Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF ANDREW UPTON, LEGAL MEMBER OF THE FIRST-TIER TRIBUNAL 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 Procedural Rules")

in connection with

25 Larch Place, East Kilbride, G75 9HQ ("the Property")

Case Reference: FTS/HPC/EV/19/2302

Mr John Douglas Lamont, Mr Graham Smart ("the applicant")
Dallas McMillan, Solicitors ("the applicant's representative")
Ms Kirsty Macdonald ("the respondent")

1. On 22 July 2019, an application was received from the applicant. The application was made under Rule 66 of the Procedural Rules being an application for recovery of possession under section 33 of the Housing (Scotland) Act 1988 ("the 1988 Act") of a property let on a Short Assured Tenancy, although the terms of the application tend to suggest that the application also sought, in the alternative, recovery of possession under sections 18 and 19 of the 1988 Act. The following documents were enclosed with the application:-
    - Partial copy Short Assured Tenancy Agreement dated 3 July 2014;
    - Copy Form AT5 dated 3 July 2014;
    - Copy Notice to Quit dated 5 June 2019;

- Copy Form AT6 dated 5 June 2019; and
- Copy s.11 Notice to Local Authority dated 19 July 2019.

Following requests for information from the Tribunal, the applicant's representative provided the following additional documents:-

- Full copy Short Assured Tenancy Agreement dated 3 July 2014; and
- Copy Notice under s.33 of the 1988 Act.

DECISION

2. I considered the application in terms of Rule 8 of the 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;
(b) the dispute to which the application relates has been resolved;
(c) they have good reason to believe that it would not be appropriate to accept the application;
(d) they consider that the application is being made for a purpose other than a purpose specified in the application; or
(e) the applicant has previously made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First-tier Tribunal, under the 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 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."

3. After consideration of the application, the attachments and correspondence from the applicant, I consider that the application should be rejected on the basis that it appears to be frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules, and I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1)(c) of the Procedural Rules.

REASONS FOR DECISION

4. '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".* It is that definition which I have to consider in this application in order to determine whether or not this application is frivolous, misconceived, and has no prospect of success.

5. This application ostensibly proceeds under section 33 of the 1988 Act but, as I highlighted above, also appears to proceed in the alternative on the bases of sections 18 and 19. In terms of the 1988 Act:-

"18 Orders for possession.

(1) The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.

(2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

... (6) 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.

19 Notice of proceedings for possession.

(1) The First-tier Tribunal shall not entertain proceedings for possession of a house let on an assured tenancy unless—

(a) the landlord (or, where there are joint landlords, any of them) has served on the tenant a notice in accordance with this section; or

(b) the Tribunal considers it reasonable to dispense with the requirement of such a notice.

(2) The First-tier Tribunal shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the Tribunal.

(3) A notice under this section is one in the prescribed form informing the tenant that—

(a) the landlord intends to raise proceedings for possession of the house on one or more of the grounds specified in the notice; and

(b) those proceedings will not be raised earlier than the expiry of the period of two weeks or two months (whichever is appropriate under subsection (4) below) from the date of service of the notice.

(4) The minimum period to be specified in a notice as mentioned in subsection (3)(b) above is—

(a) two months if the notice specifies any of Grounds 1, 2, 5, 6, 7, 9 and 17 in Schedule 5 to this Act (whether with or without other grounds); and

(b) in any other case, two weeks.

(5) The First-tier Tribunal may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on Ground 8 in Schedule 5 to this Act.

...

33 Recovery of possession on termination of a short assured tenancy.

(1) 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 First-tier Tribunal shall make an order for possession of the house if the Tribunal is satisfied—

(a) that the short assured tenancy has reached its finish;

(b) that tacit relocation is not operating; and

(c) . . . . . .

(d) that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house.

(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 two months, that period;

(ii) in any other case, two months.

(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.

(4) Where the First-tier Tribunal makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that finish shall end (without further notice) on the day on which the order takes effect.

(5) For the avoidance of doubt, sections 18 and 19 do not apply for the purpose of a landlord seeking to recover possession of the house under this section."

6. Dealing firstly with the application insofar as it seeks recovery under section 33, I do not consider that the applicant can succeed. Section 33 of the Housing (Scotland) Act 1988 provides a basis for recovery of possession of properties let on Short Assured Tenancies. In terms of subsection (1), the Tribunal must be satisfied of four things:- (i) that the short assured tenancy has reached its ish

(that is to say, its natural expiry); (ii) that tacit relocation is not operating; and (iii) that the landlord has given notice to the tenant stating that he requires possession of the property.

