



Decision and Statement of reasons of Mrs Jan Todd, Legal Member of the First-tier Tribunal for Scotland (Housing and Property Chamber) with delegated powers of the Chamber President.

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

Case Ref: FTS/HPC/20/PR/2529

Re: Property at Cherrytree Cottage, Dundas Estate, South Queensferry, EH30 9SP

Parties: Mr Dominic Bargeton, Mrs Bryony Bargeton, Woodend House, 10 Winchburgh Road, Newton (“the Applicant”)

DANZAN PROPERTIES LIMITED 44 Esplanade St Helier Jersey JE4 9WG (“The Respondent”)

FBR Seed Limited (Respondent’s Representative)

1. On 4th December 2020 an application was received from the First Applicant. The application was made under Rule 69 of the Rules being an application by a private tenant for damages for an unlawful eviction in terms of a tenancy under s36(3) of the Housing (Scotland) Act 1988.

The following documents were received:-

1. Copy of a private residential tenancy agreement with an entry date of 21st June 2018

The applicant is seeking compensation for being misled into leaving the Property.
The applicant

2. The Applicant was requested by letter from the Tribunal dated 23rd December 2020 to :-
 - *“Please provide the address for the landlords. If the address is unknown a request for Service by Advertisement should be made, see our website for guidance.*

- *We note that there were two tenants, does the second tenant Bryony Bargeton wish to be a joint applicant, if so please amend the applications to include her name and address.*
 - *Rule 69 of the tribunal rules provide that you must provide details of the amount of damages sought based on section 37 of the 1988 Act in respect of the loss of the right to occupy the premises. Please submit this information. (You should consider the terms of section 36 and 37 in progressing with this application under this rule.)*
 - *The legal member would also draw to your attention that if your tenancy is in fact a private residential tenancy then you may consider an application under rule 110 application for a wrongful termination order of a private residential tenancy may be appropriate.*
 - *Please reply to this office with the necessary information by 6 January 2021. If we do not hear from you within this time, the President may decide to reject the application.”*
3. The First Applicant then asked on 23rd December to change their application to one under Rule 110 an application for a wrongful termination order under S57(2) or S58(2) of the Private Housing (Tenancies) (Scotland) Act 2016 and asked for the second Applicant to be added.
4. The Tribunal sent a reminder asking for the Respondent’s address and the Applicant then provided an address for the Respondent on 14th January 2021. The application was further considered by a legal member and the following request for further information was sent to the Applicant:-
- *An application under Rule 110 is for a “wrongful termination order” under Section 57(2) or 58(2) of the Private Housing Tenancies (Scotland) Act 2016. Section 57(2) is for cases where the landlord has obtained an eviction order. Section 58(2) is for cases where no eviction order has been obtained but that the tenancy ended after a notice to leave was served on the tenants. It does not appear that your application relates to an eviction order. If the application is for wrongful termination without an eviction order, please provide a copy of the notice to leave which was issued to you together with evidence that the tenancy was wrongfully terminated. This should be evidence which tends to show that you were misled into ceasing to occupy the property by the landlord.*
 - *Please reply to this office with the necessary information by 9 February 2021. If we do not hear from you within this time, the President may decide to reject the application.”*
5. The Applicants responded on 26th January by email and confirmed that :-
- “As per the supporting evidence we submitted with our application: In February 2020 we were contacted by email and told we would not be able to continue living in the property. We were told there would be a visit from the managing agent to explain more. At this meeting a few days later we were told by the managing*

agent (David Seed of Seed & Co now FBR Seed) that the landlord would be taking the property back for family use.

Mr Seed explained at the meeting that the family do not have enough space to accommodate their family at their primary residence (Dundas Castle) at times like Christmas. They had carried out an assessment of all properties under management and selected ours as the most suitable for their family to use when visiting the family estate. It was explained that the family, who live in London, need a property they can use on occasions when they visit the estate.

We were told that they wouldn't be serving us with a formal notice and instead that we could take up to 6 months to find somewhere else to live.

Around August 2020 we were contacted by the landlord and asked if they could access the property that day as they planned to make purchases at an auction for furniture for the property once we had vacated.

The guidance for a PRT lease in Scotland states:

Your notice has to be given 'freely and without coercion'. This means your landlord must not have pressured you into leaving. If your landlord tries to persuade or force you to leave without following the correct legal process then they could be carrying out an illegal eviction.

To summarise we were never formally given notice to leave the property. The only formal communication is an email (attached) where they first told us the property was to be taken back for family use. We were told they wouldn't issue a termination and instead we could take six months to find somewhere else to live. I believe this is because they knew they did not have the grounds to end the tenancy. The meeting at the property and subsequent phone call were never followed up with anything formally in writing. Because I suspected we were being coerced into leaving I recorded the conversation that took place in our home. This audio confirms that we were told the property was to be used for occasional family use and not a permanent residence. However I would need to speak with a solicitor if that was required to be submitted. I would hope that the email attached, details of the meeting that took place and lack of any formal notice given should be enough evidence."

