

Housing and Property Chamber
First-tier Tribunal for Scotland



**DECISION AND STATEMENT OF REASONS OF LESLEY JOHNSTON 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

158 Livingstone Terrace, Irvine, Ayrshire, KA12 9LA

Case Reference: FTS/HPC/EV/19/2200

DAVID OSBORNE ("the Applicant")

ANGELA CAMPBELL ("the Respondent")

1. On 16 July 2019, an application was received from the Applicant. The application was made under Rule 66 of the Procedural Rules being an application for possession of a short assured tenancy in terms of section 18 of the Housing (Scotland) Act 1988. The following documents were enclosed with the application:-
 - (i) Lease between the Applicant and Respondent (undated);
 - (ii) Copy AT6 Notice dated 30 April 2019;
 - (iii) Photographs showing the condition of the property;
 - (iv) Notice to Quit dated 30 April 2019

2. On 17 July 2019 the Tribunal administration requested further information from the Applicant as follows:
 - (i) The AT5 Notice;
 - (ii) The notice given to the Tenant under section 33(1)(d) of the 1988 Act;
 - (iii) Proof of Service of the Notice to Quit on the tenant;
 - (iv) A copy of the section 11 Notice to the local authority.

3. On 23 July the Applicant responded to advise:

“I do not have form AT5 as the short assured tenancy agreement was issued before December 2017 and when the new rules came into force the tenant was unable to sign or agree to any new tenancy agreement as she was under the mental health department in Ayrshire Central.”

4. Also attached to his email was a further copy of the lease; a section 33 Notice dated 30 April 2019 requiring the Respondent to leave by 24 May 2019; a further copy of the AT6 Notice.

DECISION

5. 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."

6. After consideration of the application, the attachments and correspondence from the Applicant, I consider that the application should be rejected on the basis that I have good reason to believe that the application is vexatious within the meaning of Rule 8(1)(a) of the Procedural Rules.

REASONS FOR DECISION

7. In terms of Rule 8(1)(a) of the Procedural Rules, the Tribunal may reject an application if it considers that it is frivolous or vexatious. '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.

Eviction under section 33 of the 1988 Act

8. The Applicant has confirmed that no AT5 Notice has been served in respect of the property. Since no AT5 Notice has been served, a short assured tenancy has not been created (see section 32(1) and 32(2) of the Housing (Scotland) Act 1988 (hereinafter referred to as 'the 1988 Act')). Accordingly, any attempt to remove the Respondent under section 33 of the 1988 Act (recovery of possession of a short assured tenancy) is bound to fail and has no prospect of success.
9. Despite the application form setting out that recovery of possession was sought under rule 66, section 5 of the application sets out that the Applicant seeks to recover possession in terms of ground 8 of schedule 5 to the 1988 Act (rent arrears of more than 3 months). That application would be made in terms of rule 65 of the Tribunal rules. The application also sets out that the tenant has vandalised the property and that the cost to repair will be over £20,000, although no ground is referenced in relation to eviction on the basis of the tenant's damage to the property.
10. The Tribunal therefore considered whether the application could proceed under rule 65 in respect of eviction under ground 8 of the 1988 Act.

Eviction under Ground 8

11. 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 –

(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."

12. The lease between the parties does not provide for the tenancy to be brought to an end on the basis of ground 8 (or any other ground save for ground 1). Clause 19 of the lease states as follows:

“the tenant acknowledges that the landlord may require possession of the property for his own use at termination and that the landlord may therefore make application to the court for possession of the property under Ground 1 of Sch 5 of the Housing (Scotland) Act 1988 and any other Act or Order amending the same.”

13. In any event, the AT6 notice included with the application makes no reference to possession being sought under ground 8. The AT6 provided with the application sets out that the grounds upon which possession is sought are grounds 12 (some rent lawfully due from the tenant at the time proceedings for possession are begun and the date of service of the AT6) and ground 14 (the deterioration of the condition of the property owing to the tenant’s neglect or default).

14. On the basis the application was made in terms of ground 8 and the AT6 did not set out that possession was sought on ground 8, the application for an order for possession on this ground was bound to fail and falls to be rejected on this basis also.

Eviction under grounds 12 and 14

15. The Tribunal next considered whether, if the Applicant was to amend his application to seek recovery in terms of grounds 12 and 14, the application could proceed.

16. The Tribunal notes that no proof of service of the AT6 has been provided. However, even if the AT6 had been validly served, since grounds 12 and 14 are not referenced in the lease (see section 18(6) of the 1988 Act above) the Tribunal required to consider whether a valid Notice to Quit had been served such as to permit reliance on the AT6 in respect of grounds 12 and 14.

The Notice to Quit

17. The Notice to Quit dated 30 April 2019 stated:

"I hereby give you formal Notice to Quit the premises occupied by you at 158 Livingstone Terrace, Irvine, KA12 9LA by 24 May 2019"

18. The Notice to Quit is defective for the following reasons:

- (i) The Notice to Quit seeks to terminate the lease on 24 May 2019. The period of let is stated in the lease to be "6 months from 14 March 2016." The lease is silent as to tacit relocation. Accordingly, the ish dates for the lease were 14 September and 14 March each year. The Notice has not been served to coincide with the ish dates. The Notice to Quit is invalid for that reason;
- (ii) The Notice to Quit fails to provide at least four weeks' notice before the ish date. Even if the ish date had been 24 May, notice given on 30 April 2019 would not amount to at least four weeks' notice as required by section 112 of the 1988 Act.
- (iii) The Notice does not contain the prescribed information required in terms of section 112 of the 1988 Act and the Assured Tenancies (Notices to Quit Prescribed Information)(Scotland) Regulations 1988. In terms of the regulations, the Notice to Quit ought to have specified as follows:

"1. Even after the Notice to Quit has run out, before the tenant can lawfully be evicted, the landlord must get an order for possession from the court.

2. If a landlord issues a Notice to Quit but does not seek to gain possession of the house in question the contractual assured tenancy which has been terminated will be replaced by a statutory assured tenancy. In such circumstances the landlord may propose new terms for the tenancy and may seek an adjustment in rent at annual intervals thereafter.

3. If a tenant does not know what kind of tenancy he has or is otherwise unsure of his rights he can obtain advice from a solicitor. Help with all or part of the cost of legal advice and assistance may be available under the Legal Aid legislation. A

tenant can also seek help from a Citizens Advice Bureau or Housing Advisory Centre.”

- (iv) Finally, no proof of service of the Notice to Quit on the Respondent was provided by the Applicant, despite the Tribunal requesting evidence from the Applicant in that regard on 17 July 2019.

19. For all those reasons, the Notice to Quit is invalid.

20. Since the Tribunal has determined that the Notice to Quit is invalid; and since the lease does not set out the grounds for eviction other than ground 1 of Schedule 5 to the 1988 Act, the application is bound to fail whether it is made in respect of grounds 8, 12 or 14.

21. For all these reasons, the Legal Member concludes that the application is frivolous, misconceived and has no prospect of success. The application is rejected in terms of Rule 8(1)(a) of the Procedural Rules on that basis.

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.

L Johnston

Lesley Johnston
Legal Member
7 August 2019