DECISION AND STATEMENT OF REASONS OF LEGAL MEMBER (under 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")

Chamber Ref: FTS/HPC/EV/19/1304

Re: Property at 17 St Valery Drive, St Ninians, Stirling, FK7 9HW **("the Property")**

Parties:

Gary Anderson ("the Applicant")
Mary McLaughlin ("the Respondent")

Joel Conn (Legal Member)

BACKGROUND

1. On 26 April 2019 an application was drafted for the Applicant under Rule 65 of the Rules, being an application for an order for possession in relation to an assured tenancy under which the Applicant leased to the Respondent the Property from 23 September 2016 until 23 September 2017, which would then "continue on a month to month basis thereafter" ("the Tenancy").

2. I noted from the routine title investigations by the Tribunal that the Property is actually owned by Gary Anderson and Fay Margaret Anderson "equally between them". Notwithstanding the terms of the Tenancy agreement, there is a question as to whether Fay Anderson would require to be a joint applicant. Given my decision, it is not necessary to consider this further in the application.

3. Section 5 of the application stated that the ground for possession was: "Ground 1, My wife and I have separated and the accommodation has been granted to my spouse as part of the separation agreement. My former spouse requires the home at ST Valery Drive for her principal home" (all *sic*).

4. On lodging, the Tribunal's clerk noted that the application lacked an AT6 (notice under section 19 of the *Housing (Scotland) Act 1988* and requested this from the Applicant on 1 May 2019 along with "evidence that the possession grounds or ground have been met".

5. The application was accompanied by a Notice to Quit and a notice under section 33 of the 1988 Act (a "Section 33 Notice") both dated 12 November 2018 and providing the Respondent with notice that the Applicant wished the

bring the tenancy to a conclusion and retake possession as at 11 January 2019.

6. Following the letter of 1 May 2019, the Applicant provided the Tribunal with an AT6 referring to Ground 1 of Schedule 5 to the 1988 Act and purporting to have given the Respondent notice of the intention to recover possession on this ground due to the need for his wife to occupy the Property as her home. The AT6 notice purported to be dated 7 May 2019 and stated at Part 4: "Proceedings will not be raised before 8/5/19".

7. As stated, the application relied on eviction on Ground 1 of Schedule 5 to the 1988 Act. This reads:

> *Not later than the beginning of the tenancy the landlord (or, where there are joint landlords, any of them) gave notice in writing to the tenant that possession might be recovered on this Ground or the First-tier Tribunal is of the opinion that it is reasonable to dispense with the requirement of notice and (in either case)—*
>
> *(a) at any time before the beginning of the tenancy, the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them occupied the house as his only or principal home; or*
>
> *(b) the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them requires the house as his or his spouse's or civil partner's only or principal home, and neither the landlord (or, in the case of joint landlords, any one of them) nor any other person who, as landlord, derived title from the landlord who gave the notice mentioned above acquired the landlord's interest in the tenancy for value.*

There is no reference to Ground 1 in the Tenancy agreement nor any evidence of "notice in writing to the tenant" of recovery under that ground being given to the tenant "not later than the beginning of the tenancy".

8. No evidence of the date of service of the Notice to Quit, Section 33 Notice or AT6 was provided and, in light of the dates in the AT6, a Legal Member who considered the papers instructed the Tribunal to request further information from the Applicant. On 20 May 2019, the Tribunal wrote to the Applicant seeking (amongst other matters):

   a. Evidence of any notification, prior to the commencement of the tenancy, regarding the possibility of recovery under Ground 1;

   b. Proof of delivery of the AT6 and Notice to Quit; and

   c. The Applicant's comments on the date in the Notice to Quit, as the 11 January 2019 referred to in the notice did not appear to be an ish date (termination date) in the Tenancy agreement.

9. On or around 21 May 2019, the Applicant sent an undated letter to the Tribunal clarifying:

   a. That the Notice to Quit was hand-delivered to the Respondent on 12 November 2018.

   b. That the date of service of the AT6 was "the date of the notice on the AT6 form" (that is, 7 May 2019) and it was sent that day by recorded delivery to the Respondent on that date. The Applicant said that he had telephoned the Respondent and she confirmed receipt.

   c. "[T]he grounds for repossession is based on Ground 1, I have separated from my wife… Ms McLaughlin was never informed that I may separate from my wife but did receive a copy of the tenancy agreement."

10. The application was considered by myself as the current Legal Member under delegated powers in order to carry out the functions detailed in Rules 5 and 8.

DECISION

11. I considered that the application in terms of Rules 5 and 8 of the Rules. These Rules provide:

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 to be 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.

