Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF ANDREW UPTON, 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

Flat 2/1, 30 Garry Street, Cathcart, Glasgow, G44 4AX

Case Reference: FTS/HPC/EV/17/0507

JAMES LAIRD (GOLD BEATERS) LTD ("the Applicant")

CLAUDINE GAUCHAN ("the Respondent")

1   On 22 December 2017, an application was received from the applicant via its solicitor. 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. However, Rule 66 relates to recovery of possession of a property under section 33 of the Housing (Scotland) Act 1988, and it appears that this application actually seeks recovery under sections 18 and 19 of the 1988 Act. Accordingly, it appears that this application is in fact made under Rule 65, and has been considered on that basis. The following documents were enclosed with the application:-

(i)   Copy Short Assured Tenancy;

(ii)   Copy Form AT5;

(iii)   Copy Form AT6;

(iv)   Copy Notice to Quit;

(v)   Copy Notice under section 33 of the 1988 Act;

(vi)   Copy Sheriff Officer's Certificate of Execution;

(vii)   Copy Notice to Local Authority under section 19A of the 1988 Act; and

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(viii)   Copy Rent Account Statement.

2   In terms of clause 7 of the Tenancy Agreement, the duration of the tenancy was a period of six months. That clause is supplemented by a Schedule to the Tenancy Agreement, which again notes that the duration of the tenancy was a period of six months from 16 September 2013 until 15 March 2014. There is no provision within the Tenancy Agreement contracting out of tacit relocation. There is no provision within the Tenancy Agreement which makes provision for the agreement to be brought to an end on the basis of Grounds 2, 8, 9, 10, 15 or 17 in Schedule 5 to the 1988 Act.

3   The Notice to Quit provides that the Tenancy Agreement will terminate on 15 March 2018.

DECISION

4   I 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."

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5   After consideration of the application, the attachments and correspondence from the Applicant's solicitor, 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. 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 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 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."

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8   Section 18(6) of the 1988 Act provides as follows:-

"18. - Orders 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   There are only two types of assured tenancy: a contractual assured tenancy and a statutory assured tenancy. A contractual assured tenancy, once terminated, becomes a statutory assured tenancy in terms of section 16(1) of the 1988 Act. Accordingly, it follows that where a contractual assured tenancy is in operation, the First-tier Tribunal cannot make an order for possession unless the requirements of section 18(6) are met.

10   The Notice to Quit does not expire until 15 March 2018. Accordingly, the Short Assured Tenancy in this application is currently a contractual assured tenancy, and shall remain so until the very end of 15 March 2018.

11   The Tenancy Agreement does not make provision for it to be brought to an end on any of the Grounds specified in section 18(6). Accordingly, the requirements of that subsection are not met.

12   For those reasons, it seems to me that the application is premature. The First-tier Tribunal cannot, at the date of raising this application, grant the order sought. It follows that this application has no prospect of success and must be rejected on the basis that it is frivolous.

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

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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.

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Mr Andrew Upton
Legal Member
8 January 2018