

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



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988.**

**Chamber Ref: FTS/HPC/EV/18/1749**

**Re: Property at 36 Rigghead, Stewarton, KA3 3DH (“the Property”)**

**Parties:**

**Dr Lachlan McMillan, 95 High Street, Stewarton, Kilmarnock, KA3 5DX (“the Applicant”)**

**Mr Stephen Murphy, 36 Rigghead, Stewarton, KA3 3DH (“the Respondent”)**

**Tribunal Members:**

**Lesley Ward (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) dismissed the application in terms of s18 of the Housing (Scotland) Act 1988 and rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Rules 2017 on the basis that the tribunal does not have jurisdiction in relation to the proceedings in terms of rule 27.**

This is case management discussion regarding an application for an order for possession of the property at 36 Rigghead Stewarton KA2 3DH in terms of rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Rules 2017. ‘the rules’. The application was made by Dr Lachlan McMillan on 11 July 2018.

The tribunal had before it the following copy documents:-

1. Application dated 5 July 2018 and received by the Tribunal on 11 July 2018.
2. Tenancy agreement dated 7 November 2016.
3. AT5 dated 7 November 2016.
4. AT6 dated 12 June 2018.
5. Notice to quit  
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6. Execution of service of notice to quit and s33 notice by sheriff officer on 5 February 2018.
7. S33 notice dated 29 January 2018.
8. S11 notice to local authority.
9. Bank statements from 18 December 2017 to 9 July 2018.
10. Receipts numbered 27 to 43 (not inclusive).

The Applicant attended today's hearing. The Respondent did not attend and was not represented. The tribunal administration received a telephone call from the Respondent to advise that he would not be attending and he was told he would be notified of the decision in due course.

The parties entered into a tenancy agreement for the property at 36 Rigghead Stewarton Kilmarnock KA3 3DH. The copy lease is undated. The testing clause at the end states that it is signed "on the said month and year". The lease refers to the start date as 7 November 2016 and terminating on 6 May 2017. Given that the AT5 is dated 7 November 2016 it is reasonable to conclude that the lease was signed on 7 November 2016. The lease states

*If this agreement is not brought to an end by either party on the end date it will continue thereafter on a monthly basis until terminated by either party giving no less than two months' notice in writing to the other party.*

The applicant is seeking possession of the property on the basis of ground 8 of the schedule 5 of the Housing (Scotland) Act 1988, 'the Act' as he contends that the respondent is in more than three months' rent arrears both at the date of service of the AT6 and at a today's date.

The applicant has sought to terminate the agreement by serving a notice to quit. The tribunal considered the notice to quit carefully. The original term of the tenancy was 7 November 2016 until 6 May 2017. The ish date is therefore 6 May 2017. The tenancy continues after that date and any future ish date would therefore be on or around the 6<sup>th</sup> of the month. The notice to quit should be for a minimum of 4 weeks but in terms of the tenancy agreement between these parties the notice required is 2 months. The notice to quit was served by sheriff officers on 5 February 2018. The 2 months notice had been given however the date referred to in the notice to quit is 11 April 2018. This date does not tie in with the ish date. The ish date should be on or around 6 April 2018. The purpose of the notice to quit is to terminate the tenancy agreement. It must therefore give the respondent clear and unambiguous notice of the date at which he is required to leave the property. It also has the purpose of preventing tacit relocation of the tenancy. The tribunal considered the requirements of a notice to quit and had regard to "Evictions in Scotland" by Stalker at page 34 to 37. At page 35 he states:

*The notice must state the term and date at which the tenant is required to remove. If the date stated on the notice to quit is earlier than the ish, the notice is ineffective; the landlord cannot call on the tenant to leave before the tenant is contractually*

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*obliged to do so. If the date stated on the notice is later than the ish date, the notice is similarly ineffective to prevent tacit relocation occurring at the ish.*

It is the tribunal's view today that for the foregoing reason the applicant cannot rely on the terms of the notice to quit as it is invalid.

The applicant can however still have a remedy and proceed in terms of s18(6) of the Act. The tribunal can order possession where the tenancy agreement is still in force ie a contractual tenancy is still in force. To do so the terms of the tenancy agreement and the AT6 form have to be looked at closely.

In terms of s18(6) of the Act

*The sheriff 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.*

The tenancy agreement between these parties makes no reference to schedule 5 of the Act or any of the grounds contained therein. The tenancy agreement makes no reference to ground 8 which is the ground that the Applicant is relying on in this application. It states at clause 4:-

*If the tenant is late in making any payments of rent, then interest will be at 5% per annum above the base lending rate from time to time of the Bank of Scotland from the date of payment until paid and a Certificate granted by the authorised Official of the said Bank shall be sufficient to determine the rate or rates applicable hereunder.*

## **Discussion**

The tribunal explained both these matters to the Applicant. The Applicant wishes to proceed with his application and he stated that he sought legal advice at an earlier stage although he is not legally represented today. The Applicant had no submissions to make and he did not lodge any other documents.

## **Reasons**

The tribunal is not satisfied that the notice to quit is valid as the date given does not tie in with the ish date. This being the case, the tenancy has not been terminated and a contractual tenancy is in existence.

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Further, s18(6) of the Act has not been complied with. The tenancy agreement does not provide for the agreement to be brought to an end on ground 8. The tribunal considered the judgment of Sheriff Principal Wheatly in Royal Bank of Scotland-v-Boyle 1999 HousLR 43. The clause in the agreement in that case was similar to the clause noted above. The Sheriff held that

*“the essential ingredients of the grounds for recovery of possession in schedule 5 of the Act must be referred to in the tenancy agreement and while this could be done by an exact citation of the grounds and maybe also by providing a summary containing the essential ingredients of the grounds incorporation by reference would not necessarily be appropriate..”.*

As was the case in Boyle, this tenancy agreement does not have the “essential ingredients” of the grounds for possession and s18(6) has not been complied with. That avenue is therefore not open to the applicant.

This application is undefended however the tribunal decided that it did not have jurisdiction to grant the order sought given these two serious legal defects and accordingly the tribunal dismissed the application in terms of rule 27.

## **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.**

Lesley Ward

**Lesley A Ward Legal Member**

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**17 September 2018.**