



**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/EV/18/0975

**Re: Property at 2/11 Hawkhill Close, Edinburgh EH7 6AL**

**Parties: Par Investments Ltd (Edinburgh)**

**(“the Applicant”)**

**Miss Lisa Montgomery**

**(“the Respondent”)**

1. On 19<sup>th</sup> April 2018 an application was received from the Applicant via his solicitor. The application was made under Rule 66 of the Rules being an application by a private landlord for possession of a rented property let under a Short Assured Tenancy in terms of S33 of the Housing (Scotland) Act 1988.
2. The Applicant stated that it wished to recover possession of the Property on the grounds of the termination of the Short Assured Tenancy under Section 33 of the Housing Scotland Act 1988. The Applicant referred to a Notice to Quit by the tenant dated 15<sup>th</sup> February 2018 and advised the tenant has now quit the Property but the tenant’s wife has refused or delayed to remove from the Property and resides there with no right or title.

The following documents were received:-

1. Copy tenancy agreement dated 10<sup>th</sup> October 2016
2. Copy notice to quit by the tenant dated 15<sup>th</sup> February 2018
3. Copy Form AT5 dated 10<sup>th</sup> October 2016
4. Copy S11 notice to Edinburgh City Council

2. In terms of the tenancy agreement the Applicant entered into a lease of the Property with the tenant Mr Alexander Ivan Montgomery (the Tenant). The Respondent is the wife of the Tenant. The tenancy agreement commenced on 10<sup>th</sup>

October 2016 and was for an initial period of 6 months to 10<sup>th</sup> April 2016. In terms of clause 20 of the lease the Tenant can bring the lease to an end by serving 2 months notice of intention to end at the End Date, which is 10<sup>th</sup> April. The Landlord advises that the tenant has left the Property and gave 2 months notice but the Respondent the Tenant's wife refuses or delays in moving. The Applicant is relying on S33 of the Housing (Scotland) Act 1988 to recover possession of the Tenancy but has not served a S33 Notice. This is a mandatory requirement under S33 (d) without which there can be no right of recovery under this section.

### 3. 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.*

5. 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.

#### 6. 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.*

7. S33 (1) of the Act provides:-

Without prejudice to any right of the landlord under a short assured tenancy to recover possession of the house let on the tenancy in accordance with Sections 12 to 31 of this Act the Tribunal shall make an order for possession of the house if he is satisfied\_

- a) That the short assured tenancy has reached it's ish
- b) That tacit relocation is not operating
- c) That no further contractual tenancy is for the time being in existence and
- d) That the landlord has given the tenant notice stating that he requires possession of the house.

S33 (2) the period of notice to be given under subsection (1) (d) above shall be

- i) If the terms of the tenancy provide in relation to such notice for a period of more than 2 months that period
- ii) In any other case 2 months

S33 (3) A notice under paragraph (d) of subsection (1) above may be served before at or after the termination of the tenancy to which it relates.

8. A notice to quit has been served by the Tenant but is dated 15<sup>th</sup> February and does not bring the tenancy to a termination at it's ish.

9. The Applicant has not served a notice as required in terms of S33 and so this application cannot proceed under Rule 66 as it is misconceived.

10. While the application purports to proceed under Rule 66 of the 2017 Regulations the documentation submitted appears to be more relevant to an application under Rule 65, being an application for possession of the Property in terms of S18 of the 1988 Act. Such an application requires a notice in terms of S19 of the 1988 Act to be served by the Landlord. It is noted that the Respondent may have rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and has the right not to be evicted without lawful process.

#### **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.

S A Todd

Legal Member

Date

4<sup>th</sup> May 2018