

Housing and Property Chamber
First-tier Tribunal for Scotland



**DECISION AND STATEMENT OF REASONS OF ANDREW UPTON, 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

Kerrysdale Farmhouse, Gairloch, Ross-shire, IV21 2AD

Case Reference: FTS/HPC/EV/19/0342

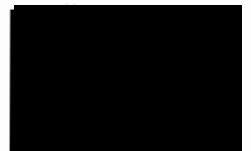
Mr John Alexander MacKenzie ("the applicant")

Gillespie Macandrew, Solicitors ("the applicant's representative")

Mr William Macrae ("the respondent")

1. On 1 February 2019, an application was received from the applicant. The application was made under Rule 79 of the Procedural Rules being an application for an order for eviction of an occupier upon termination of a tenancy commenced prior to 2 January 1989. The following documents were enclosed with the application:-

- Copy Disposition by Mrs Marjory Charlotte Mackenzie in favour of John Alexander Mackenzie dated 4 April 1973;
- Copy letter from Messrs. Clark Oliver, solicitors, to Mr William Macrae dated 20 July 1984, with enclosures;
- Copy Minute of Lease between John Alexander Mackenzie and



William Macrae dated 25 July and 19 August, both dates 1985;


- Copy rent review schedule and associated correspondence dated 2010;
- Copy letter from Messrs. Bowlts, Chartered Surveyors, to William Macrae dated 6 February 2003;
- Copy missives of lease dated 8 and 17 October 2003;
- Copy notice to quit dated 11 October 2018; and
- Copy report by S.I.S. Claims Investigators Ltd dated 12 August 2018.

By letter dated 15 February 2019, the Tribunal requested further information from the applicant, :-

- Clarification of the identity of the alleged occupier;
- Submissions on why the tenancy is a Regulated Tenancy under the Rent (Scotland) Act 1984, as opposed to an Assured Tenancy under the Housing (Scotland) Act 1988; and
- Submissions on why either form of tenancy exists where the applicant asserted that the respondent was not in possession of the property.

By email dated 20 February 2019 the applicant's representative responded with a detailed history of the tenancy and the respondent's alleged operations at the Property. The position of the applicant is that the respondent was a regulated tenant, but is no longer in possession of the property. As such, the applicant contends that the respondent does not benefit from security of tenure under the 1984 Act.

Thereafter, the applicant raised concurrent proceedings at Inverness Sheriff Court and requested that this application be held for a period to allow that action to continue. The Tribunal acceded to that request, and held the application until 17 June 2019. On 17 June 2019, the applicant's representative wrote to the Tribunal to advise that settlement discussions



were ongoing, Inverness Sheriff Court had not reached a determination on jurisdiction, and requesting that the action be held for a further three months.

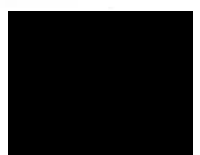
DECISION

2. Firstly, having considered the application and correspondence associated with it, I have determined that the application should not be held for a further three month period. I reach that decision on two grounds:-
 - i. It is not appropriate, in my view, for an application to be held indefinitely when the question of whether it should be accepted at all remains undetermined; and
 - ii. In any event, for the reasons set out hereafter, I have concluded that the application ought to be rejected. It serves no purpose to delay rejection when parties could make appropriate use of their time addressing flaws in the application.
3. That being said, 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."

4. After consideration of the application, the attachments and correspondence from the applicant, I consider that the application should be rejected on the basis that it appears to be frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules, and I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1)(c) of the Procedural 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. 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.
6. The applicant's principal submission is that the tenancy in this case is a Regulated Tenancy within the meaning of the 1984 Act. That is on the basis that the unwritten tenancy agreement was entered into in 1984. At that point, the tenancy became a Protected Tenancy in terms of section 1 of the 1984

Act. By service of the notice to quit in October 2018, the Protected Tenancy came to an end. The applicant's submission is that the Protected Tenancy did not become a Statutory Tenancy within the meaning of section 3 of the 1984 Act because the respondent has not retained "possession" of the Property, although the applicant concedes that the Property is occupied by third parties with the permission of the respondent.

