Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF YVONNE MCKENNA, 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 Procedural Rules")

in connection with

33 INDIA STREET, MONTROSE,DD10 8PQ

Case Reference: FTS/HPC/EV/20/0043

Mrs. Elizabeth Swankie, The Homestead, 10 Bents Road, Montrose,DD10 8NA ("the applicant")

Mr. Rodger Dolan, 33 India Street, Montrose,DD10 8PQ ("the respondent")

1. On 8TH January 2020, an application was received from the applicant. The application was made under Rule 65 of the Procedural Rules being an application for an order for possession in relation to assured tenancies. The following documents were enclosed with the application:-
    - Tenancy agreement dated 29/06/2017
    - Notice to quit dated 20th September 2019
    - Form AT6 dated 20th September 2019
    - Schedule of rent arrears
    - Proof of service of Notices by recorded delivery on 21st September 2019

2. By letter dated 29th January 2020, the Tribunal requested further information from the applicant in the following terms;-

   - Please address the Tribunal on why you have chosen 28th November as the ish date in terms of your Notice to Quit.
   - Please address the tribunal on why the AT6 should be treated as competent given that it does not give the ground number on which you seek to rely, nor does it fully specify the ground.

3. By e-mail dated 6th February 2020 the Applicant answered the points raised as follows;-

   - We would have to concede that we have picked the wrong "ish" date. Our standard Short Assured Tenancy Agreement made provision for a period of six months and then month to month thereafter subject always to a statutory two month notice period. Having looked more carefully at the rental agreement in this case we would have to accept that the period of let would be for 6 months and thereafter half yearly so that the "ish" would have to be 28th December. We trust, however, that the Tribunal will accept that the Tenant here has been given ample notice of the termination of his tenancy.
   - With regard to the Form AT6, we believe in Part 2 thereof it has been made abundantly clear that the second ground relates to three months rent arrears.
   - We would be quite happy for this case now to proceed and should the Tenant or his Agent raise any procedural point then we would be prepared to address the same.
   - We would advise you that no further rent has been paid and that the Tenant is now in arrears to the tune of 10 months £4200.

DECISION

4. I considered the application in terms of Rule 5 and 8 of the Procedural Rules. Rule 5 provides:-

Requirements for making an application

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

Rule 8 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."

5. After consideration of the application, the attachments and correspondence from the applicant, I consider that the application should be rejected on the basis that I have good reason to believe that I consider that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules.

REASONS FOR DECISION

6. The Tribunal has requested further information from the applicant in order to consider whether or not the application must be rejected as frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules. '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 to consider in this application in order to determine whether or not this application is frivolous, misconceived, and has no prospect of success.

7. Section 16 of the Housing (Scotland) Act 2014 provides for the functions and jurisdiction of the sheriff court in relation to civil actions arising from regulated tenancies within the meaning of section 8 of the Rent (Scotland) Act 1984 (the 1984 Act), Part VII contracts within the meaning of section 63 of the 1984 Act and assured tenancies within the meaning of section 12 of the Housing (Scotland) Act 1988 (the 1988 Act), to be transferred to the first-tier Tribunal. This includes matters of eviction

and recovery of possession. The tenancy in relation to this application is an assured tenancy. Therefore when considering the provisions in the Housing (Scotland) Act 1988 where there is reference in Section 19 to sheriff that can be read as the First-tier Tribunal.

Section 19 of the Housing (Scotland) Act 1988 states ;- 19 Notice of proceedings for possession.

(1)The [**F1**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)[**F2**the Tribunal] considers it reasonable to dispense with the requirement of such a notice.

(2)The [**F3**First-tier Tribunal] shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground [**F4**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 [**F3**Tribunal] .

(3)A notice under this section is one [**F5**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 [**F6**First-tier Tribunal] 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.

8. Section 19(1) is clear that the Tribunal shall not "entertain" proceedings for possession of the house let on an assured tenancy unless the landlord has served on the tenant notice in accordance with the section or considers it reasonable to dispense with the requirements of the notice. However , the Tribunal has no powers to dispense with the service of the notice of proceedings where the landlord seeks to recover possession on Ground 8 of Schedule 5 of the 1988 Act. In addition, the Tribunal may not make an order for possession on any of the grounds in Schedule 5 in the 1988 Act unless that ground and particulars of it are specified in the notice. The notice must be in the prescribed form in terms of the Assured Tenancies (Forms)(Scotland) Regulations SSI 1988/2109. The prescribed form in question is an AT6. The AT6 must inform the tenant that the landlord intends to raise proceedings for possession of the house on one or more grounds specified in the notice. It is not sufficient to merely refer to the ground in question by number or without reference to a number. There is a requirement in the AT6 at part 2 to give the ground number and fully state the ground as set out in Schedule 5 of the Act , presumably as the intention is that the AT6 should contain the relevant information without the need to refer to legislation. At Part 3 of the AT6 the landlord must specify the "particulars" of the ground stated in the notice.
9. In relation to this application the AT6 served on the tenant stated that the intention was to raise proceedings for possession with no specified ground number stated . In Part 2 there is a requirement that the ground must be fully stated as set out in Schedule 5 of the 1988 Act. Furthermore no further information is provided at Part 3 .
10. The extent to which "particulars" need to be stated is considered by Peter Robson in his commentary on the 1988 Act and he states " It should be made clear to the tenant what actions need to be done to put matters right;Torridge D.C. V Jones (1985) 18 H.L.R. 107. In that case which deals with notices of proceedings of possession under the equivalent English legislation, Oliver LJ stated that "the object of the notice is to bring to the tenant`s notice the defect of which complaint is made to enable him to make a proper restitution before proceedings are commenced and to deal with that." He went

on to refer to the comments of Bankes LJ in Jones V Evans (1923) 1KB 12 to the effect that particulars required to "contain information as to the nature of the claim as distinguished from the class of the claim."

11. In relation to the AT6 in question not only is there an absence of required information in Part2 but also there are no particulars provided in Part 3 .
12. Section 19(2) of the 1988 Act specifies that the grounds specified in an AT6 may be altered or added to with the leave of the Tribunal. The defects in the AT6 in this application render it invalid and incurable by the operation of section 19(2). Ground 8 is the one ground where the Tribunal has no power to dispense with the requirement for a notice.
13. The Notice to Quit terminating the tenancy on a date before the "ish" date is invalid.
14. The written submissions received from the applicant's solicitor does not dispute the defect in the AT6 and the date chosen for the "ish" is wrong . If there was a debateable legal point , it would be appropriate to accept the application and allow a legal debate on the issue at a hearing even if the likelihood of success is not high. However , for the foregoing reasons I consider that there is not any prospect of success at such a debate. Accordingly, the application based on the AT6 provided and the Notice to Quit provided is rejected on the basis that the application 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.

Yvonne McKenna, Legal Member dated 18/02/20.