



**DECISION AND STATEMENT OF REASONS OF ANDREW UPTON, 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 Procedural Rules")

in connection with

5B Main Street, Bonhill, G83 9JU

**Case Reference: FTS/HPC/EV/19/1835**

**Mr Hugh Wells ("the applicant")**

**Philpott Platt Niblett & Wight ("the applicant's representative")**

**Ms Aileen McMartin ("the respondent")**

1. On 13 June 2019, an application was received from the applicant. The application was made under Rule 65 of the Procedural Rules being an application for recovery of possession of a property let on an Assured Tenancy. The following documents were enclosed with the application:-

- Copy Short Assured Tenancy Agreement dated 8 June 2016;
- Copy undated form AT5;
- Copy undated Notice to Quit;
- Copy undated Form AT6; and
- Copy undated notice in terms of section 33 of the Housing (Scotland) Act 1988.

## DECISION

2. I considered the application in terms of Rule 8 of the 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, the attachments and correspondence from the applicant, I consider that the application should be rejected on the

basis that it appears to be frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules, and I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1)(c) of the Procedural 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. L.R. 9. 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 to consider in this application in order to determine whether or not this application is frivolous, misconceived, and has no prospect of success.
5. This application proceeds under section 18 of the Housing (Scotland) Act 1988. In terms of the 1988 Act:-

### ***"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.*
- ... (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.*

### ***19 Notice of proceedings for possession.***

- (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 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 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.*
- (5) *The First-tier Tribunal 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.

**32 Short assured tenancies.**

(1) A short assured tenancy is an assured tenancy—

- (a) which is for a term of not less than six months; and
- (b) in respect of which a notice is served as mentioned in subsection (2) below.

(2) The notice referred to in subsection (1)(b) above is one which—

- (a) is in such form as may be prescribed;
- (b) is served before the creation of the assured tenancy;
- (c) is served by the person who is to be the landlord under the assured tenancy (or, where there are to be joint landlords under the tenancy, is served by a person who is to be one of them) on the person who is to be the tenant under that tenancy; and
- (d) states that the assured tenancy to which it relates is to be a short assured tenancy.

(3) Subject to subsection (4) below, if, at the finish of a short assured tenancy—

- (a) it continues by tacit relocation;...
- (b) .....

the continued tenancy... shall be a short assured tenancy, whether or not it fulfils the conditions in paragraphs (a) and (b) of subsection (1) above.

(4) Subsection (3) above does not apply if, before the beginning of the continuation of the tenancy..., the landlord or, where there are joint landlords, any of them serves written notice in such form as may be prescribed on the tenant that the continued... tenancy is not to be a short assured tenancy.

(5) Section 25 above shall apply in relation to a short assured tenancy as if in subsection (1) of that section the reference to an assured tenancy were a reference to a short assured tenancy.

**33 Recovery of possession on termination of a short assured tenancy.**

(1) Without prejudice to any right of the landlord under a short assured tenancy to recover possession of the house let on the tenancy in

*accordance with sections 12 to 31 of this Act, the First-tier Tribunal shall make an order for possession of the house if the Tribunal is satisfied—*

- (a) that the short assured tenancy has reached its finish;*
- (b) that tacit relocation is not operating; and*
- (c) .....*
- (d) that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house.*

*(2) The period of notice to be given under subsection (1)(d) above shall be—*

- (i) if the terms of the tenancy provide, in relation to such notice, for a period of more than two months, that period;*
- (ii) in any other case, two months.*

*(3) A notice under paragraph (d) of subsection (1) above may be served before, at or after the termination of the tenancy to which it relates.*

*(4) Where the First-tier Tribunal makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that finish shall end (without further notice) on the day on which the order takes effect.*

*(5) For the avoidance of doubt, sections 18 and 19 do not apply for the purpose of a landlord seeking to recover possession of the house under this section.”*

6. This application proceeds under section 18 of the 1988 Act. However, given that the applicant has provided a copy notice under section 33, it is appropriate that I pass comment on whether I consider that the tenancy in this case is a Short Assured Tenancy. I do not. In terms of section 32(1)(a), a tenancy must be for a period of not less than six months to be a Short Assured Tenancy. In this case, the tenancy commenced on 8 June 2016 and had a duration of 5 months and 29 days. That is not six months. It does not matter that it continued thereafter month to month by tacit relocation. The initial period of let was less than six months, and it is therefore not a Short Assured Tenancy.

7. Turning to the applicant's attempts to terminate the Assured Tenancy in terms of section 18 of the 1988 Act, I note that the proof of delivery suggests that the Notice to Quit and Form AT6 were delivered on 23 November 2018.
8. It is my opinion that the Notice to Quit is invalid. It appears to terminate the tenancy with immediate effect. It does not state an ish date. It gives no period of notice which is compliant with the lease, legislation or common law. As such, the contractual tenancy is continuing by tacit relocation.
9. In terms of section 18(6) of the Housing (Scotland) Act 1988, the 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 the conditions of subsection (6) are met. It follows that, to be entitled to recovery of possession of a property let on an assured tenancy, the applicant would have had to have first terminated the contractual tenancy. Having not done so, the applicant would need to satisfy the Tribunal that the conditions of subsection (6) are satisfied. I am satisfied that those conditions are met in this case. The application proceeds under Ground 11, and the terms of the tenancy agreement are sufficient to bring the tenancy to an end on that Ground.
10. However, in terms of s.19(1), the Tribunal may not make an order for possession where the landlord has not given notice to the tenant in form AT6. Whilst the applicant did so in this case, that notice expired on 23 May 2019 in terms of s.19(7). Whilst I have the power to dispense with the requirement to serve a form AT6 where I consider it reasonable to do so, I am not persuaded that in the circumstances of this case, standing the issues in particular with the notice to quit, that it is so reasonable to dispense with that requirement. Accordingly, I will not exercise my discretion under s.19(1)(b).
11. For those reasons, it is my view that the application is frivolous within the meaning of Rule 8(a). Further, it is my view that it would be inappropriate in these circumstances to accept this application in terms of Rule 8(c). I reject the application.

## **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.

Andrew Upton  
Legal Member  
28 June 2019