DECISION AND STATEMENT OF REASONS OF LEGAL MEMBER (under 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")

Chamber Ref: FTS/HPC/EV/19/0986

Re: Property at 52 Glebe Street, The Village, East Kilbride, G74 4LX **("the Property")**

Parties:

Ann Kennan ("the Applicant")
Suzanne Tahraoui ("the Respondent")

Joel Conn (Legal Member)

BACKGROUND

1. On 4 March 2019 an application was drafted for the Applicant under Rule 65 of the Rules, being an application for an order for possession in relation to an assured tenancy under which the Applicant leased to the Respondent the Property from 14 November 2014 "including the whole of the day" for a period of "six months" which would "continue thereafter on a month to month basis" ("the Tenancy"). The Tenancy set a rent of £450 per month to be paid in advance on the "first day in each month".

2. The application relied upon "Mandatory Ground 8 – excess of three months rent arrears" and "Discretionary Ground 10. Notice to quit and AT6 served. Tenant has not left property" (both all *sic*).

3. The lease makes almost no reference to the grounds for recovery under Schedule 5 of the 1988 Act. The only explicit references are at clause 5 where it states:

> "The tenancy may be ended in any one of the four following ways…
>
> "5.1 By written notice to quit from either the landlord or the tenant, to the other, terminating the tenancy on at least 2 months notice. The notice to quit may be served by the landlord for one or more of the following reasons:
>
> …

- "If any of the grounds contained in section 5 to the Housing (Scotland) Act 1988 are satisfied.

"Neither party is entitled to give notice to quit which would have effect before the expiry of the initial period... expect in the case of material breach of the tenancy by the other party, or if any of the grounds contained in schedule 5 to the Housing (Scotland) Act 1988 are satisfied." (all *sic*)

4. As stated, the application relied on eviction on Grounds 8 and 10 of Schedule 5 to the 1988 Act. These are:

> *Ground 8: Both at the date of the service of the notice under section 19 of this Act relating to the proceedings for possession and at the date of the hearing, at least three months rent lawfully due from the tenant is in arrears.*
>
> *Ground 10: The following conditions are fulfilled—*
>
> *(a) the tenant has given a notice to quit which has expired; and*
> *(b) the tenant has remained in possession of the whole or any part of the house; and*
> *(c) proceedings for the recovery of possession have been begun not more than six months after the expiry of the notice to quit; and*
> *(d) the tenant is not entitled to possession of the house by virtue of a new tenancy.*

5. The application did not refer to the amount of the arrears though a rent statement submitted (subsequent to a request for further information) showed the amount of £3,600 due as at 1 October 2018, being 8 months of arrears. The statement was dated 1 February 2019 so subsequent pages covering the period between October 2018 and February 2019 may have been omitted. (In a conjoined application CV/19/1381 the Applicant has provided a statement also dated 1 February 2019 which says that rent was also missed on November 2018 to January 2019 and total £4,950 as at 1 February 2019.)

6. The application was accompanied by a Notice to Quit and Section 33 Notice both dated 3 January 2019 which sought to bring the lease to an end on 3 March 2019. The application relied upon an AT6 (notice under section 19 of the 1988 Act). At least one page was missing from the AT6, so the date could not be discerned though I am inclined to assume it was 3 January 2019 as well. In regard to those parts of the AT6 that were provided, in Part 2 the Applicant had simply stated "Ground 8". In Part 3, the Applicant had written "Non payment of rent. Three Month Rent Arrears". The figure in rent was not stated and, given the missing page, it was not possible to see what date (if any) the Applicant had stated that proceedings would not be raised before. No evidence of the date of service of the Notice to Quit, Section 33 Notice or AT6 was provided.

7. The application was considered by the current Legal Member under delegated powers in order to carry out the functions detailed in Rules 5 and 8.

DECISION

8. The Legal Member considered that the application in terms of Rules 5 and 8 of the Rules. These Rules provide:

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.

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.

