Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF JOSEPHINE BONNAR, 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

41 East Bridge Street, Falkirk ("the Property")

Case Reference: FTS/HPC/EV/21/0253

Stephen Dick, 25 Watersend Road, Carron, Falkirk ("the Applicant")

Alison McCue, 41 East Bridge Street, Falkirk ("the Respondent")

1. By application received on 2 February 2021, the Applicant seeks an order for recovery of possession of the property in terms of Rule 65 of the Rules and Section 18 of the Housing (Scotland) Act 1988 ("the 1988 Act"). The Applicant lodged documents in support of the application including AT6 Notice and copy tenancy agreement. The tenancy agreement states that the initial term of the tenancy is 2/2/09 until 2/8/09 and that it "will continue until terminated by one party giving the other not less than one months notice of termination in writing".

2. The Tribunal wrote to the Applicant requesting further information and documentation. The Applicant was asked to provide a copy of the Notice to Quit served on the Respondent. He was also notified that the AT6 Notice lodged did not appear to give the correct period of Notice, as 6 months notice was now required in terms of the Coronavirus (Scotland) Act 2020. In response the Applicant lodged a Notice to Quit dated 15 February 2021 which calls upon

the Respondent to vacate the property on 20 August 2021. A further AT6 was also lodged which also specified the 20 August 2021 as the earliest date that an application could be submitted to the Tribunal.

DECISION

3. The Legal Member 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."

4. **After consideration of the application and documents lodged in support of same 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) of the Rules.

Reasons for Decision

5. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court,* (1998) Env LR9. He indicated at page 16 of the judgment; *"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 the Legal Member has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success.

6. The Legal Member noted that the Applicant has submitted two AT6 Notices. The first does not give the Respondent the correct period of Notice, as 6 months' notice is now required following the amendments to the 1988 Act introduced by the Coronavirus (Scotland) Act 2020. The second appears to specify the correct period of Notice. However, this period of notice has not yet expired and as a result cannot be relied upon until the relevant date, 20 August 2021, has passed.

7. The Tribunal notes that the Applicant could ask the Tribunal to dispense with service of the AT6 notice in terms of Section 19(1)(b) of the 1988 Act. However, the Notice to Quit lodged by the Applicant also specifies the 20 August 2021. Section 112 of the Rent (Scotland) Act 1984 states that a Notice to Quit must give at least 4 weeks' notice. The Notice submitted by the Applicant gives 6 months, presumably to tie in with the AT6. However, these notices do not require to specify the same date. On the other hand, in order to terminate the tenancy contract, the the Notice to Quit must specify a date which coincides with an ish or end date of the tenancy. From the tenancy agreement which has been lodged it would appear that there has been an ish or end date on the 2 February and 2 August each year, since the expiry of the initial term. The date specified in the Notice is 20 August 2021, which is not an ish. Furthermore, the date specified in the Notice has not passed. The Legal Member is therefore satisfied that the Notice to Quit which has been lodged is invalid and that the tenancy contract has not yet been terminated.

8. The Legal Member proceeded to consider whether the application could still be considered in terms of Section 18(6) of the 1988 Act. This states "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 1 of Schedule 5 to the 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**". This provision allows a landlord to make an application to the Tribunal, without serving a valid notice to quit. However, in Royal Bank of Scotland v Boyle 1999 HousLR it was held that, where an invalid Notice to Quit had been served, and the Pursuer sought to rely on Section 18(6) of the Act, "(1) that the essential ingredients of the grounds for recovery of possession in Schedule 5 to the 1988 Act must be referred to in the tenancy agreement, and while this could be done by an exact citation of the grounds, and maybe also by providing a summary containing the essential ingredients of the grounds, incorporation by reference would not necessarily be appropriate". The Legal Member notes that the tenancy agreement which has been produced does not make any specific provision for recovery of possession on any of the grounds contained within Schedule 5. As a result the Applicant has failed to meet the requirements of section 18(6) and cannot proceed under this section. In order to raise proceedings for recovery of the property, the Applicant must first bring the contractual tenancy to an end. The Notice to Quit which has been lodged is invalid and does not bring the contractual tenancy to an end. Accordingly, the Applicant has not complied with the requirements of the legislation and the application cannot succeed.

9. As the Notice to Quit is invalid and the requirements of the 1988 Act have not been met the Legal Member determines that the application is frivolous, misconceived and has no prospect of success. The application is rejected on that basis.

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.

Josephine Bonnar
Legal Member
17 February 2021