Housing and Property Chamber
First-tier Tribunal for Scotland

Decision and statement of Reasons of the First Tier Tribunal (Housing and Property Chamber)

Under Rule 8 of the First Tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 'the Rules'.

In respect of application by Mr Jonathan Leiper in terms of rule 65 of the Rules.

Case reference FTS/HPC/EV/19/3685

At Glasgow on the 13 January 2020, Lesley Anne Ward, legal member of the First –Tier Tribunal 'the Tribunal' with delegated powers of the Chamber President, rejected the above application in terms of Rule 8(1)(a) and (c) of the Rules .

1. This is an application on behalf of Mr Jonathan Leiper, for recovery of possession of the property at 25 Coates Gardens Edinburgh EH12 5LG in terms of Rule 65 of the rules.

2. The application was made on behalf of Mr Jonathan Leiper by AM Lettings on 18 November 2019.

3. The application was accompanied by the following:-

    1. Short assured tenancy agreement for let of the property for an initial period of 12 months from 21 October 2016 until 21 October 2017 and month to month thereafter.
    2. AT5 form dated 21 October 2016.
    3. Guarantee agreement
    4. Rent increase notice.
    5. Notice to quit dated 16 August 2019 with an ish date of 21 October 2019.
    6. S33 notice dated 16 August 2019 with a termination date of 21 October 2019.
    7. S11 notice on local authority.

4. The tribunal wrote to the applicant's representative on 3 December 2019 seeking further information as follows: L. A. Ward

- *The Applicant is Jonathan Leiper. AM Lettings Ltd are detailed as representatives. The application is signed by Mrs J Barr of AM Lettings rather than by the Applicant. Please provide confirmation that the Applicant wishes AM Lettings Ltd to act as his representatives in this case.*
- *The lease is a short assured tenancy. It does not appear to contain any provision in relation to service of documents. In particular it does not contain any provision permitting service of documents by email. The s33 Notice and Notice to Quit have apparently been intimated by email and copy sent by post. Please address, by reference to legal authority if necessary, whether this amounts to valid service of the notices upon the respondent.*

5. The applicant's representative contacted the tribunal on 4 December 2019 with a copy email from Mr Leiper authorising them to act on his behalf. No substantive response has been made to the second point. The applicant's representatives contacted the tribunal on 19 December 2019 and enclosed a copy of an email exchange from them and the respondent from 16 and 17 March 2018. They stated "Hi Thomas can you confirm that you are happy for us to send you future correspondence in relation to your property via email?" The response from the respondent from the 17 march 2018 reads" Lauren perfectly happy Tom".

6. The tribunal wrote a further letter to the applicant's representatives on 3 January 2020 as follows:

- *The tribunal acknowledges receipt of the copy email exchange between you and the Respondent regarding future correspondence being emailed, however the Notices to Quit and section 33 Notice are formal documents which require to be served. Please address the Tribunal as to why you consider it appropriate to serve documents by email.*

7. The applicant's representatives replied on 5 January 2020 as follows:
   I can advise that our reasoning for emailing the documentation to the tenant was due to the fact that we did not think that the tenant would sign for any 'recorded Delivery' communication that was addressed to him. According we thought best to email him as he had given permission for us to communicate by that method and also posting correspondence to tenant.

   The tenant is not being responsive to verbal communication and will not answer the door when we attend, even when the neigh bouts can her him moving around and accordingly not allowing aces to the property.

   The neighbours have reported to us that he is not answering the door either when debt collectors are now calling even when he is in the property. Family members have also advised that Mr Sillar is not responding to them either.

8. There is a further issue with this application as it appears that the applicant is attempting to make a case for a rule 66 application (application for order for possession upon termination of a short assured tenancy) but has in fact made an application under rule 65 (application for possession in relation to assured tenancies) in error.

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9. Assuming for the moment that this is a rule 66 application, there is a fundamental problem with it: No proof of service of the notice to quit and s33 notice have been produced. Further, it appears to be the case that service of the notice to quit has not taken place and the s33 notice has not been 'given' to the respondent in terms of s33 of the Act which provides:

(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 **[F1**First-tier Tribunal**]** shall make an order for possession of the house if **[F2**the Tribunal**]** is satisfied—

(a)that the short assured tenancy has reached its finish;

(b)that tacit relocation is not operating; **[F3**and**]**

F4(c). . . . .

(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 **[F5**First-tier Tribunal**]** makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that finish shall end (without further notice) on the day on which the order takes effect.

[F6(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.)**]**

10. S33(1)(d) refers to the landlord having 'given ' the tenant the s33 notice and s33(3) provides that said notice is to be 'served' on the tenant. In this instance the notice has been emailed and sent in the post. No proof of service has been produced. The notice to quit is problematic too as it has similarly been emailed and posted. No proof of service either by recorded delivery or by sheriff officer has been produced. Alternatively, no proof that the notice to quit was given personally to the respondent has been produced.

11. Rule 8(1)(a)of the Rules allows an application to be rejected by the Chamber President if ***"they consider that an application is vexatious or frivolous".***

12. "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". L. A. Ward

13. I consider that this application is frivolous or vexatious and has no reasonable prospect of success for the reasons given above. Further, in terms of Rule 8(c) of the rules I have good reason to consider that it would not be appropriate to accept the application even if it was amended to rule 66. In my view the absence of proof of service of the notice to quit here means that the tribunal would not be able to grant the eviction and the application would have no prospects of success. The absence of proof of the s33 notice is an additional problem which would prevent a tribunal from granting an eviction under rule 66. Even if s33 above could be interpreted as meaning that service could be effected by 'giving 'the respondent the s33 notice, this has not been done here. The application cannot proceed and be successful under rule 65 either and there is no AT6 and no other eviction grounds have been raised.

NOTE: What you should do now.

If you accept this decision there is no need to reply.

If you disagree with this decision you should note the following:

An applicant aggrieved by this 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 seek permission to appeal within 30 days of the date the decision was sent them. Information about the appeal procedure can be forwarded on request.

L. A. Ward

Legal Member