Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF NEIL KINNEAR, 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

46 Coronation Street, Carstairs Junction, South Lanarkshire, ML11 8RB

Case Reference: FTS/HPC/EV/18/0067

AMPG LTD T/A Ahuga Holdings ("the applicant")

MR JACOB NICHOLS ("the respondent")

1. On 4th January 2018, an application was received from the applicant via its property agents. The application was made under Rule 65 of the Chamber Procedural Rules being an application by a private landlord for possession of rented property let under an Assured Tenancy. The following documents were enclosed with the application:-
   (a) Copy Short Assured Tenancy Agreement;
   (b) Copy Notice to Quit;
   (c) Copy Form AT6;
   (d) Copy Section 33 Notice;
   (e) Copy s.11 Notice;

(f) Proof of service; and

(g) Copy Rent Account Statement.

DECISION

2. I considered the application in 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."

3. After consideration of the application, the attachments and correspondence from the

applicant's property agents, 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 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 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.

5. The notice to quit, which is dated 8th August 2017, is invalid in respect that it specifies a date to leave the premises of 8th October 2017. That termination date is not an *ish* of the tenancy agreement, as that date is required to be in order to constitute an effective notice. The Short Assured Tenancy Agreement states at paragraph 1.5 that the tenancy commences on 8th May 2017 and has a duration of 6 months. Accordingly, the *ish* of the lease has not yet been reached, and the notice is ineffectual.

6. The applicant is left to rely on the AT6 alone in order to attempt to validly terminate the lease. In so doing, the applicant relies upon the grounds contained in para 8 of Sched 5 of the *Housing (Scotland) Act 1988.*

7. Section 18(1) and 18(6) of the *Housing (Scotland) Act 1988* provide as follows:

   "(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.

   (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. It has been held by the Scottish courts in the cases of *Royal Bank of Scotland v Boyle* 1999 Hous LR 63 and *Eastmoor LLP v Bulman* 2014 G.W.D. 26-259, that a lease may only be brought to an end prior to its *ish* if there is a statutory or conventional irritancy, and that section 18(6) of the *Housing (Scotland) Act 1988* is in effect a provision *anent* conventional irritancies the purpose of which is to restrict the conventional irritancies to the grounds set out in section 18(6)(a). For that reason, the tenancy agreement must provide for it to be brought to an end on the ground in question, being a ground in schedule 5 to the 1988 Act specified in section 18(6)(a). Since therefore a tenancy agreement may only be brought to an end prior to its *ish* on certain permitted conventional grounds, the parties must contract in such a way that the contract itself sets out the grounds for bringing to an end the lease prior to determination of its *ish*. While this can be done by an exact citation of the grounds in the lease, it is not sufficient for the tenancy agreement merely to refer to the number of the ground in schedule 5. Best practice is to refer to its number and terms *ad longum*; if the ground is summarised, the summary must contain the "essential ingredients" of the ground in question. It is an essential condition of para 8 of Sched 5 of the *Housing (Scotland) Act 1988* that the tenant is able to purge the irritancy at any time between service of the notice and the hearing.

9. In this case, the contractual terms do not at any point attempt to reflect, repeat or incorporate the essential elements of the ground contained in paras 8 of Sched 5 of the *Housing (Scotland) Act 1988*. Instead, the contract simply notes that non-payment of any amount of rent for a period of 14 days constitutes a material breach which might entitle the landlord to terminate the tenancy at paragraph 1.9, and makes reference in paragraph 5.1 to the provision that neither party is entitled to give notice to quit which would have effect before the expiry of the initial period defined in paragraph 1.4 ... except in the case of material breach of the tenant by the other party (sic), or if any of

the grounds in schedule 5 to the *Housing (Scotland) Act 1988* are satisfied. Paragraph 1.9 of the lease does not have either of the essential features of para 8 of Sched 5 of the *Housing (Scotland) Act 1988* as it allows the landlord to terminate the lease following non-payment of any amount of rent for a period of 14 days. Paragraph 5.1 merely refers to schedule 5 without providing an exact citation of its terms nor a summary containing its essential ingredients.

10. For these reasons, the provisions in the tenancy agreement are insufficient to satisfy the requirement in s 18(6)(b) of the *Housing (Scotland) Act 1988* that the terms of the tenancy should make provision for it to be brought to an end on the grounds relied upon by the landlord, and accordingly this application has no prospect of success and must be rejected upon 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.

N Kinnear

Neil Kinnear
Legal Member
24th January 2018