

Housing and Property Chamber
First-tier Tribunal for Scotland



DECISION AND STATEMENT OF REASONS OF SUSAN CHRISTIE, LEGAL MEMBER
OF THE FIRST-TIER TRIBUNAL WITH DELEGATED POWERS OF THE CHAMBER
PRESIDENT

Under Rules 5, 8 & 66 of the First-tier Tribunal for Scotland Housing and Property Chamber
Rules of Procedure 2017 ("the Procedural Rules")

In connection with

Case Reference: FTS/HPC/EV/19/0537

Mrs Anona Somasundaram ("the Applicant")

Mr Stewart Cowan ("the Respondent")

Background

1. On 19 February 2019, an application was submitted by the Applicant's solicitor. The application is made under Rule 66 of the Procedural Rules. The following documents were enclosed with the application: copy Assured Shorthold Tenancy Agreement under the Housing Act 1986 as amended by Part III of the Housing Act 1996, over the property at Laight, Bowling Green Road, Stranraer (the property), an AT5 under the Housing (Scotland) Act 1988, a Notice under the Section 33 of the Housing (Scotland) Act 1988, and a Notice to Quit and accompanying cover letter. A confirmation of service by an employee of the Applicant's Solicitor's firm was also produced stating that the Notice to Quit and Section 33 Notice nad letter were delivered to the Respondent on 21 December 2018 by being left at the property in an envelope addressed to the tenant.
2. On 20 February 2019 the Tribunal wrote to the Applicant requesting information as follows:
'The following further information is required from you before your application can proceed... A copy of the notice given to the local authority as required under section

19A(1) of the 1988 Act, which states "Notice under subsection (1) above shall be given in the form and manner prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003(asp 10). Please reply to this office with the necessary information by 27 February 2019 otherwise the application will not be accepted'.

3. On 22 February 2019 a Section 11 notice under said Act of 2003 was lodged. This erroneously stated that the date of raising the proceedings was 13 September 2018.No evidence of service on the local authority was produced.
4. On 5 March 2019 the Applicant was further written to requesting the following: *'The Notice to Quit and Section 33 Notice do not give the requisite period of Notice. Please address the Tribunal on why you think the Application should proceed in the circumstances. Please reply to this office with the necessary information by 19 March 2019 otherwise the application will not be accepted'.*
5. On 13 March 2019 the Applicant's solicitor responded indicating that the tenant has had in excess of forty days' notice.
6. On 25 March 2019 the Applicant was further written to requesting the following: *"Whilst we note that the tenant was given in excess of 40 days' notice in terms of the Notice to Quit served on him and dated 21 December 2018, the Form AT5 provided to the tenant at the commencement of the lease was two months' notice. Furthermore the tenancy commenced on 4 February 2008 for a term of one year. It will have continued thereafter by tacit relocation from year to year. It therefore appears to the legal member who has considered the application that for the Notice to Quit to be valid the ish date would have required to have been 4 February 2019.However before deciding whether to reject the application please let us have any comments you may have in support of your contention that a shorter period of notice and an earlier leaving date would be valid. Please reply to this office with the necessary information by 8 April 2019 otherwise the application will not be accepted'.*
7. On 11 April 2019 the Applicant's solicitor responded by e mail as follows: *"Dealing first with the earlier leaving date. The tenancy was for a period of one year. In this particular case the tenancy agreement renewed by tacit relocation on 4 February 2018.365 days from that date is 3 February 2019 which is the date for the ish. In relation to the notice period given we note your comments in respect of the AT5.We should say, in respect of this matter, that Mr. Stewart Cowan was served with a notice to quit on 22 my 2018 albeit that the notice referred to a date of 4 August 2018 for the end date. A copy of that earlier notice to quit is attached for your information".*
8. On 30 April 2019 the Applicant was further written to requesting the following: *"You have provided an earlier Notice to Quit dated 22 May 2018.Can you please provide proof of service. The Notice to Quit does not terminate the lease at the ish. Please*

provide your comments on its validity. Please reply to this office with the necessary information by 14 May 2019 otherwise the application will not be accepted'.

9. On 29 May 2019 a further letter was sent by the Tribunal extending the timescale to reply to 12 June 2019.
10. On 12 June 2019 the Applicant's solicitor responded by e mail indicating that the earlier request had been sent to the wrong mail box and attached the proof of service in relation to the earlier Notice to Quit. Their position in respect of matters is that the tenant has had notice to terminate the tenancy since 28 May 2018 and that the Notice to Quit served on him dated 21 December 2018 remedied the position in respect of the ish date.

11. Decision

12. I considered the application in terms of Rule 5 of the Procedural Rules. That Rule 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. "

13. I considered the application in terms of Rule 8 of the 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.”

14. I considered the application in terms of Rule 66 of the Procedural Rules. That Rule provides:

‘Application for order for possession upon termination of a short assured tenancy

66. Where a landlord makes an application under section 33 (recovery of possession on termination of a short assured tenancy) 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; and

(iii) the name and address of the tenant;

(b) be accompanied by a copy of—

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

(ii) the notice by landlord that the tenancy is a short assured tenancy; and

(iii) the notice given to the tenant under section 33(1)(d) of the 1988 Act;

(iv) the notice to quit served by the landlord on the tenant

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

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

15. 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.

16. After consideration of the terms of the application and the various documents produced, I consider that the application should be rejected on the basis that that it would not be appropriate to accept the application under Rule 8 (1) (a) and (c). The application should be rejected.

Reasons for Decision

17. The Tribunal must have regard to the mandatory requirements contained in Procedural Rules 5, 8 & 66.

18. I must have regard to the requirements contained in Section 33 of the Housing (Scotland) Act 1988 which state (as highlighted by me):

"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 First-tier Tribunal shall make an order for possession of the house if the Tribunal is satisfied—

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

(b) that tacit relocation is not operating; 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 First-tier Tribunal makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that finish 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.”

19. The Section 33 Notice relied upon by the Applicant is dated 21 December 2018. It requires vacant possession by 3 February 2019. Leaving to one side any issue as to what is the correct *ish* date for this tenancy, the Section 33 Notice was served on 21 December 2018 by letterbox service. The lease specifies at Part 8 that any notices or other documents can *inter alia* be served on the tenant by being left at the premises. However, the Section 33 Notice has not been served with the minimum period of Notice being given in terms of that section of that Act.

20. Accordingly, it would not be appropriate to accept the application under Rule 8 (a) and (c) as it has no prospect of success.

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.

S Christie

Legal Member
26 June 2019