



**Decision with Statement of Reasons of H Forbes, 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/22/2202**

**Re: 81 Maybury Avenue, Loanhead, EH20 9EP ("the Property")**

**Parties:**

**Melanie DePlacido ("the Applicant")**

**Jennifer Hamilton ("the Respondent")**

**Tribunal Member:**

**Ms H Forbes (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be dismissed on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules and that it would not be appropriate to accept the application in terms of Rule 8(1)(c).**

**Background**

1. An application was received by the Tribunal under Rule 65 on 6<sup>th</sup> July 2022. The Applicant was seeking an order for possession under Ground 1 of schedule 5 of the Housing (Scotland) Act 1988.
2. The application was considered by the Tribunal and further information was requested by letter dated 2<sup>nd</sup> August 2022, as follows:

Your application is made under rule 65 of the tribunal rules - which applies where the tenancy was granted before December 2016. In such cases the Housing (Scotland) Act 1988 regulates what you need to do to bring an action for recovery. It appears from the tenancy agreement you have submitted, that the Housing (Scotland) Act 1988 does apply, therefore please provide the following documents in support of your case:-

1. Please provide a copy of a valid notice to quit together with evidence of service (the notice to quit provided is not in the correct form and does not terminate the lease on the ish date). It does not appear to be a valid notice to quit).
2. Please provide a copy of a valid AT6 notice together with evidence of service - referring to the ground of recovery under the 1988 Act that you are relying on. (You have supplied a Notice to leave, this type of notice is used where the tenancy was granted after December 2016 and is regulated by the Private Housing (Tenancies) (Scotland) Act 2016). Further, the 1988 Act does not have a ground for recovery that the property is needed for the use of your family members. You must consider which if any ground applies in the 1988 Act.
3. Please provide a copy of the evidence of service for the section 11 notice.
4. The title deeds show that the owner is Melanie Deplacido, please therefore the applicant's title and interest to bring these proceedings. You may wish to amend the application to bring it into the name of the owner and produce her written authorisation from her allowing you to act as her representative in this matter.

Finally, it appears that there may be material errors in the current application, and you may wish to withdraw the application and re-submit it once new notices have been served. In addition you may also wish to consider seeking legal advice on bringing proceedings to the First Tier Tribunal if you are unclear of the requirements to make a valid application for recovery of possession under the Housing (Scotland) Act 1988

3. By a letter dated 6<sup>th</sup> August 2022, the Applicant responded enclosing copy email to the local authority, amended application form, copy Form AT6 and Notice to Quit together with a letter from the tenant confirming receipt by hand delivery of the documents, and explaining that the family referred to was herself and her children. Furthermore, the Applicant stated that, in respect of the the further Notice to Quit, she had provided a further period of notice beyond the ish date of the tenancy, explaining that this was more helpful for the tenant and, although a new tenancy had been put in place dated 15<sup>th</sup> June 2016, payment arrangements continued as set out in a previous tenancy agreement. The Applicant stated that she did not wish to withdraw the application.
4. The application was considered by the Tribunal and further information was requested by letter dated 13<sup>th</sup> September 2022, as follows:

The terms of your letter of 6<sup>th</sup> August 2022 have been noted by the Legal Member. However, as previously confirmed, as the tenancy began on 15<sup>th</sup> June 2016 it is subject to the Housing (Scotland) Act 1988, not the Private Housing (Tenancies) (Scotland) 2016. Grounds of eviction under

the 2016 Act (Ground 1 as referred to by you) are not available for use in relation to tenancies governed by the 1988 Act. Please confirm if you wish to withdraw the application to allow you to serve the correct notices, or provide the correct notices and an amended application form within 14 days,

5. By letter dated 6<sup>th</sup> August 2022, received on or around 20<sup>th</sup> September 2022, the Applicant stated:

I can confirm that I am applying under section 65 housing act 1988 grounds 1 and not the Scotland Housing Act 2016. (RULE 65: Housing (Scotland) Act 1988 (“the 1988 Act”))

The grounds for possession under the 1988 Act are grouped as mandatory and discretionary and are listed below. Mandatory Grounds

Ground 1: either the house was the landlord's only or principal home at any time before the tenancy was granted; or the landlord needs the property for them or their spouse for use as the principal home of one or both of them and did not become the landlord through buying the house or otherwise acquiring it for value (Copied from housing scotland act 1988 ).

