Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of Fiona Watson, Legal Member of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section Rule 8 of the First-tier Triunal for Scotland Hosing and Property Chamber Rules of Procedure 2017 ("the Rules")

Chamber Ref: FTS/HPC/EV/19/2238

Re: Property at Flat 5, 27 Sir Michael Street, Greenock, PA15 1PJ ("the Property")

Parties:

Chris Doak, 1/1, 250 Bearsden Road, Glasgow, G13 1LA ("the Applicant")

Magdalena Kurowska, Flat 5, 27 Sir Michael Street, Greenock, PA15 1PJ ("the Respondent")

1. On 18 July 2019 an application was received from the applicant. The application was made under Rule 65 of the Rules being an application by a landlord for possession of a property let under an Assured Tenancy in terms of section 18 of the Housing (Scotland) Act 1988 ("the 1988 Act"). The following documents were enclosed with the application:

    (i) Copy Tenancy Agreement
    (ii) Copy Notice to Quit
    (iii) Copy notice under s33 of the Housing (Scotland) Act 1988
    (iv) Rent statement

2. A request for further information was sent to the Applicant on 19 July 2019 and thereafter on 7 August 2019. The applicant responded to both in providing the following additional documents:
    (i) Copy Form AT6
    (ii) Copy section 11 notice to the Local Authority
    (iii) Photograph of an envelope addressed to the Respondent
    (iv) Copy Form AT5

Decision

3. I considered the Application in terms of Rule 65 of the Rules. I also considered the Application in terms of Rule 8 of the Rules. Rule 8 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."

4. After consideration of the application and the documents provided by the Applicant. I consider 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 DECISION

5. "Frivilous" in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Midlenhall) 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 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.

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

"18. Orders for possession

(1) The sheriff 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 sheriff 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, he shall make an order for possession.

(3A) If the sheriff is satisfied—

(a) that Ground 8 in Part I of Schedule 5 to this Act is established; and

(b) that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit,

he shall not make an order for possession unless he considers it reasonable to do so.

(4) If the sheriff is satisfied that any of the grounds in Part II of Schedule 5 to this Act is established, he shall not make an order for possession unless he considers it reasonable to do so.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the sheriff shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the sheriff in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit

(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

(6) The sheriff 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.

(6A) Nothing in subsection (6) above affects the sheriff's power to 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, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.

(7) Subject to the preceding provisions of this section, the sheriff may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

(8)In subsections (3A) and (4A) above—

(a) "relevant housing benefit" means—

(i) any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or

(ii) any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;

(aa)"relevant universal credit" means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;

(b) references to delay or failure in the payment of relevant housing benefit or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant.

7. The Applicant has provided a copy Form AT6 which seeks to rely on Grounds 8, 11 and 12 of Schedule 5 to the 1988 Act. That AT6 does not set out the grounds in full. The Applicant has also provided a copy Tenancy Agreement with his application. The Tenancy Agreement at Clause 32 states as follows:

"*The Landlord may terminate the tenancy by service on the tenant of a notice to quit. The Landlord may serve such notice either:*

i. To terminate the tenancy at its end date, or

ii. To terminate the tenancy where the Tenant has broken or not performed any of his obligations under this Agreement.

In the event that the tenant fails to remove from the House at the end of the period specified in such a notice to quit, the Landlord may bring legal action against the tenant to recover possession of the House on one or more of the grounds set out in section 33 and Schedule 5 to the Housing (Scotland) Act 1988. These grounds are set out in the Schedule to this Agreement."

8. By letter of 22 August 2019 the Applicant was requested to lodge a full copy of the tenancy agreement to include the schedule of grounds referred to in Clause 32 of the Tenancy Agreement as stated above. The Applicant lodged a further copy tenancy agreement which did not include any schedule of the grounds referred to. Accordingly, the Tribunal finds that such a schedule was not attached to the tenancy agreement and accordingly no intimation of the grounds of repossession contained within schedule 5 to the 1988 Act was given to the tenant.

9. In terms of section 18(6) of the 1988 Act, an order for repossession of a property currently let on an assured tenancy, not being a statutory tenancy, cannot be made unless the terms of the tenancy make provision for it to be brought to an end on the grounds in question. The Tenancy Agreement provided by the Applicant does not contain any terms allowing it to be brought to an end on any of the grounds of repossession.

10. In terms of the requirements of section 18(6) of the 1988 Act, I do not consider that the Tenancy Agreement is currently a statutory assured tenancy. In order for the existing agreement to be a statutory assured tenancy, a valid notice to quit must have been served on the tenant to bring the contractual tenancy to an end. The Notice to Quit provided by the Applicant requires removal of the tenant by 23 September 2019. That date has not yet been reached and accordingly, the contractual tenancy is still ongoing.

11. Furthermore, it should also be noted that in terms of Clause 32 of the Tenancy Agreement, the landlord can only raise proceedings to rely on one or more of the grounds contained in Schedule 5 to the 1988 Act "*at the end of the period specified in such a notice to quit."* That date has not yet been reached. The action is accordingly premature.

12. Further, it is also prudent to highlight that no valid proof of service has been lodged in respect of the Notice to Quit either. The Applicant has provided a photograph of an envelope addressed to the tenant. Said photo is dated 19 June 2019. The Notice to Quit, if it was indeed contained within said envelope, would appear to have been hand delivered to the tenant by the Applicant's representative. Hand delivery of a Notice to Quit is not valid service in any event and reference is made to the decision of *Govan Housing Association v Kane 2003 Hous LR 125*, which was also referred to in the case of *City of Edinburgh Council v Martin Smith [2016] SC EDIN 42* in relation to the validity of hand delivery of a notice to quit. *Govan* gives authority that hand delivery to the Property of a notice to quit by anyone other than Sheriff Officer is not competent service. Accordingly I do not consider that this notice has been competently served.

13. Accordingly, for the reasons outlined above I consider that the application for an order for repossession should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Rules.

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 appal 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,

Fiona Watson
Legal Member
19 September 2019