Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF JAN TODD, LEGAL MEMBER OF THE FIRST-TIER TRIBUNAL WITH DELEGATED POWERS OF THE CHAMBER PRESIDENT

Under Rule 8 and 5 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Procedural Rules")

in connection with

Case Reference: FTS/HPC/EV/19/3638

Dr Norma McAvoy c/o Freelands 139 Main Street Wishaw ML2 7AU ("the Applicant")
Mr Aaron Kane, Freelands Solicitor 139 Main Street Wishaw (Applicant Representative)

Mr Andrew James Harrison 1 Littlemill Way, Motherwell ML1 4FF ("the Respondent")

1. On 11th November 2019, an application was received from the Applicant. The Application was made under Rule 65 of the Procedural Rules, being an application for eviction in relation to a possession on termination of tenancy in terms of S33 of the Housing (Scotland) Act 1988. In clause 5 of the application form the Applicant makes reference to an order for possession on the basis of the Landlord giving notice in writing to the tenant that possession might be recovered on the basis the Property was formerly her principal home and that she requires the property to be returned to her. Clause 5 goes on to narrate that "a notice to Quit has expired the tenant remains in possession and proceedings have been raised no later than 6 months after the expiry of the Notice to Quit. The tenant is not entitled to possession of the Property by virtue of a

new tenancy".

2. The following documents were enclosed with the application:-
    - Copy Short Assured Tenancy Agreement between the parties dated 20th October 2015
    - AT6 notice dated 15th August 2019 and stating date proceedings will not be raised before as 21st October 2019
    - S33 notice dated 15th August 2019 requiring vacant possession by 21st October 2019 stating that the 21st October is the termination date of the tenancy
    - Copy Notice to Quit dated 15th August 2019 giving notice to Quit by 21st October 2019
    - track and trace showing item delivered on 17th August 2019
    - S11 Notice to Glasgow City Council stating proceedings will not be raised before 2019
    - Letter from Letting Agent GSL Property Management dated 15th August 2019 to the Respondent

3. The Tribunal wrote to the Applicant on 22nd November requesting a copy of the S11 notice served on the Local Authority and the Applicant's agents responded on 27th November enclosing a copy of the S11 notice addressed to North Lanarkshire Council and accompanying letter dated 26th November to North Lanarkshire council enclosing said Notice. On 11th December the legal member reviewing the application on behalf of the Chamber President requested further clarification namely:-

"The Notice to Quit specifies a date which does not appear to coincide with an ish or end date of the tenancy. Please clarify the basis upon which the Tribunal can proceed to consider the application". A response was requested by 25th December 2019.

A response was received in the form of a letter from Freelands solicitors the Applicant's solicitors which referred to the requirements of the Sheriff Courts

(Scotland) Act 1907 and the Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988.

The representative correctly states that the Notice to Quit "is a notice terminating the tenancy agreement at its natural end (the ish date). It must give the tenant at least 40 days' notice. That is the fundamental point of and principle underpinning a Notice To Quit. There is also certain prescribed information which is of the essence of the Notice.

Frankly all of the above has been satisfied subject to the date noted on the Notice to Quit is perhaps one or two days out. Our view is this would simply be an error and not substance. Therefore our view is that it is of no practical significance nor does it have any material effect on the purpose of the Notice."

4. The Tribunal considered the application further and wrote to the Applicant's representatives again on 31st December with a request for further information and submissions. In particular the Tribunal requested
    a. An AT5 form if the application was to proceed as a Rule 66 application
    b. Clarification about whether the application is to proceed under Rule 65 as an AT6 had been lodged and if so confirmation as to whether notice was given to the tenant before the beginning of the tenancy that recovery of possession may be sought on this ground
    c. Submissions as to what the applicant considers the "ish" date to be in this case and any comment on the fact the tenancy appeared to be silent on the matter of what happens after the expiry of the initial term.
5. The Applicant's representatives have responded in detail by e-mail dated 13th January 2020.
6. Firstly they have enclosed an AT5 form dated 20th October 2015.
7. The Representative then goes on to consider in some detail how long the lease was for and why there is an argument that it may have been for 6 months even though by simple arithmetical calculation the dates specified in the lease indicate it may be one day short of 6 months.
8. This Tribunal is not concerned about that point in this decision. If that was the only matter at issue the legal member considering the application would have felt this should be dealt with by legal submissions at a case management discussion.

