



**Decision and Statement of reasons of Mrs Jan Todd, Legal Member of the First-tier Tribunal for Scotland (Housing and Property Chamber) 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”)**

Case Ref: FTS/HPC/EV/18/0021

**Re: Property at 113, Hamilton Road Motherwell, ML1 3 DG**

**Parties: John McConville**

**(“the Applicant”)**

**Farooq Mohammed**

**(“the Respondent”)**

1. On 15<sup>th</sup> December 2017 an application was received from the applicant via his representative Love Homes. The application was made under Rule 66 of the Rules being an application by a private landlord for possession of a rented property on termination of a Short Assured Tenancy.

The following documents were received:-

1. Copy tenancy agreement dated 16<sup>th</sup> May 2016
2. Copy notice to quit
3. Copy Form AT5
4. Copy S33 notice
5. Copy S11 notice to North Lanarkshire Council

2. In terms of the tenancy agreement the Landlord is Love Homes who is the agent of the owner and is acting on his behalf. The Respondent is noted as the Tenant. The tenancy agreement commenced on 16<sup>th</sup> May 2016 and was for an initial period of 6 months to 16<sup>th</sup> November 2016. In terms of S6 of the Tenancy Agreement two months notice by either party is required in writing to terminate the tenancy, otherwise a new contractual tenancy is created. A Notice to Quit was delivered by hand to the tenant at the offices of Love Homes. The Notice to Quit and S33 notice are dated 16<sup>th</sup> September 2017.

### 3. DECISION

I considered the application in terms of Rule 8 of the Rules and that Rule provides:-

#### *“Rejection of the Application*

8. (1) *The Chamber President or another member of the First Tier Tribunal under 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 is resolved*
- c) they have good reason to believe that it would not be appropriate to accept the application*
- d) they consider the application is being made for a purpose other than a purpose specified in the application or*
- e) the applicant has made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First Tier Tribunal under 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 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 reasons for the decision.*

5. After consideration of the application, the attachments and the correspondence from the Applicant I consider that the Application should be rejected on the basis that it is frivolous in terms of Rule 8(1) (a) of the Rules.

#### 6. Reasons for the Decision

“Frivolous” in the context of legal proceedings is defined by Lord Justice Binham 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.*

#### 7. S33 of the Act states:-

S33(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 tenancy has reached it's ish
- b) That tacit relocation is not operating and

- c) That the landlord has given to the tenant notice stating that he requires possession of the house

8. Rule 34.8 of Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (Schedule 1 Part II) state that a notice under section 34,35,36,37 or 38 of the Sheriff Courts (Scotland) Act 1907 which relate to notices of removal may be given by

- a) a sheriff officer
- b) the person entitled to give such notice or
- c) the solicitor or factor of such person

posting the notice by registered post or the first class recorded delivery service at any post office within the United Kingdom in time for it to be delivered at the address on the notice before the last date on which by law such notice must be given addressed to the person entitled to receive such notice and bearing the address of the person at the time, if known, or if not known, to the last known address of that person.

(2) A sheriff officer may also give notice under a section of the Sheriff Courts (Scotland) Act 1907 mentioned in paragraph (1) above in any manner in which he may serve an initial writ.

9. Sheriff Johnston considered service in Govan Housing Association v Thomas Kane 6<sup>th</sup> July 2001 and confirmed that in his view, the service of a notice to quit, which is such a fundamental and important document for the purpose of recovery of heritable possession, required to be served in the manner set out in S.34.8.

9. In terms of the rules relating to notices of removal set out above there is no option of delivering a Notice to quit or Notice of intention to raise proceedings by personal service other than personal service by sheriff officer. By e-mail of 18<sup>th</sup> January Ms McCaughey confirmed the Notices were collected by the tenant at the Office of Love Homes. The Notice to Quit and S33 notice have not been validly served, the tenancy has therefore not been terminated, the requirements of S33 of the Act are not met and the current application has no chance of success and is therefore frivolous.

Observation: - Even if the Notice to Quit and S33 Notice had been served by recorded delivery post the requisite 2 months' notice would not have been able to be given before the ish date.

### **What you should do now:-**

If you accept the decision there is no need to reply.

If you disagree with the decision then an applicant aggrieved by the decision of the Chamber President, or another member of the First Tier Tribunal acting under delegated powers of the Chamber President, 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 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.

J Todd

Legal Member

Date

2/2/18