Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF JOSEPHINE BONNAR, 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 Rules")

in connection with

10 Murdoch Terrace, 3F3 Top Left, Fountainbridge, Edinburgh ("the property")

Case Reference: FTS/HPC/EV/20/2134

Stonelime Investments Limited, 239 Eskhill, Pennicuik, Midlothian ("the Applicant")

Pitero Passiatore, 10 Murdoch Terrace, 3F3 Top Left, Fountainbridge, Edinburgh ("the Respondent")

1. By application received on 8 October 2020, the Applicant seeks an order for possession of the property in terms of Rule 66 of the Rules. The Applicant lodged a Section 33 Notice, Notice to Quit and Invoice dated 9 February 1996 in support of the application. The date specified in the Notice to Quit is 14 March 2020. The invoice is addressed to the Respondent, relates to the property and states that a deposit of £425 and rent of £375 are due, the latter in relation to the period 15 February 1996 to 14 March 1996. The Applicant also lodged submissions stating that the tenancy agreement and AT5 could not be located and that the only evidence of the tenancy and the start and ish dates that could be provided was the invoice.

2. The Tribunal issued a request for further information to the Applicant. The Tribunal noted that the Applicant had failed to provide evidence to support an application under Rule 66. The Applicant was asked to explain the basis upon which the Tribunal could entertain the application. The Tribunal also noted that

a term of 12 months would generally be assumed if the Applicant could not provide evidence of an agreed term, in which case the Notice to Quit appeared to be invalid as the date specified did not appear to coincide with an ish date. In response the Applicant stated that the Respondent might have a copy of the tenancy agreement, that the dates specified in the Notices were based on the dates in the invoice and that it was "more likely than not" that the tenancy was a short assured tenancy and that in "all likelihood" an AT5 had been served. The Applicant also made reference to the overriding objective and stated that the issues raised might be resolved by way of facts being agreed by the Respondent.

DECISION

3. The Legal Member considered the application in 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."

4. **After consideration of the application and supporting documentation from the Applicant, the Legal Member considers 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

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 LR9. He indicated at page 16 of the judgment; *"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 the Legal Member has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success.

6. The Legal Member notes that the Applicant does not appear to have met the mandatory requirements for lodging an application, as required by Rule 5 and Rule 66 of the Rules. Rule 66 requires an application to 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 the landlord that the tenancy is a short assured tenancy." The Applicant has not submitted a copy of the AT5 notice or any evidence that this notice was given to the Respondent. Furthermore, the Applicant has only provided very limited information about the tenancy – the start date, the rent and the deposit.

No evidence of the agreed term or evidence that the tenancy, which started in 1996, is ongoing has been provided. Before the application could be considered, the Applicant would have to provide further information and evidence of these matters, in order to meet the requirements of Rules 5 and 66.

7. In any event, the Legal Member determines that the application should be rejected in terms of Rule 8. The Applicant seeks recovery of possession of a short assured tenancy in terms of Section 33 of the Housing (Scotland) Act 1988 ("the 1988 Act"). Section 32 of the 1988 Act states "(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." Subsection (2) specifies the essential components of the AT5 Notice which must be served. It follows that a tenancy which does not meet the requirements of Section 32 is not a short assured tenancy. The Applicant has not provided any evidence that Section 32 applies. Not only is there no copy of the tenancy argument or the AT5, there is no evidence of the agreed term. A term of not less than 6 months is a mandatory requirement. The Applicant relies on the "likelihood" of a short assured tenancy having been created. It is also suggested that the Tribunal could look to the Respondent for the evidence. The Legal Member is not persuaded by these arguments. It is for the Applicant to prove their case. In the absence of the required documents, or other evidence of same, the Legal Member concludes that the application has no prospect of success.

8. The Legal Member also notes that the Notice to Quit which has been lodged is only valid if the Applicant is able to establish that the tenancy was for an initial term of 6 months, starting at midnight on 15 February 1996, ending at midnight on 14 March 1996, and thereafter continuing on a month to month basis. If the term was a year, which is usually assumed if there is no written agreement or other evidence of an agreed term, the ish date would be the 15th February each year. If the term was simply stated to be 6 months, with no provision for a monthly continuation, then the ish would be 15 February and 15 August each year. A Notice to Quit can only terminate a tenancy at an ish. Section 33 of the 1988 Act states that an order for possession under this section can only be granted if "(a) the short assured tenancy has reached its ish" and "(b) tacit relocation is not operating". The Notice to Quit appears to be invalid and, as a result, the Applicant cannot comply with the requirements of Section 33.

9. The Legal Member therefore determines that the application is frivolous, misconceived and has no prospect of success. The application is rejected on that basis.

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.

Josephine Bonnar

Josephine Bonnar
Legal Member
18 November 2020