



Decision with Statement of Reasons of Alan Strain, Legal Member of the First-tier Tribunal with delegated powers of the Chamber President of the First-tier Tribunal for Scotland (Housing and Property Chamber)

Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules")

Chamber Ref: FTS/HPC/EV/23/1491

Re: 63 Burnfoot Road, Hawick, TD9 8EJ ("the Property")

Parties

Mr Scott Richardson (Applicant)

Ms Ilona Brandwijk (Respondent)

Messrs. Bannerman Burke Law (Applicant's Representative)

Tribunal Member:

Alan Strain (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined 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.

Background

1. The application was received by the Tribunal originally under Rule 66 on 9 May 2023. The grounds for possession/eviction were stated to be termination of a short assured tenancy under the Housing (Scotland) Act 1988 (**Act**). The application also made reference to Ground 14 of Schedule 5 to the Act. The following documents (of relevance to this decision) were enclosed with the application:

- (i) Short Assured Tenancy (**SAT**) commencing 1 July 2015 for a period of 6 months and month to month thereafter;

- (ii) AT6 specifying Ground 14, Notice to Quit and Section 33 Notice all dated 13 December 2022. Both Notices specifying that the tenancy would terminate 2 months from the date of service of the Notice;
- (iii) Royal Mail Track and Trace Receipt confirming delivery of the Notices and AT6 on 17 December 2022.

2. The application was considered by the Tribunal and further information was requested by letter of 8 June 2023. In particular the Applicant was requested to provide the following further information:

“You have submitted a Notice to Quit. The ish date of the tenancy is determined by the tenancy agreement and the description of when an end date of the tenancy will occur. The initial period was for 6 months from 1.7.2025 and the tenancy agreement thereafter in clause 1.4 states that after the initial period the tenancy will continue from month to month. It is not clear from your representations on what basis you conclude that the 26th day of a month could possibly be an ish date for a tenancy which commenced on the first day of the month and continued thereafter as stated above. Similarly it is not clear how you consider that a date which is actually not defined by a specific date can meet the requirement of terminating the lease to an ish. Please consider the matter and reply with your representations as to how the date of “two months from the date of service of this notice” can be a valid ish date. 3. It is also not clear on what basis the Notice to Quit issued meets the requirement of specifying a date by which the tenant is required to remove. The Notice to Quit does not state a specific date. It appears that there is no certainty for the tenant on which date they are required to move out. Please make representations as to the validity of issuing a Notice 3 to Quit without stating the specific date on which the tenant has to remove and include copies of any case law you wish to rely on.”

3. The Applicant’s Representative responded by email of 13 June 2023:

1. It appears my erroneous reference to Rule 65 was on the cover email sending the application. I cannot see having referenced the rule on the application itself. I hereby confirm that the previous reference on my cover email to Rule 65 was a typographical error and was intended to be a reference to Rule 66. I hope that may be sufficient but please confirm if that is not the case and what else may be required. 2. I had issued the notice to quit on 13 12 22 and the next ish date that lay more than 40 days on from that I had calculated as 1 February 2023. The notice therefore gave some additional time effectively in using the date 2 months from the Notice to Quit as dated 13 12 22, 2 months being 13 2 2023. It would be straightforward matter in my submission for the tenant to calculate the period of 2 months from 13 12 2022 and it is submitted the Notice to Quit giving more time in excess of the next available ish date of 1 February 2023 is valid. Please however let me know if this is not acceptable and I will re-issue the Notice to Quit and lodge a new application. My client would seek to continue with the other eviction ground of the deterioration of the property in the interim period if that is possible. 3. It is submitted that it would be a straightforward matter for the tenant to calculate a period of 2 months from the date of the Notice to Quit and thereby they would have certainty regarding the date that

they were required to remove. Please however let me know if this is not acceptable and I will re-issue the Notice to Quit and lodge a new application. My client would seek to continue with the other eviction ground of the deterioration of the property in the interim period if that is possible."

Reasons for Decision

4. The Tribunal 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;-
(c) they have good reason to believe that it would not be appropriate to accept the application;*

(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."

5. '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".*

6. The application seeks to proceed under Rule 66. In order to rely upon these Grounds the Applicant must have validly terminated the SAT. The commencement date of the tenancy was 1 July 2015 for a period of 6 months and month to month thereafter. The Notice to Quit and section 33 Notice both state two months from the date of service as the date by which the Respondent should quit and remove. This was not an "ish" of the tenancy. The tenancy was not validly terminated at its "ish" and continues as a consequence.

7. The Tribunal considered whether the application could still proceed in terms of Section 18(6) of the 1988 Act. This states *"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 1 of Schedule 5 to the 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".* In ***Royal Bank of Scotland v Boyle 1999 HousLR*** it was held that, where an invalid Notice to Quit had been served and the Pursuer sought to rely on Section 18(6) of the Act, *"(1) that the essential ingredients of the grounds for recovery of possession in Schedule 5 to the 1988 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".* The

Tribunal notes that the SAT which has been produced does not refer to or incorporate the grounds for possession relied upon in the application, as required by Section 18(6). As a result the Applicant has failed to meet the requirements of section 18(6) and cannot proceed under this section. In order to raise proceedings for recovery of the property the Applicant must first bring the contractual tenancy to an end. The Notice to Quit which has been lodged is invalid and does not bring the contractual tenancy to an end. Accordingly, the Applicant has not complied with the requirements of the legislation and the application cannot succeed.

8. As the tenancy has not been validly terminated the Tribunal could not grant the order sought. Applying the test identified by Lord Justice Bingham in the case of ***R v North West Suffolk (Mildenhall) Magistrates Court*** (cited above) the application is frivolous, misconceived and has no prospect of success. Furthermore, the Tribunal consider that there is good reason why the application should not be accepted. The application is accordingly rejected.

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.

7 August 2023

Legal Member/Chair

Date