Housing and Property Chamber
First-tier Tribunal for Scotland

Decision 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/19/2108

Re: Property at 18D High Street, Inverkeithing, Fife, KY11 1NN ("the Property")

Parties:

Douglas Sampson, 31 Manor Gardens, Dunfermline, KY11 8RW ("the Applicant")

Shane Bricknell, 18D High Street, Inverkeithing, KY11 1NN ("the Respondent")

1. On 4July 2019, an application was received from the Applicant. The application was made under Rule 65 of the Chamber Procedural Rules being by a private landlord for possession on termination under an Assured Tenancy. The following documents were enclosed with the application:-

    1. Copy tenancy agreement;
    2. Copy Notice to Quit;
    3. AT6 Form ;
    4. Copy rent statement;
    5. Texts from letting agent;
    6. Photograph;
    7. Section 11 Form; and
    8. Recorded delivery proof.

2. The Tenancy Agreement commenced on 23 August 2016 for a period of 6 months until 23 February 2017. The Notice to Quit was dated 30 May 2019 and sought vacant possession on 28 June 2019. The AT6 Notice submitted sought recovery under grounds of recovery of possession8, 11 and 12. It was dated 30 May 2019 and Part 4 advised that proceedings would be raised no earlier than 14 June 2019.

3. Further information was sought from the Applicant's agent raising the issue regarding where Grounds in 5 Schedule of the Housing (Scotland) Act 1988 were not narrated in the lease, then as required by section 18(6) of that Act a valid notice to quit required to be served to bring the contractual lease agreement to an end. The Applicant's agent responded by way of letter dated 30 August 2019, advising that in their opinion Section 18 (6) did not require that the Grounds in Schedule 5 had to be set out in length in the tenancy agreement, merely that the lease should make it clear that it can be brought to an end on that ground. They submitted that the lease did this by giving notice to the tenant the position would be sought on the basis of grounds 8,11, 12, or 16. They submitted that the Act does not require the lease to go any further. Further they submitted that they had not calculated the ish date to be 28 June 2019. This is not a notice under section 33 of the Act whether notice based on breach of tenancy by the tenant. In those circumstances the ish is not relevant.

DECISION

4. I have considered the applications 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."

5. After consideration of the application, I consider that the applications should be rejected on the basis that they are frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules.

REASONS FOR DECISION

6. "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. 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 applied as the test in this application and, on consideration of this test, I have determined that this application is frivolous, misconceived and has no prospect of success.

7. Section 18 of the 1988 Act provides as follows:-

18 Orders for possession.

(1)The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.

(2)The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3)If the First-tier Tribunal is satisfied that any of the grounds in Part I of Schedule 5 to this Act is established then, subject to subsections (3A) and (6) below, the Tribunal shall make an order for possession.

...

(6)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.

8. Section 16(1) of the 1988 Act provides as follows:-

"16 - Security of tenure

(1) After the termination of a contractual tenancy which was an assured tenancy the person who, immediately before that termination, was the tenant, so long as he retains possession of the house without being entitled to do so under a contractual tenancy shall, subject to section 12 above and sections 18 and 32 to 35 below—

(a) Continue to have the assured tenancy of the house; and

(b) observe and be entitled to the benefits of all the terms and conditions of the original contract of tenancy so far as they are consistent with this Act but excluding any—

(i) which makes provision for the termination of the tenancy by the landlord or the tenant; or

(ii) which makes provision for an increase in rent (including provision whereby the rent for a particular period will or may be greater than that for an earlier period) otherwise than by an amount specified in or fixed by reference to factors specified in that contract or by a percentage there specified, or fixed by reference to factors there specified, of an amount of rent payable under the tenancy,

and references in this Part of this Act to a "statutory assured tenancy" are references to an assured tenancy which a person is continuing to have by virtue of this subsection, subsection (1) of section 31 below, or section 3A of the Rent (Scotland) Act 1984.

(3)Notwithstanding anything in the terms and conditions of tenancy of a house being a statutory assured tenancy, a landlord who obtains an order for possession of the house as against the tenant shall not be required to give him any notice to quit."

9. Section 18 (6) of the 1988 Act provides that "*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."* In the application before me the tenancy agreement provides that the tenancy can be brought to an end at any time in terms of the "Irritancy" Clause 34 which provides if the "*Circumstances mentioned in Grounds 8,11, or 12 or 16 ... arise*". The tenancy

agreement does not make any other provision for the tenancy to be brought to an end under any of the Grounds in Schedule 5.

10. The Applicant's agent submitted that Section 18 (6) did not require that the Grounds in Schedule 5 had to be set out in length in the tenancy agreement, merely that the lease should make it clear that it can be brought to an end on that ground. They submitted that the lease did this by giving notice to the tenant the position would be sought on the basis of grounds 8,11, 12, or 16. I do not agree with their submission on this issue. I consider the cases of *Eastmoor LLP v Bulman , Sheriff Court (South Strathclyde, Dumfries and Galloway) (Dumfries) 5 June 2014* and *Royal Bank of Scotland v Boyle, Sheriffdom of Tayside Central and Fife at Stirling 21 May 1999 1999 Hous. L R 63* relevant in this matter. They considered the extent of the wording required in a lease agreement in relation to the Grounds in Schedule 5, in order for the Sheriff (or the Tribunal in this case) to dispense with the requirement for a valid Notice to Quit to have been served terminating the contractual assured tenancy and creating a statutory assured one. They held that more than a reference to the number of the Grounds was required. Reference is made to para 12-11 of decision of the *Royal Bank of Scotland v Boyle* where the Sheriff Principal stated "The *terms of section 18(6) are reasonably precise; what is required is that the terms of the tenancy must make provision for it to be brought to an end on the grounds relied upon by the landlord in terms of Schedule 5 of the Act. In my opinion this means that the essential ingredients of those conditions must be referred to in the tenancy agreement. ... I am not however satisfied that necessarily in all, cases incorporation by reference would be sufficient or indeed appropriate"*.

11. Given that only the numbers of the grounds has been referred to in the irritancy clause, I consider that in the present case the terms of section 18(6) have not been met. The tenancy therefore requires to first, have been brought to an end by either service of a valid notice of irritancy or by service of a valid Notice to Quit at the ish date before any order can be granted.

12. No notice of irritancy has been produced with the application and therefore it would appear that the contractual assured tenancy has not been terminated by Clause 34 of the lease agreement.

13. Turning to whether or not a valid notice to quit has been served bringing an end to the contractual assured tenancy. To determine the *"ish date"*, you need to consider the terms of the Tenancy Agreement. The first page of the tenancy agreement defines a

number of terms including "Term Date" and provides that the "The tenancy is for a period of 6 months commencing on 23 August 2016 expiring on 23 February 2016. There is no renewal duration period specified in the Tenancy Agreement and therefore the tenancy would renew on a 6monthly basis thereafter. I consider therefore that the "*ish date*", in this case falls every 23 August and 23 February. The Notice to Quit was dated 30 May 2019 and provides that the Respondent requires to remove by 28 June 2019. The Notice to Quit does not therefore end the tenancy on the "*ish date*" and I consider therefore that the contractual tenancy has not been brought to an end. The Notice to Quit in its present form is not valid and a contractual tenancy still exists.

14. Accordingly, no order for possession could be completely granted by the Tribunal.

15. For the reasons set out above, it seems to me that the application is frivolous as the statutory requirements are not met and the application should therefore be rejected

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 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 of the decision was sent to them. Information about the appeal procedure can be forwarded to you on request.

M.B

18/9/19

Legal Member/Chair **Date**