

Housing and Property Chamber First-tier Tribunal for Scotland



DECISION AND STATEMENT OF REASONS OF THE FIRST-TIER TRIBUNAL in the case

APPLICANT: MR WILLIAM OWEN, C/O OWEN & CASSIDY, 64
CORSTORPHINE ROAD, EDINBURGH

RESPONDENT : MS JODIE DIXON

PROPERTY ADDRESS: 52 HIGH STREET, PEEBLES, EH45 8AN

CASE REFERENCE: FTS/HPC/EV/18/0409

BACKGROUND

1. On 21st February 2018 an application was received from the Applicant. The application was made under Rule 66 of the Schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("The 2017 Regulations") being an application by a private landlord to obtain possession, under section 33 of the Housing (Scotland) Act 1988 "the 1988 Act", of rented property let under a short assured tenancy. The grounds for seeking an order for eviction, however, were rent arrears.
2. The application stated that the following documents were being submitted in support of the it:-
 - a) Copy of the lease agreement relied upon,
 - b) Copy AT6, section 33 and execution of service,
 - c) S11 notice,
 - d) Copy statement of rent
3. The documents actually provided in support of the application were as follows:-
 - a) Copy lease dated 31.05.16, the initial rental period being 20.06.16 – 20.12.16
 - b) Copy notice to quit, seeking possession of the property as at 26.01.18;
 - c) Sheriff officers certificate of execution of service of Notice to Quit and s33 notice stating notices served on 9 Jan 2018;
 - d) S11 notice;
 - e) Copy AT6 stating reasons for removal as Grounds 11 & 12 of Schedule 5 to the Housing (Scotland) Act 1988;

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- f) Rent statement
- 4. The following documents were not submitted:-
 - a) S33 notice;
 - b) AT5 form advising tenant that the lease was a short assured tenancy.
- 5. The First Tier Tribunal attempted to obtain a copy of the Land Certificate relating to the property. The Tribunal was unable to identify titles to the property.

DECISION

- 6. The legal member considered the application in terms of Rule 8 of the Schedule to the 2017 Regulations. 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.

- 7. After consideration of the application and other documents submitted in support of it, the Legal Member considers that the application should be rejected on the basis that it would not be appropriate to accept the application in accordance with Rule 8 (1)(c) .

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REASONS FOR DECISION

8. The Housing (Scotland) Act 1988 provides as follows:-

18 Orders for possession.

(1)The sheriff 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.

(2)The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3)If the sheriff is satisfied that any of the grounds in Part I of Schedule 5 to this Act is established then, subject to [subsections (3A) and (6)] below, he shall make an order for possession.

(3A)If the sheriff is satisfied—

(a)that Ground 8 in Part I of Schedule 5 to this Act is established; and

(b)that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit [or relevant universal credit],

he shall not make an order for possession unless he considers it reasonable to do so.]

(4)If the sheriff is satisfied that any of the grounds in Part II of Schedule 5 to this Act is established, he shall not make an order for possession unless he considers it reasonable to do so.

(4A)In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the sheriff shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the sheriff in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit [or relevant universal credit].

(5)Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

(6)The sheriff 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—

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(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.

(6A)Nothing in subsection (6) above affects the sheriff's power to 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, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.]

(7)Subject to the preceding provisions of this section, the sheriff may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

(8)In subsections (3A) and (4A) above—

(a)“relevant housing benefit” means—

(i)any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or

(ii)any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;

(aa)“relevant universal credit” means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;]

(b)references to delay or failure in the payment of relevant housing benefit [or relevant universal credit] do not include such delay or failure so far as referable to any act or omission of the tenant.]

19 Notice of proceedings for possession.

(1)The sheriff 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

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

(2)The sheriff shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground [and particulars of it are] 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 sheriff.

(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.

(5)The sheriff may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on Ground 8 in Schedule 5 to this Act.

(6)Where a notice under this section relating to a contractual tenancy—

(a)is served during the tenancy; or

(b)is served after the tenancy has been terminated but relates(in whole or in part) to events occurring during the tenancy,

the notice shall have effect notwithstanding that the tenant becomes or has become tenant under a statutory assured tenancy arising on the termination of the contractual tenancy.

(7)A notice under this section shall cease to have effect 6 months after the date on or after which the proceedings for possession to which it relates could have been raised.

32 Short assured tenancies.

(1)A short assured tenancy is an assured tenancy—

(a)which is for a term of not less than six months; and

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(b)in respect of which a notice is served as mentioned in subsection (2) below.

(2)The notice referred to in subsection (1)(b) above is one which—

(a)is in such form as may be prescribed;

(b)is served before the creation of the assured tenancy;

(c)is served by the person who is to be the landlord under the assured tenancy (or, where there are to be joint landlords under the tenancy, is served by a person who is to be one of them) on the person who is to be the tenant under that tenancy; and

(d)states that the assured tenancy to which it relates is to be a short assured tenancy.

