Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS BY THE 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

107 Main Street, Flat 10, Sauchie, FK10 3JT

Case Reference: FTS/HPC/EV/19/1712

The Parties:-

Claymert Ltd, 158 Claremont, Alloa, FK10 2ER ("the Applicant")

Jardine Donaldson, Solicitors, 18/22 Bank Street, Alloa, FK10 1HP ("the Applicant's Representative")

Mr James Hossack, Flat 10, 107 Main Street, Sauchie, FK10 3JT ("the Respondent")

1. By application dated 3 June 2019 the Applicant applied to the Tribunal under Rule 65 of the Procedural Rules for an order for recovery of possession of a short assured tenancy under section 18 of the Housing (Scotland) Act 1988. The following documents were enclosed with the application:-

   (1) Tenancy Agreement between the Applicant and Respondent dated 5 May 2011 together with Form AT5;
   (2) Copy AT6 dated 2nd April 2019 citing grounds 8, 11 and 12 of Schedule 5 of the 1988 Act and stating that proceedings would not be raised before 18th April 2019;
   (3) Notice to Quit dated 2 April 2019 purporting to terminate the tenancy as at 18th April 2019;
   (4) Copy Execution of Service from Sheriff Officers in relation to the above

Notices;
(5) Rent Statement
(6) Section 11 Notice to Clackmannanshire Council.

2. By letter dated 1st October 2018 the Applicant's Agent was asked to clarify the date in the Notice to Quit which did not appear to align with the ish date of the tenancy. By email dated 18 June 2019 the Applicant's Agent responded to confirm that fourteen days notice was sufficient in terms of the AT6 and given that the grounds for possession were stated in the lease, the Notice to Quit was not a legal requirement.

3. By letter dated 2 July 2019 the Tribunal sought further clarification on the grounds upon which repossession was sought. In particular the Legal Member requested representations as to how the terms of the tenancy agreement met the requirements of section 18(6) of the 1988 Act in light of the decisions Eastmoor LLP v Bulman, Sheriff Court (South Strathclyde, Dumfries and Galloway) 5 June 2014 and Royal Bank of Scotland v Boyle, Sheriffdom of Tayside Central and Fife at Stirling, 21 May 1999, 1999 Hous.L.R 63. The Legal Member also sought representations as to the calculation of the notice period in the AT6.

4. By letter dated 11 July 2019, the Applicant's Agent made representations in response to the Legal Member's comments. The Applicant's Agent submitted that it was sufficient that the lease made reference to the grounds in Schedule 5 of the Act. There was no ambiguity. The Applicant should not be prejudiced by not having repeated the statutory wording in its entirety. With regard to the AT6, the Applicant's Agent submitted that it was calculated based on the date of service, being 4th April 2019. 18th April 2019 was the last date of the notice and proceedings would be raised after that date. The Applicant's Agent further noted that proceedings were not in fact raised until 3rd June 2019.

DECISION

5. The Legal Member determined to reject the application on the basis that she had good reason to believe that it is frivolous under Rule 8(1)(a) of the Procedural Rules.

REASONS FOR DECISION

6. The Legal Member considered the application together with the attachments and the subsequent correspondence from the Applicant's Agent.

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. 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 the Legal Member had to consider in this application in order to determine whether or not this application is frivolous, misconceived, and has no prospect of success.

8. Section 18(6) of the Housing (Scotland) Act 1988 provides that the Tribunal cannot make an order for recovery of possession of an assured tenancy unless the terms of the tenancy make provision for it to be brought to an end on the ground in question. In the absence of such express provision in the tenancy agreement, the landlord must terminate the contractual tenancy by service of a valid Notice to Quit.

9. In this case the Applicant had submitted a Notice to Quit dated 2 April 2019 which purported to terminate the tenancy as at the 18th April 2019. The Tenancy Agreement between the parties commenced on 11 May 2011, for a period of six months. In the absence of any specification to the contrary, it was therefore continuing by tacit relocation on a six monthly basis. The Legal Member therefore concluded that the 18th April 2019 was not a valid ish.

