Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS 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

41A English Street, Dumfries DG1 2BU

Case Reference: FTS/HPC/EV/17/0455

V & E Properties (Dumfries) Limited ('the applicant')

Mr Jamie Rennie ("the respondent")

1. On 5 December 2017 an application was received from the applicant via his solicitor. The application was made under Rule 65 of the Chamber Procedural Rules being an application by a private landlord for possession of rented property let under an assured tenancy. Attachments were provided with the application form to support the application and these attachments included an AT6 Notice and Notice to Quit along with execution of service of these notices on the respondent who is noted in the paperwork to be the tenant of the house. A partial tenancy agreement was also attached along with a rent statement.

2. The application was considered by the Chamber President and in order to carry out the functions detailed in Rules 5 and 8, she sought a written submission from the applicant on the validity of the AT6 notice which appeared to be defective. Rule 20 (1) entitles the First-tier Tribunal to make inquiries as it thinks fit for the purposes of exercising its functions. The applicant was asked to provide a written submission on the following -

i. The AT6 form is a statutory form and at Part 2 you have indicated that you intend to raise proceedings for possession on ground number 8. However, there is a requirement to "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".
ii. The sufficiency of particulars in Part 3 of the AT 6 form.

The application was held as pending awaiting this response.

3. The applicant's solicitor responded

"In this case the only reason for rejection under rule 8 could be rule 8(1) (c). It is submitted that rule 8(1) (c) is not intended to be used to determine the validity of documents submitted under rule 65. Therefore, it is submitted that procedurally the application should be accepted.

However, it is conceded that the AT6 form does not state the particulars of the ground as required by Section 19(2) of the 1988 Act and may be invalid as a result.

There is little point in having the application accepted only to fail at a hearing when a new AT6 can be issued and a new application raised in a few weeks' time."

"If it is decided that the application should be accepted I undertake to withdraw it and raise a new application following the issue of a new and correctly drafted AT6."

4. DECISION

The Chamber President considered that the application in terms of rule 5 and 8 of the Chamber Procedural Rules. These Rules provide

Requirements for making an application

5.—*(1) An application is held to have been made on the date that it is lodged if, on that date, it is lodged in the manner as set out in rules 43, 47 to 50, 55, 59, 61, 65 to 70, 72, 75 to 91, 93 to 95, 98 to 101, 103 or 105 to 111, as appropriate.*

(2) The Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, must determine whether an application

has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.

(3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held to be made on the date that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement.

(4) The application is not accepted where the outstanding documents requested under paragraph (3) are not received within such reasonable period from the date of request as the Chamber President considers appropriate.

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.

After consideration of the application, the attachments and submission from the Applicant, the Chamber President considers that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8 (1) (a) of the Procedural Rules.

5. Reasons for the Decision

'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 Chamber President has considered as the test in this application, and on consideration of this test, the President considers that this application is frivolous and is misconceived and has no prospect of success for the following reasons:-

Section 16 of the Housing (Scotland) Act 2014 provides for the functions and jurisdiction of the sheriff court in relation to civil actions arising from regulated tenancies within the meaning of section 8 of the Rent (Scotland) Act 1984 ("the 1984 Act"), Part VII contracts within the meaning of section 63 of the 1984 Act and assured tenancies within the meaning of section 12 of the Housing (Scotland) Act 1988 ("the 1988 Act"), to be transferred to the First-tier Tribunal. This includes matters of eviction and recovery of possession. The tenancy in relation to this application is an assured tenancy. Therefore when considering the provisions in the Housing (Scotland) Act 1988 where there is reference in Section 19 to sheriff that can be read as the First-tier Tribunal.

Section 19 of the Housing (Scotland) Act 1988 states

"(1) The sheriff 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)he considers it reasonable to dispense with the requirement of such a notice.

*(2)The sheriff shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground **[F1**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 sheriff.*

(3)A notice under this section is one ***[F2****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 sheriff 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.

(6)Where a notice under this section relating to a contractual tenancy—

(a)is served during the tenancy; or

(b)is served after the tenancy has been terminated but relates (in whole or in part) to events occurring during the tenancy,

the notice shall have effect notwithstanding that the tenant becomes or has become tenant under a statutory assured tenancy arising on the termination of the contractual tenancy.

