



**Decision and statement of Reasons of the First Tier Tribunal (Housing and Property Chamber)**

**Under Rule 8 of the First Tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 'the Rules'.**

In respect of application by Stobmuir Enterprises Limited in terms of Rule 65 of the Rules.

**Case reference FTS/HPC/EV/19/1432**

At Glasgow on the 24 July 2019, Lesley Anne Ward, legal member of the First –Tier Tribunal 'the Tribunal' with delegated powers of the Chamber President, rejected the above application in terms of Rule 8(1)(a) and (c) of the Rules.

1. This is an application on behalf of Stobmuir Enterprises Limited, the owner of the property at 67 Balunie Drive Dundee DD4 8PZ, 'the property', for recovery of possession of the property in terms of Rule 65. The application was made on behalf of Stobmuir Enterprises Limited by Mr Alex Campbell of Campbell Both Solicitors on 10 May 2019.
2. The application was accompanied by the following:-
  1. Lease for let of the property from 15 July 2009 until 15 July 2009.
  2. Notice to quit dated 17 April 2019 with a purported ish date of 31 May 2019.
  3. S11 intimation on local authority.
  4. Rent arrears schedule.
  5. AT6 dated 18 April 2019.
3. The tribunal wrote to the applicants' representatives on 29 May 2019 as follows:

*Before a decision can be made, we need you to provide us with the following:*

1. *The tenancy agreement is for the period 15 July 2008 to 15 July 2009. It does not appear to be on the basis of it continuing month to month thereafter. In those circumstances the tenancy will have renewed for a period of 12 months on 15 July in each year. In those circumstances can you clarify why a notice to quit has been provided seeking to terminate the tenancy at 31 May 2019?*
2. *The tenancy agreement refers to the grounds for termination by the landlord at clause 35(b). Reference is made to the grounds set out in the Housing (Scotland) Act 1988. The grounds however are not narrated in full or in summary. Reference is made to the decision in Royal Bank v Boyle 1999 HOUS LR 63 where it was determined that the essential grounds for recovery of possession in schedule 5 to the 1988 Act must be referred to in the tenancy and that incorporation by reference would not necessarily be appropriate. Reference is also made to section 18(6) of the Act which provides that the tribunal shall not make an order for possession of a house let on an assured tenancy (not being a statutory assured tenancy) unless the grounds specified in the section have been met and the terms of the tenancy makes provision for it to be brought to an end on that ground. As no notice to quit has been served bringing this tenancy to an end at the ish of 15 July 2019 it has not been converted from an assured tenancy to a statutory assured tenancy. In the circumstances for an order for possession to be considered based on ground 8 as narrated in the AT6. Can you clarify?*

4. The applicants' representatives responded by letter dated 10 June 2019 as follows:

*The present application before the Housing and Property Chamber is not an 'ish 'date application. The Respondent Ms Rafferty has not paid rent for the property she rents from the Applicant with the current position being more than 3 months' rent is owed to the Applicant and in these circumstances it is reasonable for the Applicant to provide minimum notice to bring an early termination of the tenancy to an end.*

*The Respondent was also issued with a copy of the grounds 1 to 17 in Schedule 5 to The Housing(Scotland) Act 1988 at the service of the Notice to Quit therefore informing her of the grounds as stated under Section 35(b)(2) of the lease.*

*Furthermore, as this tenancy initially was for a contractual period of one year without the provision of a rollover clause stated in the lease the tenancy remained an Assured Tenancy on the basis of tacit relocation as neither party had given notice to terminate the tenancy throughout the contractual period.*

*The action raised under section 19 of the Housing (Scotland) Act 1988 under mandatory grounds 8 and also discretionary ground 11 in Schedule 5 to the Housing (Scotland Act 1988 is in our opinion competent with to without ending the tenancy. In these circumstances under section 19(5) of the said Act, The First-tier Tribunal may not exercise the power conferred by subsection 1(b) if the landlord seeks to recover possession on ground 8 in Schedule 5 to this Act.*

*We trust this explanation satisfies the Housing and Property Chamber and allows matters to proceed.*

5. This response did not satisfy the tribunal and the tribunal wrote a further letter to the applicant's representatives on 25 June 2019 in similar terms to the above noted letter of 29 May 2019 and reiterating that, standing the case of Boyle, a valid notice to quit would be required to enable the matter to proceed in the basis

of a statutory assured tenancy. The applicant's representatives wrote back to the tribunal on 8 July 2019. It is not necessary to narrate the full terms of their letter here. It is sufficient to say that they had no further documents to lodge or alternative legal argument to make. The notice to quit lodged does not bring the tenancy agreement to an end. The position therefore remains that the application is on the basis of a **contractual tenancy** rather than a **statutory assured tenancy**.

6. S18(6) of the Act PROVIDES:-

*The sheriff shall not make an order for possession of a house which is for the time being let on an 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*
- (b) The terms of the tenancy make provision for it to be brought to an end on the ground in question.*

7. Looking carefully at the tenancy agreement between these parties I note that the penultimate clause in the schedule attached to the tenancy agreement states: The landlord having timeously served on the tenant the relevant notice and subsequently obtaining an order for recovery of possession of heritable property from the Sheriff Court on one or more of the grounds 1-17 contained in Schedule 5 of the Housing (Scotland) Act 1988. Without prejudice to the foregoing and with particular reference to ground 2 of Schedule 5 as aforesaid the tenant further acknowledges and is aware that as evidence of the execution hereof the subjects of let are subject to a standard security by the landlord in favour of the heritable creditor. ". This is the only reference to the schedule 5 grounds.

8. I have considered whether the failure to narrate the grounds rather than simply make this reference to them is fatal to this application. Looking at the case of Royal Bank of Scotland –v- Boyle 1999 HousL.R. 43 and the judgment of Sheriff Principal Wheatley, he stated:-

*The terms of s18(6) are reasonably precise; what is required is that the terms of the tenancy agreement must make provision for it to be brought to an end on the grounds relied on by the landlord in terms of schedule 5 to the Act. In my opinion that means that the essential ingredients of those conditions must be referred to in the tenancy agreement. An exact citation of those grounds would clearly suffice...I do not think it reasonable to expect tenants to require access to the relevant legislation in order to understand their contract. "*

9. Taking into account the wording of s18(6) and the judgment of Sheriff Principal Wheatley I consider that this the application cannot proceed as the grounds for possession are not narrated in the tenancy agreement. Further, the essential ingredients of the grounds are not contained in the tenancy agreement.

10. Rule 8(1)(a) of the Rules allows an application to be rejected by the Chamber President if "**they consider that an application is vexatious or frivolous**".

**L. Ward**

11. "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".

12. I consider that this application is frivolous or vexatious and has no reasonable prospect of success for the reasons given above. Further, in terms of Rule 8(c) of the rules I have good reason to consider that it would not be appropriate to accept that aspect of the application

**NOTE: What you should do now.**

If you accept this decision there is no need to reply.

If you disagree with this decision you should note the following:

An applicant aggrieved by this 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 seek permission to appeal within 30 days of the date the decision was sent them. Information about the appeal procedure can be forwarded on request.

# Lesley Ward

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Legal Member