12. Rule 65 (as amended), governing the application, provides:

Where a landlord makes an application under section 18(1) (orders for possession) of the 1988 Act, the application must—

(a) state—

(i) the name, address and registration number (if any) of the landlord;

(ii) the name, address and profession of any representative of the landlord;

(iii) the name and address of the tenant; and

(iv) the possession grounds which apply as set out in Schedule 5 of the 1988 Act;

(b) be accompanied by—

(i) a copy of the tenancy agreement (if available) or, if this is not available, as much information about the tenancy as the landlord can give;

(ii) a copy of the notice served on the tenant by the landlord of intention to raise proceedings for possession of a house let on an assured tenancy;

(iii) a copy of the notice to quit served by the landlord on the tenant (if applicable); and

(iv) evidence as the applicant has that the possession ground or grounds has been met;

(v) a copy of the notice given to the local authority by the landlord under section 11 of the Homelessness (Scotland) Act 2003 (if applicable); and

(vi) a copy of Form BB (notice to the occupier) under schedule 6 of the Conveyancing and Feudal Reform (Scotland) Act 1980 (if applicable); and

(c) be signed and dated by the landlord or a representative of the landlord.

13. Section 18(6) of the 1988 Act (as amended) 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 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.

14. Section 19 of the 1988 Act (as amended) states:

(1) The First-tier Tribunal shall not entertain proceedings for possession of a house let on an assured tenancy unless—

(a) the landlord (or, where there are joint landlords, any of them) has served on the tenant a notice in accordance with this section; or

(b) the Tribunal considers it reasonable to dispense with the requirement of such a notice.

(2) The First-tier Tribunal shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the Tribunal.

(3) A notice under this section is one in the prescribed form informing the tenant that—

(a) the landlord intends to raise proceedings for possession of the house on one or more of the grounds specified in the notice; and

(b) those proceedings will not be raised earlier than the expiry of the period of two weeks or two months (whichever is appropriate under subsection (4) below) from the date of service of the notice.

(4) The minimum period to be specified in a notice as mentioned in subsection (3)(b) above is—

(a) two months if the notice specifies any of Grounds 1, 2, 5, 6, 7, 9 and 17 in Schedule 5 to this Act (whether with or without other grounds); and

(b) in any other case, two weeks.

15. After consideration of the application and supporting papers, I considered 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 THE DECISION

16. "Frivolous" in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court, [1997] EWCA Civ 1575*. 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 this definition that I have considered as the test in this application in holding that the application is frivolous in that it has no prospect of success for the reasons following.

17. In consideration of all the papers, the AT6 notice did not satisfy the requirements of the 1988 Act in my view. It provided a single day's notice, at best, where the terms of section 19(4)(a) of the 1988 Act, it required to provide two months' notice.

18. Further, in terms of section 18(6) of the 1988 Act, the Tribunal cannot make an order under Ground 1 in an assured tenancy, that is a tenancy where a valid Notice to Quit has not yet been issued (and thus the tenancy has not yet turned into a statutory assured tenancy). No such Notice to Quit has been provided with the application. The terms of the Tenancy are such that the ish would have been 23 September 2017 and monthly on the 27th of each month thereafter. The Notice to Quit attempts to terminate the tenancy as at 11 January 2019. It is not a valid notice to quit as it does not terminate the Tenancy at an ish date.

19. If requested, the Tribunal is entitled to consider dispensing with the need for a valid AT6 in terms of section 19(1)(b) of the 1988 Act as well as dispense with the lack of prior notice of potential recovery under Ground 1 (all as specified within the wording of Ground 1 in Schedule 5 of the 1988 Act). Given the lack of a valid Notice to Quit, if asked to dispense with such notices, I would refuse to do so in these circumstances as it would lack any purpose. The application could not be granted due to lack of a valid Notice to Quit (and the fact that this remains an assured tenancy, and not a statutory assured tenancy).

20. In all the circumstances, I do not consider there to be any prospect of success of this application and an application based on the documentation provided is rejected on the basis that the application is frivolous.

21. I noted that the application also lacked a copy of the notice given to the local authority by the landlord under section 11 of the *Homelessness (Scotland) Act 2003*, as required by Rule 65(b)(v). Had I not refused the application on the above grounds, I would have required a copy of such a notice, as well as clarification as to the ownership of the Property (as referred to in paragraph 2 above) before considering the application further.

22. I further considered whether the application may be acceptable if considered under Rule 66 (given the Section 33 Notice lodged). No AT5 was provided but, given the deficiency with the Notice to Quit, I did not request a copy. Even with a valid AT5, the application would not be capable of being accepted under Rule 66 due to the lack of a valid Notice to Quit.

RIGHT OF APPEAL

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:-

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal 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.

J Conn

Legal Member/Chair 31 May 2019 **Date**