(7)A notice under this section shall cease to have effect 6 months after the date on or after which the proceedings for possession to which it relates could have been raised."

Annotations:

Amendments (Textual)

F1*Words substituted by Housing Act 1988 (c. 50, SIF 61), s. 140(1),* ***Sch. 17 Pt. I para. 85(a)***

F2*Words inserted by Housing Act 1988 (c. 50, SIF 61), s. 140(1),* ***Sch. 17 Pt. I para. 85(b)***

Section 19(1) is clear that the sheriff shall not "entertain" proceedings for possession of the house let on an assured tenancy unless the landlord has served on the tenant notice in accordance with the section or s/he considers it reasonable to dispense with the requirements of the notice. However, the sheriff has no powers to dispense with the service of notice of proceedings where the landlord seeks to recover possession on Ground 8 of Schedule 5 of the 1988 Act. In addition, the sheriff may not make an order for possession on any of the grounds in Schedule 5 in the 1988 Act unless that ground and particulars of it are specified in the notice. The notice must be in the prescribed form in terms of the Assured Tenancies (Forms) (Scotland) Regulations SSI 1988/2109. The prescribed form in question is an AT6. The AT6 must inform the tenant that the landlord intends to raise proceedings for possession of the house on one or more ground specified in the notice. It is not sufficient to merely refer to the ground in question by number and there is a requirement in the AT6 at part 2 to give the ground number and fully state the ground as set out in Schedule 5 of the Act, presumably as the intension is that the AT6 should contain the relevant information without the need to refer to legislation. At Part 3 of the AT6 the landlord must specify "particulars" of the ground stated in the notice.

In relation to the application in this specific case, the AT6 served on the tenant stated that the intention was to raise proceedings for possession on "GROUND NUMBER 8" and in part 2 no further details were provided when there is a requirement that the ground must be fully stated as set out in Schedule 5 of the 1988 Act. In Part 3 of the AT6 the following was stated "GROUND NUMBER 8 - THE TENANT IS AT LEAST 3 MONTHS IN ARREARS WITH RENT."

The extent to which "particulars" need to be stated is considered by Peter Robson in his commentary on the 1988 Act and he states "It should be made clear to the tenant what actions need to be done to put matters right: *Torridge D.C. v Jones (1985) 18 H.L.R. 107."* In that case which deals with notices of proceedings of possession under the equivalent English legislation, Oliver LJ stated that "the object of the notice is to bring to the tenant's notice the defect of which complaint is made to enable him to make a proper restitution before proceedings are commenced and to deal with that." He went on to refer to the comments of Bankes LJ in *Jones v Evans (1923) 1KB 12* to the effect that particulars required to "contain information as to the nature of the claim as distinguished from the class of the claim."

In relation to the AT6 in question not only is there an absence of required information in Part 2 but also the particulars provided in Part 3 are inadequate in that the amount of the arrears should be stated or the notice should contain sufficient information to enable the tenant to calculate the amount that is due.

Section 19(2) of the 1988 Act specifies that grounds specified in an AT6 may be altered or added to with leave of the sheriff. However, in *Mountain v Hastings (1993) 25 HLR 427* in relation to an equivalent notice under the Housing Act, the Court of Appeal decided that there must be a valid notice before the power can be exercised.

The defects in the AT6 in the application in this case render it invalid and incurable by the operation of Section 19(2). Ground 8 is the one ground where the sheriff has no power to dispense with the requirement for a notice.

The written submission received from the applicant's solicitor does not dispute the defect in the AT6 and he undertakes to withdraw the application but challenges the stage that a notice can be considered invalid. If there was a debatable legal point, it would be appropriate to accept the application and allow a legal debate on the issue at a hearing even if the likelihood of success is not high. However, for the foregoing reasons the Chamber President does not consider there to be any prospect of success at such a debate. Accordingly, the application based on the AT6 provided is rejected on the basis that the application is frivolous.

What you should do now

If you accept the Chamber President's decision, there is no need to reply.

If you disagree with this decision –

An applicant aggrieved by the decision of the Chamber President 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.

Mrs. Aileen Devanny
Chamber President
22 December 2017