



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/18/0834

Re: Property at 47 Hope Park Gardens, Bathgate, EH48 2QT (“the Property”)

Parties:

Mr Paul Taylor, 22 Hamilton Gardens, Armadale, Bathgate, EH48 2JA (“the Applicant”)

Mr Kenneth Stewart, 47 Hope Park Gardens, Bathgate, EH48 2QT and currently care of 24464 Douglas C38, HMP Addiewell, 9 Station Court, Addiewell, EH55 8QA (“the Respondent”)

1. On 6 April 2018, an application was received from the Applicant. The application was made under Rule 66 of the Chamber Procedural Rules being an application by a private landlord for possession of rented property let under a Short Assured Tenancy. The following documents were enclosed with the application:-
 - (i) Short Assured Tenancy Agreement;
 - (ii) Form AT5;
 - (iii) Notice to Quit;
 - (iv) Section 33 Notice;
 - (v) Form AT 6 (Section 19 Notice);
 - (vi) Notice to Local Authority section 11 Notice; and
 - (vii) Mutual Agreement to end Tenancy for the joint tenant.

2. The Tenancy Agreement is in the name of the Respondent and a joint tenant. The date of signature of the Tenancy Agreement was 18 February 2017. An AT5 Form was submitted which purports to be signed by the Applicant on 11 February 2017, it was not however signed by either the Respondent or the joint tenant. The Tenancy Agreement states that tenancy shall commence on 18 February 2017 until 18 August 2017. There is nothing further in the Tenancy Agreement as to what basis the tenancy is to continue

after 18 August 2017. The final page of the Tenancy Agreement states that the tenants accept “*the foregoing terms and conditions of which the foregoing is a copy of the above offer and acknowledge receipt of the notices in terms of Section 32 of the Housing (Scotland) Act 1988 as contained in Clause 22 of the our offer*” Clause 22 of the Tenancy Agreement states only “Deleted”. It is therefore not apparent that the AT5 Form was provided to the tenants prior to the creation of the tenancy.

3. The Notice to Quit submitted with the application was dated 17 March 2018 . The Notice to Quit provides that “... *give you formal notice to quit the premises presently occupied by you at 47 Hope Park Gardens, Bathgate, EH48 2QT by 06/06/2018*”. The Section 33 (1)(d) Notice was dated 17 March 2018 and confirms that vacant possession is required by 06/06/2018. There is also submitted an AT6 Form in the name of the Respondent and the joint tenant, it refers to a breach of Ground 8 of Schedule 5 of the 1988 Act, it was dated 17 March 2018 and it advises that proceedings will not be raised before 6 April 2018. There is also a notice to the local authority attaching a copy of the Section 33 Notice. No evidence of service was produced with the application for any of these notices.

DECISION

4. I have considered the application 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.”

5. After consideration of the application, I consider that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules.

REASONS FOR DECISION

6. “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.

7. Section 32 of the Housing (Scotland) Act 1988 (1988 Act) deals with the creation of a short assured tenancy and states that :-

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

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

(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.

8. Section 33 of the 1988 Act provides as follows:-

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 First –Tier Tribunal shall make an order for possession of the house if satisfied that—

(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.

9. The issue before me is whether recovery of possession of the property under Section 33 of the 1988 Act is competent. To recover possession of a short assured tenancy under Section 33, the tribunal must be satisfied that the requirements of this section are met. The tenancy was for a period of 6 months, 18 February 2018 until 18 August 2018. As there is nothing in the Tenancy Agreement providing on what basis the tenancy will continue after 18 August 2017, it is presumed to be on the same terms. Accordingly, the “ish dates” on which the tenancy can be ended fall on 18 February and 18 August of each year. A Notice to Quit requires to be served to bring the tenancy to an end at an “ish date”. The Notice to Quit requires to provide 40 days’ notice to the tenant, being a requirement for a lease of more than 6 months. The Notice to Quit in this case was dated 17 March 2018. I consider that the next “ish date” for this tenancy will be 18 August 2018. Accordingly the Notice to Quits is not valid as it purports to give notice to quit on 6 June 2018. I would also observe that even if it had been valid, the application would, in my opinion, be premature given that the notice period in the Notice to Quit has not yet expired. Accordingly, the requirements of a valid Notice to Quit have not been met and an order for recovery of possession could not be competently made by the First-Tier Tribunal.

10. I would also observe that if grounds for recovery of possession had been sought under Tribunal Rule 65, as a breach of Ground 8 in Schedule 5 of the 1988 Act as an assured

tenancy. While there is a Notice of Proceedings (AT6) in terms of the section 19 of the 1988 Act. I note that the Tenancy Agreement makes no reference to the Grounds for Recovery as set out in Schedule 5 of the 1988 Act and accordingly, any application for recovery of possession under this part of the Act, under this Tenancy Agreement would require to ensure that a valid Notice to Quit was served terminating the tenancy on the "ish date". As already set out I do not consider that the current Notice to Quit is valid. Accordingly, the requirements of Section 19 would also not have not been met and an order for recovery of possession could not be competently made by the First-Tier Tribunal under rule 66 if such an application had been sought.

11. 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 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.

M Barbour

12.04.2018

Legal Member/Chair

Date