6. On 4th February 2021 the Tribunal wrote again to the Applicants requesting further clarification stating:-

- *Before a decision can be made, we need you to provide us with the following:*
- *We refer to our letter of 26 January 2021 and your recent reply. As stated in our previous letter, Rule 110 only applies in cases of applications under either S 57 (2) or S 58(2) of the Private Housing (Tenancies) (Scotland) Act 2016.*

- *An application in terms of S 57 (2) of the 2016 Act can only be made where an eviction order was issued. This seems to not be the case here.*
 - *An application in terms of S 58 (2) of the 2016 Act can only be made (S 58 (1) of the 2016 Act) if the tenancy has been brought to an end in accordance with section 50 of said Act and that, in turn, requires (S 50 (1) (a) and (b) of the 2016 Act) “that the tenant received a notice to leave from the landlord and the tenant has ceased to occupy the let property”.*
 - *If no notice to leave has been issued to you, you cannot make an application under S 58 (2) of the 2016 Act because it has not been brought to an end in accordance with section 50 of the 2016 Act. • If the application is maintained as an application under Rule 110 it will have to be rejected as you have not provided the necessary evidence for an application under Rule 110 to date.*
 - *The Tribunal cannot give you legal advice. You may wish to seek legal advice if you wish to proceed further with an application and if necessary make amendments to the application or provide further documents so that the application fulfils the relevant lodging requirements under the Rule you wish to use.*
 - *Please reply to this office with the necessary information by 18 February 2021. If we do not hear from you within this time, the President may decide to reject the application.*
7. The Applicant responded once more on 5th February repeating their claim that they feel they were misled into leaving the Property that the guidance notes accompanying the PRT state that they should be able to make a claim for wrongful eviction and that they feel they were coerced into leaving the tenancy, that they were not seeking legal advice but that they are seeking guidance as to what rule is most applicable.

6. DECISION

I considered the application in terms of Rule 8 of the Rules and that Rule provides:-

“Rejection of the Application

8. (1) *The Chamber President or another member of the First Tier Tribunal under delegated powers of the Chamber President must reject an application if:-*
- a) they consider that the application is frivolous or vexatious*
 - b) the dispute to which the application relates is resolved*
 - c) they have good reason to believe that it would not be appropriate to accept the application*
 - d) they consider the application is being made for a purpose other than a purpose specified in the application or*

e) the applicant has made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First Tier Tribunal under delegated powers of the Chamber President there has been no significant change in any material considerations since the identical or substantially similar application was determined.

(2) Where the Chamber President or another member of the First Tier Tribunal under 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 reasons for the decision.

6.. After consideration of the application, the attachments and the correspondence from the Applicant I consider that the Application should be rejected on the basis that it is frivolous in terms of Rule 8(1) (a) of the Rules.

7. Reasons for the Decision

“Frivolous” in the context of legal proceedings is defined by Lord Justice Binham 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” it is that definition which I have applied as the test in this application and, on consideration of this test I have determined that this application is frivolous, misconceived and has no prospect of success.

8. The applicant raised this action originally under Rule 69 and then changed it to rule 110 as they had a private residential tenancy and wished to bring an action for wrongful termination. However an application for wrongful termination under S57 of the 2016 requires there to have been an eviction order as a pre- requisite of making an application and that did not occur in this case. An application for a wrongful termination order under S58 of the 2016 Act is applicable only if the private residential tenancy has been brought to an end in accordance with section 50. Section 50 applies where “a tenancy which is a private rented tenancy comes to an end if the tenant has received notice to leave from the landlord and the tenant has ceased to occupy the let property. The Applicant has openly acknowledged that they did not receive any notice nor have they received an eviction order so any application under S57 or S58 of the 2016 Act is incompetent and therefore frivolous and falls to be rejected.
9. The Applicant feels they have been misled into leaving and is relying on the wording of the guidance notes to a Private Residential Tenancy. The requirements of the 2016 Act and in particular S 57 and 58 are very particular and to make a competent application under those sections requires the tenant to have left after receiving a notice to leave or an eviction order and the Applicant acknowledges this has not happened here. This Application cannot therefore be accepted.

What you should do now:-

If you accept the decision there is no need to reply.

If you disagree with the decision then an applicant aggrieved by the decision of the Chamber President, or another member of the First Tier Tribunal acting under delegated powers of the Chamber President, 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 from the First – Tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Information about the appeal procedure can be forwarded to you on request.



____Jan Todd_____

Legal Member

____18th

Date

February

2021