

Housing and Property Chamber
First-tier Tribunal for Scotland



**DECISION AND STATEMENT OF REASONS OF ALASTAIR HOUSTON, 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 Rules")

in connection with

1 Haughhead Buildings, Haughhead Road, Earlston, TD4 6EF ("the Property")

Case Reference: FTS/HPC/EV/19/1676

MR CHRISTOPHER MAKOWSKI, MS CHERYL MAKOWSKI ("the Applicant")

MR MICHAEL MOLONEY ("the Respondents")

Background

1. The application was made under Rule 65 of the Rules being an application by a private landlord for an order for possession upon one of the Grounds stated in Schedule 5 of the Housing (Scotland) Act 1988 ("the 1988 Act"). Attachments were provided with the application form to support the application and these attachments included copies of a Notice in terms of Section 19 of the 1988 Act ("Form AT6") and a Notice to Quit.
2. The schedule accompanying the application stated that there was no written tenancy agreement between the parties. It further stated that the Respondent had moved into the Property on 24 August 2010.
3. The Notice to Quit was dated 8 April 2019. It sought to terminate the tenancy on 19 May 2019. The Form AT6 was also dated 8 April 2019. It stated that possession was to be sought on the basis of Ground 14 of Schedule 5 of the 1988 Act and that an application to the Tribunal would not be made earlier than 19 May 2019.
4. A request for further information was sent to the Applicant's representatives on 11

June 2019. This requested comments on the selection of 19 May 2019 as the date on which the tenancy was terminated as per the Notice to Quit. The Applicant's representative confirmed that the date was selected in order to provide the Respondent with a 40 day notice period.

5. Another request for further information was sent to the Applicant's representatives on 4 July 2019. This asked for confirmation of the tenancy duration and the position regarding tacit relocation and the *ish*. The Applicant's representative advised that the tenancy was for an initial period of two months and was thereafter to continue on a month to month basis. They advised that the possession was not sought on the basis of the tenancy having reached its *ish* but rather on the basis of the tenant's conduct.

Decision

6. The circumstances in which an application is to be rejected are governed by 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."

7. **After consideration of the application, the attachments and correspondence from the Applicant's solicitor, 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 Procedural Rules.**

Reasons for Decision

8. There are two issues identified with this application. Section 18(6) of the 1988 Act states:-

(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.

The Applicant has listed the Ground 14 of Schedule 5 of the 1988 Act as being relied upon on the application form. This is a Ground upon which the Tribunal can make an order in respect of a property let on an ongoing contractual tenancy however, in terms of Section 18(6)(b) of the 1988 Act, the Tribunal shall not make an order for possession of a property let on an assured tenancy, not being a statutory assured tenancy, unless the tenancy agreement provides for it to be brought to an end on these grounds.

9. There is no written tenancy agreement between the parties. Accordingly, there is no provision made for the agreement to be brought to an end on the basis of Ground 14 of Schedule 5 of the 1988 Act. In terms of *Royal Bank of Scotland v Boyle* (1999) Hous LR 63, a summary of the essential ingredients of the Ground is required, if not exact citation. The Tribunal does not believe that, in the absence of a written tenancy agreement, the terms of Section 18(6)(b) can be satisfied.
10. The Tribunal is aware that the Applicant has provided a copy Notice to Quit with the

application. A valid Notice to Quit would terminate a contractual assured tenancy at its *ish*. If a tenant continued to occupy the Property after the *ish* date, this would be by virtue of a statutory assured tenancy. Any or all of the Grounds in Schedule 5 of the 1998 Act can be relied upon by a landlord when seeking an order for possession of a property let on a statutory assured tenancy. In the present application, the Applicant's representative has advised that the tenancy agreement made provision for an initial period of let of two months beginning on 24 August 2010. Thereafter, in the absence of notice given by either party, the tenancy agreement was to continue on a month to month basis. It would therefore appear to the Tribunal that any *ish* date would fall on the 24th day of each calendar month.

11. The copy Notice to Quit accompanying the application purports to terminate the agreement on 19 May 2019. This not a valid *ish* date on which the tenancy agreement can be brought to an end. The Notice to Quit served by the Applicant is not valid. Accordingly, there is an ongoing contractual assured tenancy between the parties and Ground 14 cannot be relied upon by the Applicant to found proceedings for an order for possession of the property.
12. '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. Accordingly, the present application is rejected on the basis that it is frivolous.

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.

A Houston

Mr Alastair Houston
Legal Member
29 July 2019