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

51 Old Mill Road, East Kilbride, G74 4EY ("the Property")

Case Reference: FTS/HPC/EV/19/0198

Ms Julie Asher ("the applicant")
Millar Campbell, Solicitors ("the applicant's representative")
Mr Kenneth Gauld ("the respondent")

1. This application has unfortunately been the subject of protracted process at the Tribunal. As a consequence, it has become an unadulterated mess.

2. On or around 8 January 2019, an application was received from the applicant. The application was made under Rule 65 of the Procedural Rules being an application for recovery of possession of a property let on an Assured Tenancy. The following documents were enclosed with the application:-
    - Copy Title Sheet for the Property;
    - Copy Rent Schedule;
    - Copy Notice to Quit dated 28 September 2018;

- Copy Form AT6 dated 28 September 2018;
- Copy section 33 notice dated 28 September 2018; and
- Proof of posting of the said notices.

Following a request for information from the Tribunal, the applicant's representative provided a copy of the section 11 Homelessness notice to the Local Authority.

3. On 25 February 2019, the application was rejected by the Tribunal under Rule 8. That was on the erroneous basis that, because the tenancy was subject to an unwritten agreement, it could only be brought to an end on either Whitsunday or Martinmas. Unsurprisingly, the applicant requested a review of that decision and the Tribunal determined to recall that decision.

4. Thereafter, the Tribunal reconsidered the application to determine whether it should be accepted to proceed to the next stage of process. On or around 16 April 2019, the Tribunal wrote to the applicant's representative to request the following information:-

"(a) whether [the applicant's] position is that the tenancy agreement was a short assured tenancy, or an assured tenancy;
(b) the commencement date of the tenancy agreement;
(c) the end date of the tenancy agreement;
(d) any initial agreed term;
(e) if there was a verbal agreement to the tenancy agreement running on a monthly basis, at what point did the monthly rolling period commence;
(f) the basis upon which you consider that 1 December 2018 is a relevant ish date of this particular tenancy agreement to enable the notice to quit to be competent."

5. On 31 July 2019, for reasons that I simply do not understand, the applicant's representative lodged an amended Statement of Claim which recast the entirety of the action as one for summary removal under the

Sheriff Courts (Scotland) Act 1907. The Tribunal again wrote to the applicant's representative, on 13 August 2019, requesting confirmation from the applicant's representative that the tenancy in this case was an assured tenancy. In response, a further Statement of Claim, updated as to the rent arrears value, and a new Inventory of Documents was received by the Tribunal on 4 September 2019. The Documents produced were as follows:-

- Copy Title Sheet for the Property;
- Copy Rent Schedule;
- Copy Notice under the Removal Terms (Scotland) Act 1886 dated 1 April 2019 and Sheriff Officer's certificate of service; and
- Copy "Notice of Proceedings" dated 3 July 2019 and Sheriff Officer's certificate of service.

DECISION

6. 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."

7. 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

8. '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.

9. As a starting point, standing the applicant's representative's failure to specify what type of tenancy exists between the parties, I must now consider the available information and make that decision myself. That is because the Tribunal's jurisdiction is limited by section 16 of the Housing (Scotland) Act 2014, which is in the following terms:-

*"16 **Regulated and assured tenancies etc.***

(1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal—

(a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),

(b) a Part VII contract (within the meaning of section 63 of that Act),

(c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).

(2) But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence."

Accordingly, if the tenancy in this case is not one of those listed in section 16(1), then the Tribunal does not have jurisdiction to consider the application. In making my decision, I have had regard to the entire process that I have, including the application as originally made and the previous application for review.

11. In the Statement of Claim (both original and amended), the applicant's representative stated that the tenancy commenced on 11 December 2009. I pause at this stage to say that, in my view, this statement is that a verbal contract of tenancy began on 11 December 2009. Accordingly, notwithstanding the lack of writing, there was in my view a contractual tenancy beginning on that date. That date is after the commencement of the Housing (Scotland) Act 1988 ("the 1988 Act") and, accordingly, it is my view that if the tenancy here meets the requirements of section 12 of the 1988 Act, then it will be an assured tenancy.

12. Section 12 of the 1988 Act provides as follows:-

*"12 **Assured tenancies.***

(1) A tenancy under which a house is let as a separate dwelling is for the purposes of this Act an assured tenancy if and so long as—

(a) the tenant or, as the case may be, at least one of the joint tenants is an individual; and

(b) the tenant or, as the case may be, at least one of the joint tenants occupies the house as his only or principal home; and

(c) the tenancy is not one which, by virtue of subsection (1A) or (2) below, cannot be an assured tenancy.

(1A) A tenancy cannot be an assured tenancy if it is granted on or after 1 December 2017.

(2) If and so long as a tenancy falls within any paragraph of Schedule 4 to this Act, it cannot be an assured tenancy; and in that Schedule "tenancy" means a tenancy under which a house is let as a separate dwelling."

In this application, it is stated in the Statement of Claim that there is a tenancy. Under it, a house is let as a separate dwelling to the respondent, who is an individual. The respondent occupies the house as his only or principal home. It was granted before 1 December 2017. So far, it appears to be an assured tenancy. The only question is whether it falls within any paragraph of Schedule 4 to the 1988 Act. The applicant has, in previous submissions, stated that the tenancy does not fall under any of those paragraphs. I share that view. This tenancy plainly does not fall under any of the exceptions listed in Schedule 4 to the 1988 Act. Accordingly, it is my view that the tenancy in this case is an assured tenancy, and this Tribunal has jurisdiction to determine it.

