Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF JOSEPHINE BONNAR, 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

11 Palmer Street, Arbroath ("the Property")

Case Reference: FTS/HPC/EV/20/1491

Greenworld Investments, 8 Hill Road, Arbroath ("the Applicant")

John Devenney, 11 Palmer Street, Arbroath ("the Respondent")

1. By application received on 13 July 2020, the Applicant seeks an order for recovery of possession of the property in terms of Rule 65 of the Rules and Section 18 of the Housing (Scotland) Act 1988 ("the 1988 Act"). The Applicant lodged a number of documents in support of the application including AT6 Notice, Notice to Quit and copy tenancy agreement. The tenancy agreement states that the term of the tenancy is 1 September 2017 until 31 August 2018. There is not provision for it to continue thereafter on a monthly (or other) basis. It therefore appears that the tenancy has continued by tacit relocation since the end of the initial term. The Notice to Quit lodged with the application is dated 7 January 2020 and calls upon the Respondent to vacate the property on 7 February 2020. The grounds for possession stated in the AT6 are grounds 8, 11 and 12.

2. The Tribunal wrote to the Applicant seeking clarification of validity of the Notice to Quit as the date specified does not appear to coincide with an ish date. In

his response the Applicant states “Please note that we are not seeking to rely upon the tenancy having reached its ish. The Notice to Quit states the ground of removal as being the arrears of rent accrued by the tenant.” The Applicant makes reference to the AT6 and to the grounds specified, namely 8, 11 and 12. He goes on to say “Clause 2 of the written lease agreement provides that either party can terminate the lease giving 4 weeks written notice, and mention of that is made in the AT6, however this is not the primary ground upon which the Applicant seeks to rely”.

DECISION

3. The Legal Member 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;

(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."

4. **After consideration of the application and documents lodged in support of same 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 Rules.**

Reasons for 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 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.

6. The tenancy agreement lodged with the application is an assured tenancy in terms of the Housing (Scotland) Act 1988 ("the 1988 Act"). This Act provides two mechanisms for recovery of possession. Section 33 can be used where the tenancy is a short assured tenancy in terms of Section 32. Alternatively, as in this case, a landlord can seek an order for possession of the property in terms of Section 18. These mechanisms are the only ways in which an assured tenancy can be terminated by a landlord. With one exception, under Section 18(6) of the 1988 Act, a landlord under an assured tenancy must first terminate the tenancy contract. The tenancy then becomes a statutory assured tenancy, which is terminated when the order for possession granted under section 18 takes effect. It is not possible, as the Applicant suggests, for parties to a tenancy agreement which is subject to the provisions of the 1988 Act, to contract out of those provisions. An assured tenancy cannot be terminated by a landlord simply giving the tenant four weeks notice

7. The tenancy agreement lodged with the application appears to have continued by tacit relocation beyond the original term of the tenancy, with an ish on the 31 August each year. The Notice to Quit which has been lodged by the Applicant is dated 7 January 2020. The Notice purports to terminate the tenancy contract on 7 February 2020. This does not appear to be an ish date of the tenancy. As a Notice to Quit can only terminate the tenancy contract at

the ish, the Notice is invalid. The Legal Member concludes that the Notice to Quit lodged with the application is invalid and that tenancy contract has not been terminated.

8. The Legal member proceeded to consider whether the application could still be considered 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 Legal Member notes that the tenancy agreement which has been produced does not make any specific provision for recovery of possession on any of the grounds contained within Schedule 5. 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.

9. As the Notice to Quit is invalid and the requirements of the 1988 Act have not been met the Legal Member determines that the application is frivolous, misconceived and has no prospect of success. The application is rejected 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.

J. B

Josephine Bonnar
Legal Member
2 September 2020