Housing and Property Chamber
First-tier Tribunal for Scotland

Decision 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/20/2012

Re: Property at Craigendunton, Waterside, Kilmarnock, KA3 6JJ **("the Property")**

Parties:

Mark Baird, Craigendunton Cabin, Waterside, Kilmarnock, KA3 6JJ ("the Applicant")

The Occupiers, Craigendunton, Waterside, Kilmarnock, KA3 6JJ ("the Respondent")

1. On 18 September 2020, an application was received from the Applicant. The application was made under Rule 65 of the Chamber Procedural Rules being an application for order for possession in relation to an Assured Tenancy. The following documents were enclosed with the application:-

   (i) Form AT6;
   (ii) Notice to Quit; and
   (iii) Section 11 Notice with evidence of service.

2. There was no Tenancy Agreement submitted with the application. The Applicant subsequently advised that there is no written tenancy agreement. He provided details of the tenancy agreement between the parties, which included that that there had never been any written agreement. He advised however that the tenancy had commenced on 26 July 2014. That the rent was £1000 per month. The tenants were Beth Barclay and Joe Reid.

3. The notice to quit which was submitted was dated 17 June 2020. It sought vacant possession as at 17 September 2020.

4. An AT6 Notice was also submitted, it was addressed to the Respondents and provided that the Applicant intends to recover possession of the property under Grounds 1, 8, 9, 11 and 12 of the Housing (Scotland) Act 1988. It stated that the Respondents were in rent arrears of £30,000. It provide no further information. The AT6 was dated 17 June 2020 and provided that no proceedings will be raised before 7 September 2020. The Applicant advised that these notices had been hand delivered to the Respondents. There was no evidence submitted in support of the grounds for recovery.

DECISION

5. I have considered the applications terms of Rule 8 of the Chamber 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."

6. After consideration of the application, I consider that the applications should be rejected on the basis that they are frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules.

REASONS FOR DECISION

7. "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. 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 applied as the test in this application and, on consideration of this test, I have determined that this application is frivolous, misconceived and has no prospect of success.

8. Section 18 of the 1988 Act provides as follows:-

18 Orders for possession.

(1)The First-tier Tribunal 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 First-tier Tribunal 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, the Tribunal shall make an order for possession.

…

(6)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.

9. Section 16(1) of the 1988 Act provides as follows:-

"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; and

(b) observe and be entitled to the benefits of all the terms and conditions of the original contract of tenancy so far as they are consistent with this Act but excluding any—

(i) which makes provision for the termination of the tenancy by the landlord or the tenant; or

(ii) which makes provision for an increase in rent (including provision whereby the rent for a particular period will or may be greater than that for an earlier period) otherwise than by an amount specified in or fixed by reference to factors specified in that contract or by a percentage there specified, or fixed by reference to factors there specified, of an amount of rent payable under the tenancy,

and references in this Part of this Act to a "statutory assured tenancy" are references to an assured tenancy which a person is continuing to have by virtue of this subsection, subsection (1) of section 31 below, or section 3A of the Rent (Scotland) Act 1984.

(3)Notwithstanding anything in the terms and conditions of tenancy of a house being a statutory assured tenancy, a landlord who obtains an order for possession of the house as against the tenant shall not be required to give him any notice to quit."

10. The issue before me relates to the fact that the Section 18 (6) provides that "*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*." As there is no tenancy agreement setting out the Schedule 5 grounds, then in order to grant an order under section 18, the tribunal will first require to be satisfied that the contractual assured tenancy has been brought to an end, and there now exists a statutory assured tenancy.

11. The tenancy requires to have been brought to end at the "*ish date*" by service of a valid Notice to Quit before any order for possession can be granted.

12. Notwithstanding that there is no written tenancy agreement between the Applicant and the Respondent, which specifies the date when the lease will be brought to an end, the contractual assured tenancy still requires to be brought to an end on the correct *ish* date.

13. A lease term will be repeated under the doctrine of tacit relocation for the same duration as the original lease, unless the original duration is more than a year. If it is more than one year the lease will repeat in cycles of one year until the lease is brought to an end.

14. The Applicant advises that the tenancy commenced on 26 July 2014. Unless the parties agreed for the lease term to be less than a year, then the lease will continue on a yearly basis. The notice to quit needs to bring the lease to an end on the ish date of the lease. If the lease renews on a yearly basis, then it appears to me that the ish date would be 25 July. The ish date used in the notice to quit is 17 September 2020. This does not appear to me to be a valid ish date.

15. As no valid notice to quit has been served, the contractual assured tenancy has not therefore been brought to an end and no statutory assured tenancy currently exists. This application is therefore premature. Accordingly, no order for possession could be completely granted by the Tribunal.

16. For the reasons set out above, it seems to me that the application is frivolous as the statutory requirements are not met and the application should therefore be rejected

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 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 of the decision was sent to them. Information about the appeal procedure can be forwarded to you on request.

Melanie Barbour

Legal Member/Chair **Date** **12 November 2020**