7. The tenancy agreement was for an initial period of six months, from and including 3 July 2014 and expiring on 3 January 2015. The tenancy agreement provided that it would continue monthly thereafter. In terms of clause 6, the tenancy agreement provided that the contractual tenancy could be terminated by either party giving two months' written notice to the other.

8. The purpose of a notice to quit is to stop tacit relocation from operating. It cannot bring a tenancy to an end at a date arbitrarily selected. To be effective, the end date specified in a notice to quit must coincide with the ish date. In this case, the notice to quit ought to have specified that the tenancy would end on the third day of the month after the required period of notice.

9. In fact, the notice to quit specified that the tenancy would end on 20 June 2019. It is therefore defective in two respects. Firstly, 20 June 2019 was not an ish. Secondly, even if it was an ish (which it was not), the notice was dated 5 June 2019 and therefore (assuming service occurred the following day) only gave fourteen days' notice as opposed to the contractually required two months' notice. As such, the contractual tenancy is continuing by tacit relocation and the conditions in section 33(1) of the 1988 Act have not been met. Accordingly, the application cannot succeed insofar as it seeks recovery under section 33.

10. For completeness, even if the Notice to Quit had validly terminated the tenancy agreement, I would still not have been satisfied that the requirements of section 33 had been met in this case. That is because the notice required by section 33(1)(d), dated 5 June 2019, gave notice to the tenant that possession was required at 20 June 2019 (i.e. a period of notice of two weeks). In terms of section 33(2), the minimum period of notice to be given to a tenant by such a notice is two months. It can be more than two months if the

tenancy agreement specifies such, but it can never be less. Accordingly, for this separate reason, the application cannot succeed insofar as it seeks recovery under section 33.

11. Turning now to recovery under sections 18 and 19, in terms of section 18(6) of the 1988 Act, the 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 the conditions of subsection (6) are met, which they are in this case. The tenancy agreement provides, at clause 8.2, that the tenancy agreement may be brought to an end in the event of Grounds 2, 8, 11, 12, 13, 14 or 16 in Schedule 5 to the 1988 Act applying. Accordingly, notwithstanding my decision that the contractual tenancy is continuing, the Tribunal could still make an order for possession if the requirements of section 19 of the 1988 Act were met.

12. It is here that the applicant fails. In terms of section 19(1), the Tribunal cannot entertain an application for possession under section 18 unless either the landlord has served appropriate notice on the tenant in Form AT6 or the Tribunal considers it reasonable to dispense with the notice. However, the Tribunal cannot dispense with notice if the ground for recovery relied upon is Ground 8, as it is in this case.

13. The problem that the applicant has is that the Form AT6 is both incorrectly completed and incomplete. The Form AT6 is split into four sections. Part 1 instructs the landlord to complete the name of the tenant and the address of the tenanted property. Part 2 instructs the landlords to complete their own name and address, and thereafter to specify the ground for possession. Part 3 instructs the landlords to specify in detail the reasons why they consider that the relevant ground or grounds are satisfied. Part 4 instructs the landlord to specify the earliest date upon which an action to the Tribunal may be raised. In order to comply with section 19(3), the landlord must obey those instructions stated in the prescribed Form AT6.

14. In this case, the applicants have wrongly completed Part 2. Firstly, they have stated the tenancy address as their own. The requirement here is to specify an address at which they may be contacted. Separately, the requirement in Part 2, in relation to stating which ground applies, is expressed by the Scottish Ministers as follows:-

"Give the ground number(s) and ***fully state ground(s) as set out in schedule 5 of the Housing (Scotland) Act 1988****: continue on additional sheets of paper if required)"*

What the applicants have done is state an abbreviated version of the wording of Ground 8. That is not fully stating the ground as set out in schedule 5. Accordingly, Part 2 is defectively completed.

15. Separately, Part 3 is completely blank. The requirement at Part 3 is expressed by the Scottish Ministers as follows:-

"State particulars of how you believe the ground(s) have arisen: continue on additional sheets of paper if required"

What is required by Part 3 is that the landlord gives detail of why the ground applies. Thus, for Ground 8, one might expect to see specification as to the dates when rent fell due but was not paid, the total value of arrears and how many months' rent that equates to. There is no specification given by the applicants at all.

16. For those reasons, it is my view that the application cannot succeed either under section 33 or sections 18 and 19. It is frivolous within the meaning of Rule 8(a). Further, it is my view that it would be inappropriate in these circumstances to accept this application in terms of Rule 8(c). I reject the application.

What you should do now

If you accept the Legal Member's decision, there is no need to reply.
If you disagree with this decision:-

An applicant aggrieved by the decision of the Chamber President, or any Legal Member acting under delegated powers, 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. Information about the appeal procedure can be forwarded to you on request.

Andrew Upton

Andrew Upton
Legal Member
9 September 2019