9. The issue that appears to the Tribunal to be fundamental and fatal to this application is the question of the date specified in the Notice to Quit which the agent agrees is not the ish date of the tenancy. The Applicant's Representative narrates in his e-mail

   "As previously explained in our former correspondence we are of the view that the ish date must coincide with when the original tenancy agreement was to end, which was 19th April 2016. Thereafter if there is no specific provision regulating the continuation of the tenancy post termination or post conversion to a statutory assured tenancy, then on its termination it will simply continue by way of tacit relocation and the term originally entered into. What that means is that the ish date will then either be 19 April of every year or 20 th October of every year (i.e. six months rolling period from April to October and October to April
   As previously stated in our previous correspondence in relation to the ish date we are of the view that **the letting agents who issued the Notice to Quit have in fact issued it with the wrong date**. You will no doubt recall our view in relating to this particular discrepancy in the form of the Notice to Quit and we do not believe it is fatal to the acceptance and progress of this claim. To summarise our position in short, the overriding principles of the Tribunal are to ensure the expeditious hearing of claims in the interests of justice. Moreover the purpose of a Notice to Quit and the legislative purpose behind it was to ensure tenants were provided with sufficient notice that their tenancy would be coming to an end. Therefore in our view so long as the substance of the Notice to Quit is correct and obviously within reason the dates being correct there or thereabouts is sufficient for the validity of the Notice to Quit.

10. The Agent goes on to mention clause 31 of the tenancy agreement which stipulates that where the tenant fails to give written notice the tenancy will continue on a rolling month to month basis until terminated by the tenant or landlord.

11. The Agent repeats that considering the terms of clause 31 the notice to Quit "would still revert to a similar situation of being incorrect in terms of form in so far as the dates would be slightly out".

12. The Agent finishes by reserving the Applicant's right to in relation to proceeding separately under Rule 65 and relying on the AT6 form.

DECISION

13. I considered the application in terms of Rule 5 and 8 of the Procedural Rules. Those Rules provide:-

14.

"Rejection of application

Rule 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 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."

15. After consideration of the application, the attachments and correspondence from the applicant, I consider that the application should be rejected on the basis that I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1) (a) and (c) of the Procedural Rules.

REASONS FOR DECISION

16. The Tribunal has requested further information from the applicant in order to consider whether or not the application must be rejected as frivolous within the meaning of Rule 8(1) (a) of the Procedural Rules. '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.

17. the following issues have been identified in the paperwork submitted:-

a. The Notice to Quit does not specify a valid ish date. The Applicants agree that the 19th October is not a valid ish date in both their agent's letter of 18th December and the e-mail of 13th January. They aver that the ish date could be either 19th April or October or 20th April or October in any year. They do however agree that the ish date used in the Notice to Quit which was 21st October 2019 is not an ish date.

b. The Notice to Quit does provide for over months' notice which is more than the minimum required by Section 112 of the Rent Scotland Act 1984 but it does not refer to a valid ish (or termination) date therefor it is invalid.

c. The tenancy commenced on 20th October 2015 and the tenancy Agreement set out that it was for a period of 6 months commencing on 20/10/2015 and expiring on 19/04/2016. In the absence of any provision in Tenancy Agreement to the contrary it is assumed tacit relocation is in operation. Clause 31 of the Tenancy Agreement states that in the event of the Tenant failing to give written notice the tenancy will continue on a rolling month to month basis until terminated by the tenant or the landlord. As no submissions have been made that the tenant has given such written notice it is assumed that the tenancy has continued on a rolling month to month basis from 19th April 2016 until the present date. That means the ish date should be 19th of each month and the Applicant having given a Notice to Quit with an ish date of 21st October has failed to validly terminate the contractual tenancy, the 21st of October not being a monthly date on which the tenancy automatically renews if not validly terminated. Even if there was an argument that the 20th of any month could be a valid ish date, the Notice to Quit records the 21st as the ish date. The Applicants agree this is inaccurate and invalid but have sought to argue that this is a mere error of form and is not of substance given that substantial notice has been given to the Tenant. The Tribunal does not accept this argument. The termination on a valid ish date is

an essential requirement of any application in terms of s33 of the Act. Having failed to validly terminate the tenancy on an ish date, the contractual tenancy has continued and the Applicant cannot found on S33 of the Housing (Scotland) Act 1988 as the contractual tenancy has not been brought to an end. This is not a discrepancy or a matter for Tribunal discretion. It is a fundamental and well established rule of property law and cannot be disregarded.

d. After consideration of the application, the attachments and correspondence from the Applicant 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) and Rule 8(1) (c) of the Rules.

18. Accordingly, for this reason, this application must be rejected upon the basis that I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1)(a) and (c) of the Procedural 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 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.

Jan Todd
Legal Member
16th January 2020