(3)Subject to subsection (4) below, if, at the ish of a short assured tenancy—

(a)it continues by tacit relocation; or

(b)a new contractual tenancy of the same or substantially the same premises comes into being under which the landlord and the tenant are the same as at that ish,

the continued tenancy or, as the case may be, the new contractual tenancy shall be a short assured tenancy, whether or not it fulfils the conditions in paragraphs (a) and (b) of subsection (1) above.

(4)Subsection (3) above does not apply if, before the beginning of the continuation of the tenancy or, as the case may be, before the beginning of the new tenancy, the landlord or, where there are joint landlords, any of them serves written notice in such form as may be prescribed on the tenant that the continued or new tenancy is not to be a short assured tenancy.

(5)Section 25 above shall apply in relation to a short assured tenancy as if in subsection (1) of that section the reference to an assured tenancy were a reference to a short assured tenancy.

33 Recovery of possession on termination of a short assured tenancy.

(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 sheriff shall make an order for possession of the house if he is satisfied—

(a)that the short assured tenancy has reached its ish;

(b) that tacit relocation is not operating;

(c) that no further contractual tenancy (whether a short assured tenancy or not) is for the time being in existence; and

(d) that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house.

(2) The period of notice to be given under subsection (1)(d) above shall be—

(i) if the terms of the tenancy provide, in relation to such notice, for a period of more than two months, that period;

(ii) in any other case, two months.

(3) A notice under paragraph (d) of subsection (1) above may be served before, at or after the termination of the tenancy to which it relates.

(4) Where the sheriff makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that time shall end (without further notice) on the day on which the order takes effect.

(5) For the avoidance of doubt, sections 18 and 19 do not apply for the purpose of a landlord seeking to recover possession of the house under this section.]

9. The lease submitted with the application was between “Owen and Cassidy, having its principal place of business at...”. The landlord in the lease is a business entity. The Applicant to the Tribunal is William Owen, an individual. The Applicant, therefore, is a separate legal entity from the landlord. The Applicant, therefore, does not have right or title to raise the proceedings.
10. Ownership of the property could not be confirmed by the Tribunal. The application detailed the address as being 52 High Street, Peebles EH45 8AN. The lease details the postcode as being EH45 8SW. The Tribunal made enquiry in relation to the Property and identity of the proprietor. A search under one postcode identified commercial premises, whilst a search under the other failed to identify the Property.
11. The application proceeds in terms of Rule 66, that being recovery of possession of a short assured tenancy in terms of s33 of the 1988 Act. Such an application should proceed on the basis of a Notice to Quit and a s33 notice, each providing not less than two months notice of the requirement to vacate the property.
12. The documents submitted in support of the application did not support an application in terms of Rule 66. The Notice to Quit was served by Sheriff Officers on 9th January 2018 and sought possession of the property on 26th January 2018. The Notice to Quit was headed “Notice to quit – at least two

weeks notice". An application in terms of Rule 66 and s33 of the 1988 Act, however, would normally require at least two months notice.

13. The Notice to Quit detailed the landlord as being William Owen, rather than Owen and Cassidy. It appears, therefore, that as the notice was not served by the landlord, it is invalid.
14. Contrary to the terms of the application, and despite the execution of service by sheriff officers referring to both a notice to quit and a s33 notice, no s33 notice was provided. Such a notice is required in relation to an application under Rule 66 and s33 of the 1988 Act.
15. If the application is proceeding under Rule 66 the Tribunal would require to be satisfied that the lease was a short assured tenancy. That would require a notice in terms of s32 of the 1988 Act – commonly known as a form AT5 -to have been served on the Respondent prior to the lease being executed. No such notice was provided.
16. While the application purports to proceed under Rule 66 of the 2017 Regulations, the documentation submitted appears to be more relevant to an application under Rule 65, being an application for possession of the Property in terms of s18 of the 1988 Act. Such an application requires a notice in terms of s19 of the 1988 Act – commonly known as a form AT6 – to be served by the landlord.
17. The AT6 notice, served in order to comply with s19 of the 1988 Act, was in the name of William Owen rather than Owen & Cassidy. As with the purported Notice to Quit, therefore, this has not been served by the landlord and, therefore, appears to be invalid.
18. The lease does not specify within it the grounds on which recovery of possession may be sought. The lease, therefore, does not appear to comply with the requirements of s18(6) of the 1988 Act. The competence of proceeding under that section, and under Rule 65 of the 2017 Regulations, therefore, is doubted.
19. The Applicant did not provide a landlord registration number.
20. The s11 notice forwarded to the local authority does not specify the legislation under which proceedings are being notified.

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

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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.

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Mr Virgil Crawford
Legal Member
5th March 2018