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 Procedure Rules")

in connection with

Bracken Cottage, Ringford, Castle Douglas, DG7 2AG ("the Property")

Case Reference: FTS/HPC/EV/20/1338

Christopher Whitely, Susan Whitely, Barstrobrick, Ringford, Castle Douglas DG7 2AG ("the Applicants")

Denise Obern, Luke Stephen John Rhoden, Bracken Cottage, Ringford, Castle Douglas, DG7 2AG ("the Respondents")

1. By application dated 15 April 2020 but received on 15 June 2020, when the Glasgow Tribunal Centre re-opened following the lifting of Government restrictions, the Applicants seek 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 Applicant lodged a number of documents in support of the application including AT6 Notice, Notice to Quit and copy tenancy agreement. The Notice to Quit is dated 18 March 2020 and specifies the 7 April 2020 as the date upon which the tenancy contract will terminate. The Applicants seek an order for possession of the property on grounds 11 and 12 of Schedule 5 of the 1988 Act.

DECISION

2. 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."

3. **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 Procedure Rules.**

Reasons for Decision

4. '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.

5. The Applicants seek recovery of possession of an assured tenancy on grounds 11 and 12 of Schedule 5 of the 1988 Act. A copy tenancy agreement has been produced. This states, "The tenancy shall commence on 24 August 2015 for the period of six months and one day from that date". There is no provision for the tenancy to continue on a monthly or other basis after the initial term. It therefore appears that the tenancy has continued by tacit relocation for further periods of six months and one day since 25 February 2016. This would appear to result in there being an ish date on 5 March and 6 September 2020.

6. The Notice to Quit which has been lodged by the Applicant is dated 18 March 2020. No information or evidence is produced to establish when it was given or sent to the Respondent, although it is to be assumed that this was on or about the same date. The Notice purports to terminate the tenancy contract on 7 April 2020. This is not an ish date of the tenancy. As a Notice to Quit can only terminate the tenancy contract at the ish, the Notice is invalid. Furthermore, section 112(1) of the Rent (Scotland) Act 1984 ("the 1984 Act") states, "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 may be prescribed and is given not less than four weeks before the date on which it is to take effect." The Notice to Quit lodged with the application was served on or about 18 March 2020 and seeks to terminate the tenancy contract on 7 April 2020. The Applicant has therefore failed to give the Respondent 4 weeks' notice, as required by the 1984 Act. The Legal Member concludes that the Notice to Quit lodged with the application is invalid and that tenancy contract has not been terminated.

7. 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 refer to or incorporate the grounds for possession relied upon in the application, as required by Section 18(6). 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.

8. 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. Bonnar

Josephine Bonnar
Legal Member
30 June 2020