his neighbour Garry Cron.

The Tribunal reconsidered the outstanding requirements of section 65 of the Procedure rules and Section 18(1) of the Housing (Scotland) Act 1988.

### **5.2. Requirements of Section 65 of the Procedure Rules.**

Section 65 (a) states that the application under section 18(1) of the 1988 Act must state:

(b) (i) **the name, address and registration number of the Landlords.**

As already stated it has been evidenced that Mr Steel and his wife are joint proprietors of the Property. Consequently, in terms of Tribunal Rule 32 Mrs Taylor confirmed that the application was amended to add Mrs Steel as a joint Applicant.

(b) Section 65 (b) states that the application must be accompanied by the following documents:-

**(i) The Tenancy Agreement (if available).**

The parties confirmed that the lease commencement date was 1<sup>st</sup> September 2012, as detailed in the email from Scottish Borders Council, produced.

**(iii) A copy of the Notice to Quit served by the Landlord on the Tenant (if applicable).**

A copy of the Notice to Quit dated 18<sup>th</sup> July 2018 was provided. The Notice stated that the Landlords gave notice that the Tenants had to vacate the Property by 31<sup>st</sup> August 2018. Mrs Taylor confirmed that the Notice to Quit had been validly served at the ish (termination) date of the tenancy and consequently the tenancy was now a statutory assured tenancy.

**(iv) Evidence as the applicant has that the possession ground or grounds have been met.**

### **5.3 Requirements of Section 18(1) of the Housing (Scotland) Act 1988**

The application stated that the application for the eviction/ order for possession was based on the following grounds of Schedule 5 of the 1988 Act:-

Ground 8: At the date of service of the AT6 and at the date of the hearing at least three months rent lawfully due from the Tenant is in arrears.

Ground 11: Whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due.

Ground 12: Some rent lawfully due from the Tenant:-

- (a) Is unpaid on the date on which proceedings for possession are begun and
- (b) Except where subsection (1)(b) of section 19 of this Act applies, was in arrears at the date of service of the notice under that section relating to those proceedings.

At the original hearing Mrs Taylor had advised the parties of the terms of Section 18(6) of the 1988 Act which requires the tenancy agreement to make provision for the tenancy to be ended on this ground. Mrs Taylor advised the parties that as the lease is now a statutory assured tenancy this requirement no longer applies. The parties confirmed that the Tenant has only paid rent of £50 per month since 28<sup>th</sup> February 2018 and the current arrears are in excess of £1800. The monthly rent due is £200.

Miss Swanson advised the Tribunal that the current rent arrears amount to more than three months rent. She acknowledged that the Tenant was withholding the rent due to the condition of the Property and that a Repairing Standard Enforcement Order had been as the Property does not comply with the Repairing Standard.

She explained that the amount of rent being withheld was excessive especially as the Tenant had not provided any vouching, as required by the Direction that had been issued by the Tribunal.

She also advised that the external works required in terms of the RSEO had been completed by Mr Steel but the internal works had not been completed as the Tenant

was not allowing Mr Steel access to the Property. She advised that the Tribunal that made the RSEO have not yet confirmed that the external works have been satisfactorily completed as they would only do this when all of the works have been carried out.

She explained that Mr Steel has made a separate application to the Tribunal for assistance in gaining access to the Property. The reference number of that application is 19/0264. The Tribunal have still to respond to that application. She advised that Mr Steel had not applied to the Tribunal for assistance in gaining access to the Property earlier as he had been unaware that he could make such an application.

She explained that the Tenant had sent Mr Steel emails dated 5<sup>th</sup> February 2018, 26<sup>th</sup> May 2018 and 25<sup>th</sup> December 2018 saying that access would only be provided to tradesmen and not Mr Steele himself. She referred the Tribunal to the terms of section 26 of the Housing (Scotland) Act 1988 which states that it is an implied terms of every tenancy that the tenant shall afford to the landlord reasonable access to the Property and all reasonable facilities for executing required repairs. Mr Steel explained that he did not want to instruct works until he had seen the Property himself so that he could personally evaluate the works that would be required.

Miss Swanson advised that it was unreasonable for the Tenant to both withhold rent and refuse to allow Mr Steel access to the Property.

Mr Curry advised the Tribunal that he sent the Landlord an email dated 1<sup>st</sup> March 2018 which advised that it had been over five weeks since the fireplace in the Property had been removed and he was incurring extra costs in heating the Property and in purchasing electric heaters. He gave Mr Steel notice that he was reducing the rent. Mr Steel confirmed that he had received this email.

Mr Curry confirmed that he had also sent Mr Steel the emails referred to by Miss Swanson which stated that he would only allow access to tradesmen. He explained that he did not want to provide Mr Steel access as he did not feel safe with him in the Property. When asked by the Tribunal for details of events that result in him not feeling safe he was not able to give any specific examples of incidents that had taken place. He explained that he had received a letter from Mr Steel requesting a 150% rent increase last summer and also a Notice to Quit. Since that time relations between him and Mr Steel had become rather fraught. Mr Curry confirmed to the Tribunal that the rent he has retained is presently in his bank account. He showed the Tribunal his online bank statement on his mobile phone which confirmed this. He said that the arrears of rent would be paid to the Landlords once the works were completed.