It was also mentioned over the phone that I had sent a “Notice to Leave Form” (Scotland housing act 2016) in the original application, and it stated that the grounds were for a landlords family intends to live in the property, (my mother is the landlord and put this down as I, her daughter and owner of the property was indeed the family member that need the property to live in). But this was amended in the subsequent application sent on the 6th of August 2022, as an amended application, stating on grounds 1 of the 1988 act as stated above. So I don't fully understand what you mean when stating “Grounds of eviction under the 2016 Act (grounds 1 as referred to by you) are not available for use in relation to tenancies governed by the 1988 Act?” This property was my only home for many years prior to renting it out and will again be my only home for myself and my children to live in, this is covered in grounds 1 of the 1988 Act.

As explained, the tenant was sent a notice to leave form as well as an AT6/ a notice to quit and a section 33 letter as we were unsure which ones were relevant so we did them all. If the “notice to leave form” is causing the confusion, then it can be disregarded as the other 3 forms/letters that I have sent you, should be sufficient for the purposes of the section 65 Housing Scotland act 1988.

(A tenancy which began on or after 2 January 1989, and prior to 1 December 2017, is likely to be an Assured Tenancy or a Short Assured Tenancy. This type of tenancy is subject to Rule 65 or Rule 66. For cases under Rule 65 and 66, this requires a Notice to Quit to be sent to the

tenant, along with a Notice AT6 or a Section 33 Notice. The Notice to Quit must contain certain information to be valid (copied from the housing Scotland act 1988).

As you can appreciate both myself and my tenant are eager for this application to go through as quickly as possible as we are both eager to get moving before the dead of winter sets in. But, unfortunately I can't return home to Scotland until I have my home back and my tenant can not get any help until she has a First Tier Tribunal date. My tenant has spoken to the citizens' advice and sheltered housing Scotland and they have advised her that they can see no reason why this application should be rejected, as I keep her up to date with correspondence that I receive from you.

6. The application was considered further on 17<sup>th</sup> October 2022.

### **Reasons for Decision**

7. 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.*

8. '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. The Notice to Quit dated 31<sup>st</sup> March 2022 is invalid in respect that it specifies a date to leave the premises of 1<sup>st</sup> July 2022. That termination date is not an ish of the tenancy agreement, as required in order to constitute an effective notice. The Short Assured Tenancy Agreement provides at Clause 3 that the tenancy started on 15<sup>th</sup> June 2016 and that the initial period of the tenancy is until 15<sup>th</sup>

December 2016. That clause goes on to state that 'If the agreement is not brought to an end by either party on the end date, it will continue thereafter on a monthly basis until ended by either party.' Accordingly, as the agreement was not brought to an end on 15<sup>th</sup> December 2016, the agreement continued on a monthly basis. That being so, the term of the lease falls on the 15<sup>th</sup> day of each month, and the notice to quit and vacate the premises by 1<sup>st</sup> July 2022 (which is not an exact date) is ineffectual. See *Stalker – Evictions in Scotland* (2nd Ed.) pages 58-60, and section 38 of the Sheriff Courts (Scotland) Act 1907). Upon that basis, the notice to quit is invalid.

10. Section 18(6) of the Housing (Scotland) Act 1988 provides 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 I of Schedule 5 to this 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 this case, the ground is Ground 1, and the Tribunal cannot make an order for possession as the property continues to be let on an assured tenancy, given that the invalid Notice to Quit has not terminated the contractual tenancy.

11. 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. It would not be appropriate to accept the application. The application is accordingly rejected.

## 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.

# H Forbes

Legal Member/Chair

17<sup>th</sup> October 2022  
Date