13. However, this is where the applicant encounters her first problem. The amended application now proceeds on the basis of the Removal Terms (Scotland) Act 1886 and Sheriff Courts (Scotland) Act 1907. Those archaic provisions have absolutely no impact whatsoever on assured tenancies. Section 16 of the 1988 Act provides as follows:-

"16 Security of tenure

(1) After the termination of a contractual tenancy which was an assured tenancy the person who, immediately before that termination, was the tenant, so long as he retains possession of the house without being entitled to do so under a contractual tenancy shall, subject to section 12 above and sections 18 and 32 to 35 below—

(a) continue to have the assured tenancy of the house; and

(b) observe and be entitled to the benefits of all the terms and conditions of the original contract of tenancy so far as they are consistent with this Act but excluding any—

(i) which makes provision for the termination of the tenancy by the landlord or the tenant; or

(ii) which makes provision for an increase in rent (including provision whereby the rent for a particular period will or may be greater than that for an earlier period) otherwise than by an amount specified in or fixed by reference to factors specified in that contract or by a percentage there specified or fixed by reference to factors there specified, of an amount of rent payable under the tenancy,

and references in this Part of this Act to a "statutory assured tenancy" are references to an assured tenancy which a person is continuing to have by virtue of this subsection, subsection (1) of section 31 below, or section 3A of the Rent (Scotland) Act 1984.

(1A) The factors referred to in subsection (1)(b)(ii) above must be—

(a) factors which, once specified, are not wholly within the control of the landlord; and

(b) such as will enable the tenant at all material times to ascertain without undue difficulty any amount or percentage falling to be fixed by reference to them.

(2) A statutory assured tenancy cannot be brought to an end by the landlord except by obtaining an order of the First-tier Tribunal in accordance with the following provisions of this Part of this Act.

(3) Notwithstanding anything in the terms and conditions of tenancy of a house being a statutory assured tenancy, a landlord who obtains an order for possession of the house as against the tenant shall not be required to give him any notice to quit."

14. Accordingly, where a contractual assured tenancy is terminated, it becomes a statutory assured tenancy. In terms of section 16(2), a statutory assured tenancy can only be brought to an end by an order of the Tribunal obtained under Part II of the 1988 Act.

15. Section 18 of the 1988 Act provides for orders for possession. It is in the

following terms:-

*"**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.

(3) If the First-tier Tribunal is satisfied that any of the grounds in Part I of Schedule 5 to this Act is established then, subject to subsections (3A) and (6) below, the Tribunal shall make an order for possession.

(3A) If the First-tier Tribunal is satisfied—

(a) that Ground 8 in Part I of Schedule 5 to this Act is established; and

(b) that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit,

the Tribunal shall not make an order for possession unless he Tribunal considers it reasonable to do so.

(4) If the First-tier Tribunal is satisfied that any of the grounds in Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit.

(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

(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.*

(6A) *Nothing in subsection (6) above affects the First-tier Tribunal 's power to 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, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.*

(7) *Subject to the preceding provisions of this section, the First-tier Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.*

(8) *In subsections (3A) and (4A) above—*

(a) *"relevant housing benefit" means—*

(i) *any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or*

(ii) *any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;*

(aa) *"relevant universal credit" means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;*

(b) *references to delay or failure in the payment of relevant housing benefit or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant."*

Accordingly, an order for possession cannot be made unless it is under one of the grounds for possession in Schedule 5 to the 1988 Act. Further, orders under section 18 are subject to the provisions in section 19.

16. Section 19 is in the following terms:-

"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."

Accordingly, the Tribunal may not entertain proceedings unless a notice under section 19 (a Form AT6) has been given to the tenant, or it is reasonable to

dispense with notice. The Tribunal may not dispense with notice if the ground for recovery is Ground 8.

17. The Application as re-cast does not rely on section 18. It does not refer to a notice under section 19. It does refer to a notice to quit, but that notice is invalid. 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 eleventh day of the month after the required period of notice. That is assuming that the tenancy was operating on a monthly basis. Otherwise, the implied duration at law would be one calendar year, in which case the ish would be 11 December in the given year. Either way, it is not 28 May 2019, as stated in the new Notice to Quit dated 1 April 2019.

18. Accordingly, for the foregoing reasons, this application must be rejected. 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.

19. Whilst that is sufficient to deal with this application, standing the history of this action, I consider that it is fair that I consider the original Statement of Claim, in order that the applicant understands that the application was always doomed to fail.

20. The tenancy agreement was unwritten. As such, the terms of it could not provide for termination under the grounds in Schedule 5 in accordance with section 18(6). Accordingly, the applicant would need to terminate the contractual tenancy first, by service of a valid notice to quit. Unfortunately, the Notice to Quit originally served on the respondent (dated 28 September 2018) specified that the tenancy would terminate at "1st December 2018". As provided for above, that was not an ish date. Accordingly, the Notice to Quit was invalid and the contractual tenancy was continuing in any event. That

being so, the applicant could not have obtained an order for possession from the Tribunal.

21. For completeness, I am not immediately persuaded that the terms of the Form AT6 would have been sufficient either. 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.

22. In this case, the applicants have wrongly completed Part 2. 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.

23. Separately, 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. What the applicant does is set out somewhat vague expressions as to what the respondent is alleged to have done. In my view, what is required by Part 3 is the provision of a fulsome explanation as to why a ground is satisfied. 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. For Ground 11, one might expect to see a list of dates on which rent is alleged to have been late.

24. Accordingly, even if the application had not been re-cast in the way that it has, I would nonetheless have determined that it had no prospect of success. I would have determined that it was frivolous within the meaning of Rule 8(a), or at least that it would be inappropriate to accept it in terms of Rule 8(c).

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
Legal Member
9 September 2019