10. The Tribunal further noted that a period of fourteen days notice had been given in terms of the Notice to Quit which did not accord with the requirements of the Sheriff Courts (Scotland) Act 1907. For tenancies in excess of six months, a notice period of forty days was required.

11. The Tribunal therefore concluded that the Notice to Quit was invalid for the above reasons. Accordingly the Tribunal had to consider whether the tenancy agreement made provision for it to be brought to end on the grounds specified in the AT6 and therefore satisfied the requirements of section 18(6) of the 1988 Act.

12. The lease between the parties consists of two parts – the Minute of Lease and a Schedule of Letting Conditions. The Minute of Lease contains the following wording – "*The tenancy will be a Short Assured tenancy as defined by the Housing (Scotland) Act 1988 and the Landlord will raise any action for recovery in terms of the Grounds listed in Schedule 5 of the said Act*". Clause 2 of the Schedule of Letting Conditions further provides that "*the Landlord hereby gives notice to the Tenant that possession of the subjects may be recovered under any of the Grounds for an order of possession listed in Schedule 5 of the Housing (Scotland) Act 1988 referred to in the Minute of Lease and the Tenant acknowledges such notice have been duly given*".

13. The requirements of section 18(6) have been considered by the courts in the decisions of Royal Bank of Scotland plc v Boyle 1999 Hous L.R. 63 and Eastmoor LLP v Bulman 2014 G.W.D. 26-529.

14. In Royal Bank of Scotland plc v Boyle, the court held that the grounds must be set out in the tenancy agreement and that the connection between the relevant clause and the grounds in question must be "reasonably precise and complete". While it may not be necessary to set out the grounds in full, the "essential ingredients" would have to be included. The Sheriff Principal was not satisfied that incorporation by reference would be sufficient or appropriate. The Royal Bank case was referenced in Eastmoor LLP v Bulman, where the

Sheriff took the same view. The tenancy agreement in that case had made reference to grounds 11 and 12 of Schedule 5, but did not provide any further detail. Sheriff Jamieson held that "it was not sufficient for the tenancy agreement merely to refer to the number of the ground". The "essential ingredients" of the grounds in question were required.

15. Having considered the terms of the tenancy agreement in this case, and the relevant case law, the Legal Member concluded that the provisions of section 18(6) cannot be met. Whilst the tenancy agreement between the parties makes reference the grounds listed in Schedule 5 of the Act there is no specification as to the substance of those grounds. The essential ingredients are missing. Section 18(6) requires the terms of the tenancy to "*make provision for it to be brought to an end on the ground in question*". That reference to the singular ground can only imply that there must be explicit reference to each ground the landlord is seeking to rely upon, as opposed to simply referencing Schedule 5 as a whole. The Legal Member accepts that there is no requirement to state the grounds exactly as provided for in Schedule 5, however there must be something more than just reference to that Schedule if the landlord intends to rely upon the grounds.

16. Had the Legal Member concluded that the provisions of section 18(6) had been met, there is a further ground upon which to reject the application. The Legal Member concluded that the period of notice in the AT6 is insufficient, having regard to the doctrine of *civilis computatio* in terms of the calculation of time. Section 19(3) of the 1988 Act provides that the AT6 must inform the tenant that proceedings will not be raised earlier than the expiry of the period of two weeks from the date of service of the notice. Unless statute states otherwise, the doctrine of *civilis computatio* provides that the day from which the period runs is excluded and the period of notice therefore runs from midnight on the day of service which in this case was the 4th April 2019. Taking that into account, the correct date upon which proceedings could commence would have been the 19th April 2019 following the expiry of the two week period.

17. The Legal Member therefore determined that the application had no prospect of success on the basis that no valid Notice to Quit had been served, the provisions of section 18(6) of the Housing (Scotland) Act 1988 could not be met and the AT6 did not give sufficient notice. Accordingly the application could therefore be held to be futile and misconceived as a result. Having regard to the aforementioned test in *R v North West Suffolk (Mildenhall) Magistrates Court,* the Tribunal concluded that the application was frivolous and rejected it under Rule 8(1)(a) of the Procedure Regulations.

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.

R.O'Hare

Ruth O'Hare
Legal Member

26th July 2019