

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

12 Victoria Street, Portknockie, Buckie, AB56 4LQ

Case Reference: FTS/HPC/EV/17/0541

KATHLEEN MARY WHYTE ("the Applicant")

SHIRALEE KELBIE ("the Respondent")

1 On 20 December 2017, an application was received from the applicant via its solicitor. The application was made under Rule 65 of the Chamber Procedural Rules being an application by a private landlord for possession of rented property let under an Assured Tenancy. The following documents were enclosed with the application:-

- (i) Copy Short Assured Tenancy;
- (ii) Copy Form AT6;
- (iii) Copy Notice to Quit;
- (iv) Copy Proof of Delivery of Notice to Quit and Form AT6;
- (v) Copy Notice to Local Authority under section 19A of the 1988 Act; and
- (vi) Copy Rent Account Statement.

2 The Tenancy Agreement is dated 1 April 2017. The first rent payment shown in the Rent Account Statement is also 1 April 2017. It appears to me that the Tenancy commenced on 1 April 2017. In terms of the Tenancy Agreement, the duration of the tenancy was a period of twelve months, and then on a month-to-month rolling basis thereafter. 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 December 2017.

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.”

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."

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 function of a Notice to Quit is to stop tacit relocation. A properly served Notice to Quit cannot terminate a tenancy other than at the natural expiry of the tenancy agreement. It is not, for example, a form of irritancy whereby a party can insert any termination date. To be valid, it must specify that the tenancy agreement to which it relates shall terminate at a properly calculated ish date.

11 The Notice to Quit states that the tenancy came to an end on 15 December 2017. However, that is not an ish date. The Tenancy will not reach its first ish until 1 April 2018, and (unless terminated) shall have subsequent ish dates on the first day of each month thereafter. Accordingly, the Assured Tenancy in this application is currently a contractual assured tenancy, and shall remain so until 1 April 2018.

12 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.

13 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 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.

Mr Andrew Upton
Legal Member
8 January 2018