

Housing and Property Chamber
First-tier Tribunal for Scotland



**DECISION AND STATEMENT OF REASONS OF JAMES BAULD, 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 Rules")

in connection with

33A High Street, New Pitsligo AB43 6ND

Case Reference: FTS/HPC/EV/19/2064

Mr Ian C MacDonald ("the applicant")

MacRae Stephen and Co ("the applicant's representative")

Mrs Jane MacDonald ("the respondent")

1. On 4 July 2019, an application was received from the applicant. The application was made under Rule 65 of the Chamber Procedural Rules being an application by a private landlord for an order for possession of an assured or a short assured tenancy. Various documents were provided with the application including a copy of the tenancy agreement which is in the form of a "Minute of Lease".

DECISION

2. I 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;

(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 is frivolous within the meaning of Rule 8(1)(a) 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 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.

5. This application seeks an order for possession of a property let under a Minute of Lease which bears to be a short assured tenancy. The methods for recovery of possession of such a tenancy are set out in the Housing (Scotland) Act 1988 ("the 1988 Act"). One method is provided by section 33 of the 1988 Act. That requires the service of a valid Notice to Quit and an additional notice in terms of section 33(1)(d) of the 1988 Act. Each of these notices requires to meet certain legal requirements. The Notice to Quit must give a minimum of twenty eight days' notice to the tenant. The Notice to Quit is dated 8 April 2019 and bears to become effective on 10 June 2019. The notice under section 33(1)(d) must give a minimum of two months' notice to the tenant of the landlord's intention to raise proceedings for possession. The section 33 notice in this case is dated 8 April 2019 and has an effective date of 30 May 2019. That does not provide two months' notice. Further the provisions of section 33 of the 1988 Act state that the procedure contained therein requires the tenancy to have reached its end. The Minute of Lease indicates that the tenancy runs from 6 June 2009 until 30 November 2019. The effective date in the Notice to Quit is not the end date of the tenancy. The tenancy has not yet reached the end date specified in the minute of lease. Accordingly any action which bears to be raised under section 33 of the 1988 Act is bound to fail as the section 33 notice does not meet the statutory requirement relative to the period of notice required and the tenancy has not reached its end. There is also no evidence provided of the method of service of these notices on the tenant. If it is argued that the end date specified in the Minute of lease is a typographical error and that it should have

read "30 November 2009" then the tenancy created at that time cannot be a short assured tenancy as the period of time between 6 June 2009 and 30 November 2009 is a period which does not meet the requirement in section 32 of the 1988 Act that short assured tenancies shall be for a term which is "not less than six months" .

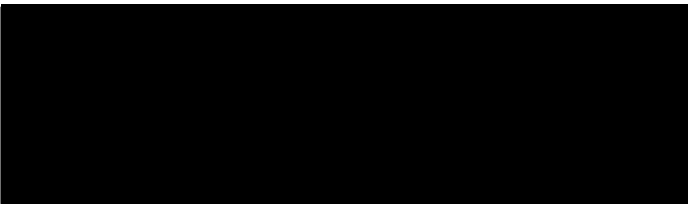
6. It is also possible to seek an order for recovery of possession of an assured tenancy using the provisions of section 18 and 19 of the 1988 Act. That procedure requires the service of a valid statutory form, the Form AT6 and the use of one of the grounds for possession set out in schedule 5 of the 1988 Act.
7. In this case a Form AT6 bears to have been served upon the tenant. A copy of the form has been provided and is dated 8 April 2019. However the form does not specify the date upon which the applicant intends to raise proceedings. Such an omission may render the Form AT6 invalid although the applicant's representative states in the letter which accompanied the application that the appropriate date is "made clear in the supporting documents". Further, this procedure can only be utilised during the currency of an assured tenancy if the applicant is seeking possession on one of a specified number of grounds for possession set out in schedule 5 of the 1988 Act and only if "the terms of the tenancy make provision for it to be brought to an end on the ground in question" (section 18(6)(b) of the 1988 Act) . The Minute of Lease contains no such provision and thus the procedure under section 18 and 19 cannot be used in this case. Indeed, in the case of *Royal Bank of Scotland v Boyle* (1999 Housing Law Reports 63) Sheriff Principal Wheatley indicated that it was not sufficient to refer to the possible grounds simply by reference to the statutory provisions and stated that "the essential ingredients of those conditions must be referred to in the tenancy agreement". The Minute of Lease in this case does not even make reference to the statutory grounds far less provides any summary of them. Even if the tribunal accepted that the omissions of the effective date in the form AT6 did not render the form itself invalid, the lack of appropriate terms in the tenancy agreement make it impossible for the procedure under sections 18 and 19 to be used .

8. Accordingly, it follows that this application is premature if it is claimed the tenancy is a short assured tenancy and the application for possession is based on the procedure set out in section 33 of the 1988 Act. Alternatively, if the application is based on the tenancy being an assured tenancy and possession is being sought using the procedure set out in sections 18 and 19 of the 1988 Act, then in the absence of appropriate terms in the tenancy agreement, it is not possible to utilise the procedure in sections 18 and 19 of the 1988 Act. Accordingly this application has no prospect of success on either possible basis of action, and must be rejected upon the basis that it is frivolous.

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.



James Baird
Legal Member
19 July 2019