Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF LESLEY JOHNSTON 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

41 Murray Terrace, Carnwath, Lanark, ML11 8HX

Case Reference: FTS/HPC/EV/19/1675

ALASDAIR SMITH AND JACQUELINE SMITH ("the applicants")

ROBERT LAMBERTON ("the respondent")

1. On 31 May 2019, an application was received from the applicant. The application was made under Rule 65 of the Procedural Rules being an application for possession of an assured/short assured tenancy in terms of section 18 of the Housing (Scotland) Act 1988. The following documents were enclosed with the application:-
   (i) Lease between the applicants and respondent dated 18 November 2012;
   (ii) Copy AT6 Notice dated 1 March 2019
   (iii) Certificate of Service from Sheriff Officers dated 5 March 2019 in relation to the Notice to Quit and AT6
   (iv) Report from Sheriff Officers dated 5 March 2019 outlining that neighbours

informed Sheriff Officers that the respondent no longer resides within the property;

(v) Notice to Quit dated 28 February 2019 giving notice to the respondent to remove from the property by 22 March 2019;

(vi) Copy bank statement of Jacqueline Smith in respect of the period 1 August 2018 to 1 March 2019

(vii) Copy AT5 notice dated 24 October 2012 and 19 November 2012

On 31 May 2019 the applicants submitted an application under Rule 5(4) of the Procedural Rules for permission to serve the Notice to Quit and Form AT6 by advertisement on the basis that Sheriff Officers had attempted to establish the respondent's whereabouts and had been advised that the respondent resides with his girlfriend in Glasgow but that they had been unable to establish his address.

DECISION

2. 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."

3. After consideration of the application, the attachments and correspondence from the applicant, I consider that the application should be rejected on the basis that I have good reason to believe that the application is vexatious within the meaning of Rule 8(1)(a) of the Procedural Rules.

REASONS FOR DECISION

4. In terms of Rule 8(1)(a) of the Procedural Rules, the Tribunal may reject an application if it considers that it is frivolous or vexatious. '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.

5. The applicants and respondent entered into an assured tenancy in terms of which the date of entry was stated to be 19 November 2012. The lease provides "the let will run from that date until 19 May 2013." The lease made no express provision for tacit relocation in the event that the tenancy continued beyond the period stated in the

lease. Accordingly, the lease appears to have continued by operation of tacit relocation on six monthly periods with ish dates at 19 May and 19 November each year.

6. The Notice to Quit dated 28 February 2019 seeks to terminate the lease on 22 March 2019. The Notice to Quit was not therefore served to terminate the lease at the ish date in terms of the lease. The Notice to Quit is invalid for that reason.

7. In any event, the Notice to Quit also fails to give the required period of notice. In terms of section 112(1) of the Rent (Scotland) Act 1984 "no notice by a landlord or a tenant to quit any premises let as a dwellinghouse shall be valid unless it is in writing and contains such information as prescribed and is given not less than four weeks before the date on which it is to take effect."

8. In addition, since the duration of the lease is for a period of more than one year, the applicants required to give 40 days notice to terminate the tenancy, at common law.

9. In this case, the applicants provided the respondents with only 21 days notice from the date of the notice and only 17 days notice from the date Sheriff Officers purported to serve the Notice to Quit (on 5 March 2019).

10. For all those reasons, the Notice to Quit is not valid.

11. The Legal Member next considered whether the action could have proceeded regardless of the fact that the tenancy has not been terminated at the ish.

12. The applicants seek repossession in terms of section 18 of the Housing (Scotland) Act 1988 ('the 1988 Act'), and ground 8 of Part I of Schedule 5 to the Act, namely that both at the date of the service of the notice under section 19 and at the date of the hearing, at least three months rent lawfully due from the tenant is in arrears. Ground 8 is a mandatory ground for eviction.

13. Section 18(6) provides that:

"The [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."#

14. In this case, the tenancy agreement does not make provision for the tenancy to be brought to an end on the ground in question. There is no reference to the grounds for eviction under Parts I and II of Schedule 5 to the Act. Specifically, there is no reference to ground 8 (the ground relied upon by the applicants).

15. The Tribunal therefore considers that even if the application was to proceed in terms of ground 8 without termination having been effected by the Notice to Quit, the application would be bound to fail for this reason.

16. In addition and in any event, the AT6 (section 19 notice) lodged with the application does not provide any details in Part 3 of the notice (the particulars of how the grounds have arisen). The AT6 requires to conform with the terms of the Assured Tenancies (Forms)(Scotland) Regulations 1988 to be valid. In terms of the Regulations, the AT6 should contain a statement of the particulars of how the landlord belies that the grounds have arisen." The respondent has not been given any particulars as to how the ground has arisen. For example, the respondent has not been provided with the level of arrears on the account. The Tribunal finds that the AT6 is invalid for this reason. The Tribunal notes that since the application proceeds on ground 8, even if the application proceeded to consideration by a Tribunal, the Tribunal would have no discretion to dispense with the notice under section 19(1)(b) (see section 19(5)).

17. For all these reasons, the Legal Member concludes that the application is frivolous, misconceived and has no prospect of success. The application is rejected in terms of Rule 8(1)(a) of the Procedural Rules on that basis.

18. The application for service by advertisement does not therefore require to be considered. However, the Tribunal notes that even if the application had not been rejected for the reasons outlined above, the applicants have not provided sufficient information in terms of rule 5(5) of the Procedural Rules to outline the attempts made to trace the respondent. It appears that Sheriff Officers certified service of the Notice to Quit and AT6 having been effected by depositing through the respondent's letterbox at the rented property on 5 March 2019. The report attached to the invoice issued to the applicants agents noted that Sheriff Officers attended the respondent's place of work nearby and his employers confirmed that he continues to work there. It notes that when Sheriff Officers attended the property it was sparsely furnished and that on speaking to the respondent's neighbours Sheriff Officers were advised that he no longer resides at the property and is thought to reside with his girlfriend in Glasgow. The applicants have not provided details of their attempts to trace the respondent following the neighbours' report to Sheriff Officers.

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.

Lesley Johnston
Legal Member
10 July 2019