9. Rule 65 (as amended), governing the application, provides:

Where a landlord makes an application under section 18(1) (orders for possession) of the 1988 Act, the application must—

(a) state—

(i) the name, address and registration number (if any) of the landlord;

(ii) the name, address and profession of any representative of the landlord;

(iii) the name and address of the tenant; and

(iv) the possession grounds which apply as set out in Schedule 5 of the 1988 Act;

(b) be accompanied by—

(i) a copy of the tenancy agreement (if available) or, if this is not available, as much information about the tenancy as the landlord can give;

(ii) a copy of the notice served on the tenant by the landlord of intention to raise proceedings for possession of a house let on an assured tenancy;

(iii) a copy of the notice to quit served by the landlord on the tenant (if applicable); and

(iv) evidence as the applicant has that the possession ground or grounds has been met;

(v) a copy of the notice given to the local authority by the landlord under section 11 of the Homelessness (Scotland) Act 2003 (if applicable); and

(vi) a copy of Form BB (notice to the occupier) under schedule 6 of the Conveyancing and Feudal Reform (Scotland) Act 1980 (if applicable); and

(c) be signed and dated by the landlord or a representative of the landlord.

10. Section 18(6) of the 1988 Act (as amended) 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 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.

11. Section 19 of the 1988 Act (as amended) states:

(1) The First-tier Tribunal 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) the Tribunal considers it reasonable to dispense with the requirement of such a notice.

(2) The First-tier Tribunal shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground 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 Tribunal.

(3) A notice under this section is one 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.

12. After consideration of the application and supporting papers, I considered 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 THE DECISION

13. "Frivolous" in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court, [1997] EWCA Civ 1575*. 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 this definition that I have considered as the test in this application in holding that the application is frivolous in that it has no prospect of success for the reasons following.

14. In consideration of all the papers, the AT6 notice did not satisfy the requirements of the 1988 Act in my view.

15. The Chamber President reviews the case law, authorities and guidance on completion of AT6s in her decision in application by *V & E Properties (Dumfries) Limited v Ian West* (reference EV/17/0454) of 22 December 2017. In that decision, she notes that for an AT6 to satisfy the requirements of section 19(3) of the 1988 Act, there requires to be both the required information in Part 2 and Part 3, and that information in Part 3 must be adequate so that, in regard to grounds relating to rent arrears, "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". I adopt her reasoning. Though it is initially tempting in this case to read the AT6 as informing the Respondent that three months of rent is due (and thus £1,350 is to be paid to avoid the risk of repossession), the supporting information shows that arrears in October 2018 were £3,600 and have only climbed since. I do not think that the AT6 is in adequate terms in the circumstances. The notice is entirely insufficient in regard to Ground 10 in that it makes no reference to it at all. Further, I am concerned that the AT6 as served was incomplete. Though I appreciate that the missing page or pages may be available and may have been served on the Respondent, given the deficiencies in Parts 2 and 3, I do not see requesting a complete copy of the AT6 would assist. This application lacks any valid AT6.

16. Further, the terms of the Tenancy are such that the ish would have been 13 May 2015 and monthly on the 13th of each month thereafter. The Notice to Quit attempts to terminate the tenancy as at 3 March 2019, which is not an ish date. Even if valid evidence of service of the Notice to Quit were provided, there is no valid Notice to Quit. This has implications for each of the two grounds relied upon in the application:

    a. In regard to Ground 10, it cannot be a relevant ground for recovery in the current circumstances as there has not been a valid Notice to Quit.

    b. In regard to Ground 8, in the absence of a valid Notice to Quit, any application under Rule 65 would require consideration as to whether the lease complied with section 18(6) of the 1988 Act. In terms of section 18(6) of the 1988 Act, in order to seek possession under Ground 8 as sought by the Applicant, either the Tenancy requires to be a "a statutory assured tenancy" (that is, the ish having expired and no tacit relocation operating, all under section 16 of the 1988 Act) or the Tenancy Agreement requires to state in detail at least Ground 8. The Tenancy bears no clause which covers the contents of Ground 8 of Schedule 5 of the 1988 Act, the terms of which are quite specific.

17. If requested, the Tribunal is entitled to consider dispensing with the need for a valid AT6 in terms of section 19(1)(b). Given the deficiencies in regard to both

Ground 8 and Ground 10, if asked to dispense with such notice, I would refuse to do so in these circumstances as it would lack any purpose. The application could not be granted on either ground due to lack of a valid Notice to Quit (and the implications this has for each of the grounds).

18. In all the circumstances, I do not consider there to be any prospect of success of this application and an application based on the documentation provided is rejected on the basis that the application is frivolous.

RIGHT OF APPEAL

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:-

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal 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.

Joel Conn

Legal Member/Chair — **Date** 15 May 2019