

Housing and Property Chamber
First-tier Tribunal for Scotland



**DECISION AND STATEMENT OF REASONS OF ALASTAIR HOUSTON, 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

2/R 56 Main Street, Dundee, DD3 7HN

Case Reference: FTS/HPC/EV/18/1232

MRS ZEENAT ALI ("the Applicant")

MR SZYMON STEC ("the Respondents")

1. The application was made under Rule 66 of the Chamber Procedural Rules being an application by a private landlord for possession of rented property let under a short assured tenancy. Attachments were provided with the application form to support the application and these attachments included a Notice to Quit, Form AT5 and Form AT6. A copy of the written tenancy contract was also attached, together with copies of agreements between the parties to expressly renew the tenancy beyond the initial period of let.
2. The tenancy commenced on 14 July 2015, for an initial period of six months. This was then expressly renewed for the periods 13 January 2016 until 13 September 2016, 13 September 2016 until 13 March 2017 and 13 March 2017 until 13 January 2018. The period of let was the only term varied and the remainder of the contract remained unchanged.
3. In the absence of any provision in the tenancy contract to the contrary, it is presumed that tacit relocation is operating.
4. The present application is accompanied by a Notice to Quit dated 13 April 2018 purporting to terminate the contractual tenancy agreement on 2 May 2018. The Form AT6 is also dated 13 April 2018 and states proceedings will not be raised earlier than 2 May 2018.

DECISION

5. The circumstances in which an application is to be rejected are governed by 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.”

- 6. After consideration of the application, the attachments and correspondence from the Applicant’s solicitor, the Legal Member considers 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

7. The application was stated as being made under Rule 66, possession on termination of a short assured tenancy however, the possession or eviction grounds are stated in the application as being Grounds 8, 11 and 12 of Schedule 5 of the Housing (Scotland) Act 1988. This would suggest that the application is actually being made under Rule 65, being assured tenancy possession.
8. The Legal Member considers that this application has no prospect of success, irrespective if it is being made under Rule 65 or Rule 66.
9. An issue identified in this application is the validity of the Notice to Quit. The period of let was, most recently, varied to a period of ten months, extending from 13 March 2017 until 13 January 2018. In the absence of any notice terminating the agreement at the end of this period, the agreement will have renewed for a further ten months by way of tacit relocation. The 2 May 2018 was not a valid *ish* date on which the contractual tenancy agreement may have been terminated.

10. The circumstances in which a property let on a short assured tenancy may be recovered upon termination are governed by Section 33 of the Housing (Scotland) Act 1988. Section 33 provides:-

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 ish;

(b) that tacit relocation is not operating; [and]

[...]

(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]⁵ makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that ish 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.]

11. It is clear that, without service of a valid Notice to Quit, it cannot be said that the tenancy agreement has reached its *ish*. A contractual tenancy agreement is continuing between the parties. Termination of a short assured tenancy agreement has not occurred.

12. As there is an ongoing contractual tenancy agreement between the parties, an order for possession could only be made under Section 18(6) of the Housing (Scotland) Act 1988. Section 18(6) provides:-

18.— Orders for possession.

(6) The [First-tier Tribunal]¹⁴ 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 [,]¹⁵Ground 10 [, Ground 15]¹⁶ 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.

13. In the present application, an order for possession is sought on the basis of Grounds 8,11 and 12 of Schedule 5 of the Housing (Scotland) Act 1988. Section 18(6)(b) of the Housing (Scotland) Act 1988 states such an order can only be made if the terms of the tenancy make provision for it to be brought to an end on one of these grounds. In the case of *Royal Bank of Scotland v Boyle* 1999 Hous LR 63, it was held that the written tenancy contract must contain the essential ingredients of the ground relied upon – incorporation by reference would not be sufficient. Paragraph 5 of terms and conditions within the written tenancy contract reads "There is reserved to the Landlord the right to recover possession at the expiry date of the lease on one or more of the grounds specified in Schedule 5 of the Housing (Scotland) Act 1988". There is no further description of or reference to any of the grounds. It is the view of the Legal Member that this is insufficient to satisfy the requirements of Section 18(6)(b) of the Housing (Scotland) Act 1988.
14. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court*, (1998) Env LR9. He indicated at page 16 of the judgment; "*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 the Legal Member has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success. Accordingly, the present application is rejected on 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.

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Mr Alastair Houston
Legal Member
4 June 2018