7. Section 3 of the 1984 Act is in the following terms:-

"3 Statutory tenants and tenancies.

(1) Subject to sections 3A, 4 and 5 below—

(a) after the termination of a protected tenancy of a dwelling-house the person who, immediately before that termination, was the protected tenant of the dwelling-house shall, so long as he retains possession of the dwelling-house without being entitled to do so under a contractual tenancy, be the statutory tenant of it; and

(b) the provisions of Schedule 1 to this Act shall have effect for determining what person (if any) is the statutory tenant of a dwelling-house at any time after the death of a person who, immediately before his death, was either a protected tenant of the dwelling-house or the statutory tenant of it by virtue of paragraph (a) above;

and a dwelling-house is referred to as subject to a statutory tenancy when there is a statutory tenant of it."

8. The applicant's submission is that the respondent does not benefit from security of tenure because he is no longer in possession of the Property. That submission is founded on the fact that the respondent is not resident at the Property, and has authorised a third party to sub-let the Property for holiday lets.

9. However, it is my view that the applicant's submission in that regard is flawed. The concept of possession is wider than simple occupation. Possession in Scots law includes civil possession. Civil possession includes the use of a Property by a third party properly authorised by the person vest in the right to

possess the property. Thus, a tenant continues to possess a property where he sub-lets that property to a third party (Rankine, *The Law of Leases in Scotland* (1916), p234; Rennie, *Leases*, para. 14-19). The only restriction to that would be where the terms of the lease in question are such that such an alienation was prohibited by the landlord without consent.

10. In this case, the applicant's position is that the lease is unwritten. The terms set out do not suggest that any such prohibition on alienation was an agreed term between them.

11. Accordingly, it is my view that if the applicant successfully proves his principal case that this tenancy was a Protected Tenancy, and that the third parties occupying the Property do so with the express authorisation of the respondent, then it is inevitably the case that the respondent does remain in possession (albeit, civil possession) of the Property and is thus a Statutory Tenant in terms of section 3 of the 1984 Act. Accordingly, the applicant would need to proceed under the provisions for recovery of possession set out in Part II and Schedule 2 of the 1984 Act.

12. The applicant has pleaded an *esto* case if the Tribunal were minded to find that the tenancy was an assured tenancy. That submission founds on the terms of section 16(1)(a) of the 1988 Act, which is in the following terms:-

"16 Security of tenure

(1) After the termination of a contractual tenancy which was an assured tenancy the person who, immediately before that termination, was the tenant, so long as he retains possession of the house without being entitled to do so under a contractual tenancy shall, subject to section 12 above and sections 18 and 32 to 35 below—

(a) continue to have the assured tenancy of the house"

13. The applicant's submission is on the same basis as before, which is that the respondent is no longer in possession of the Property. For the reasons set out above, it is my view that the Respondent remains in civil possession of the



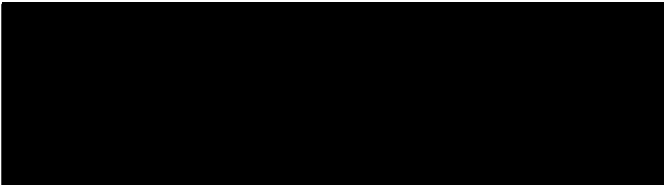
Property, and that is enough for the purposes of this rejection. If the tenancy is an assured tenancy, then the applicant will require to follow the process set out in sections 18 and 19, and Schedule 5, to the 1988 Act.

14. For those reasons, it is my view that the application is frivolous within the meaning of Rule 8(a). Further, it is my view that it would be inappropriate in these circumstances to accept this application. I reject the application.

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.



Andrew Upton
Legal Member
28 June 2019