## **6. Decision**

6.1 The Tribunal make the following finding in fact:

6.1.1 The Tenant has rent arrears of more than three months rent.

6.1.2 The Tenant gave the Landlord prior notice that he would retain rent until the repairs had been carried out.

6.1.3 The tenant has the retained rent deposited in his bank account.



6.2 The Tribunal acknowledge that:-

6.2.1 Ground 8 is a mandatory ground which means that if the requirements of Ground 8 have been met the Tribunal must grant the Order for Possession.

6.2.2 Grounds 11 and 12 are discretionary grounds which means that if the requirements of Grounds 11 and 12 have been met the Tribunal will not make the Order for Possession unless they consider it reasonable to do so.

6.2.3 The Decision turns on whether or not the Tenant is entitled to retain the rent that he has retained.

If the Tenant is entitled to retain the rent that he has retained then he is not in arrears of rent that is lawfully due.

If the Tenant is not entitled to retain the rent that he has retained he is in arrears of rent of a sum that is in excess of three months rent, he has persistently delayed paying rent which is lawfully due and some rent lawfully due is unpaid on the date on which proceedings for possession are begun and at the date of service of the AT6 notice.

Adrian Stalker: Evictions in Scotland states: 'Withholding rent is a remedy open to a defender if a landlord is in breach of its repairing obligations. However there are two important prerequisites to the exercise of this right. First, as the purpose of exercising this remedy is to prompt the landlord to carry out the repairs, the tenant must warn the landlord that he is about to cease paying rent, unless the necessary repairs are effected. Secondly, withholding the rent entails that the Tenant puts it to one side. Once the repairs have been effected, his obligation to pay the rent, including the withheld rent revives subject to any claim he may have for an abatement over the period during which the repairs were delayed.'

The Tribunal determine that both of these preconditions have been met by the Tenant.

Robson: Residential Tenancies page 80 states: 'The right to retain rent is an equitable remedy available in respect of mutual contracts (Stobbs & Sons v Hislop 1948 SC 216).'

Section 14(1) of the Housing (Scotland) Act 2006 provides that the Landlord must ensure that the Property meets the Repairing Standard at the start of the tenancy and at all times during the tenancy.

The RSEO is clear evidence that the Property did not meet the Repairing Standard at the date of the inspection by the Tribunal on 27<sup>th</sup> November 2018. The RSEO is still in place. The Tenant has had no heating in the Property since 24<sup>th</sup> January 2018 due to the problem with the open fire that both parties were aware of.

The parties have both acknowledged that the Tenant will give access to the Landlord's tradesmen. The Landlord has not arranged for tradesmen to gain access to the property to obtain estimates for the internal work required by the RSEO. The Private Rented Housing (Scotland) Act 2011 amended the 2006 Act to give the landlord an avenue to apply to the Housing and Property Chamber for assistance in exercising his right of entry if he is unable to gain access to the property. The Housing and Property Chamber were able to accept such applications from 1<sup>st</sup>

December 2015. Notwithstanding this fact the Landlord has only recently made an application to the Tribunal for assistance in gaining entry to the Property.

Both parties have contributed to the present situation. The Tenant has not provided any evidence to justify him refusing to allow the Landlord access to the Property and the Landlord has delayed in obtaining assistance in gaining access to the Property. However this does not affect the fact that the Landlord is under an obligation to ensure that the Property complies with the Repairing Standard throughout the tenancy. The Landlord has failed to do. The Landlord has been aware that the Tenant has been without proper heating in the Property since January 2018. He has not provided evidence that he has asked for access for his tradesmen to reinstate the fire/ back boiler and to carry out the repairs required by the RSEO. The Tenant is entitled to retain rent in these circumstances.

In relation to the question of how much rent is it reasonable for the Tenant to retain the Tribunal noted that the Decision by the previous Tribunal in relation to the Repairing Standard Application states:

'The fireplace had been damaged and the back boiler removed. It was apparent that there were holes around the wall and floor of the fireplace. The Landlord indicated that he wished to install a new oil fired central heating system as he had in the neighbouring cottages that he owned. The Tribunal were satisfied that it was appropriate for the Landlord either to install a new oil fired central heating, which would render the need for the fireplace and back boiler redundant. The Tenant indicated he would be happy with this being done. Alternatively the Landlord could repair/ replace the fireplace and back boiler, which option was a matter for the Landlord.'

The Tribunal reflected that if they had to consider an application for a rent relief order in terms of section 27 of the Housing (Scotland) Act 2006 it is likely that they would make an order reducing the rent by over 75% due primarily to the fact that the fireplace and back boiler in the Property have been out of use since January 2018. The Tribunal acknowledges that the Tenant purchased temporary electric heaters and the Tenant has not provided vouching for the additional heating costs he has incurred but these facts do not relieve the Landlord of the obligation on him to ensure that the Property complies with the Repairing Standard. Due to this fact the Tribunal determine that the 75% rent retention made by the Tenant, pending the required repairs, is reasonable. Consequently the Tribunal determine that the Tenant is not in arrears of rent of a sum that is in excess of three months rent lawfully due, the Tenant has not persistently delayed paying rent which is lawfully due and the Tenant has not failed to pay some rent lawfully due on the date on which proceedings for possession are begun and at the date of service of the AT6 notice.

**Accordingly the Tribunal dismissed 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.



Legal Member

8<sup>th</sup> March 2019