



**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

93 Nelson Avenue, Howden, Livingstone ("the property")

Case Reference: FTS/HPC/EV/20/1835

**Derek Adams, John Adams, 10 New Calder Mill Road, Mid Calder, Livingstone
("the Applicant")**

Leanne Carson, 93 Nelson Avenue, Howden, Livingstone ("the Respondent")

1. By application received on 31 August 2020 the Applicant seeks an order for recovery of possession of the property in terms of Rules 65, 66 and 109 of the Rules. The Applicant lodged documents in support of the application including a Notice to Leave and AT6 Notice. The application form and both Notices state that the Applicant seeks possession of the property on ground 1 of the Private Housing Tenancies (Scotland) Act 2016 ("the 2016 Act") - the landlord intends to sell the let property. The Notice to leave is dated 25 August 2020 and states that the earliest date that proceedings can be taken is 1 March 2021. The AT6 is dated 25 August 2020 and states that the earliest date that proceedings can be taken is 1 August 2020.
2. A request for further information was issued to the Applicant on 8 September 2020. The Applicant was asked to provide a copy of the tenancy agreement. They were also asked to clarify which Rule they relied upon, and to provide a

copy of the Notice to Quit served on the Respondent, if the application was to proceed under Rule 65 or 66. The Applicant was also asked to clarify the validity of the AT6 Notice. In response, the Applicant submitted a further copy of the Notice to leave and said that the Notices were given to the Respondent on 1 August 2020. They also provided the Tribunal with a copy of the tenancy agreement which states that the initial term of the tenancy is 31 July 2015 to 31 January 2016. A Section 33 Notice was also submitted which is dated 16 September 2020 and states that the earliest date proceedings can be taken is 28 February 2021.

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 documents lodged in support of same 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 application lodged with the Tribunal seeks recovery of possession of an assured tenancy. The Applicant refers to Rules 65, 66 and 109 of the Rules. Rule 109 is not applicable as the tenancy agreement lodged with the application is dated 31 July 2015 and is therefore not a private residential tenancy ("PRT") under the 2016 Act but an assured tenancy under the Housing (Scotland) Act 1988 ("the 1988 Act"). It follows that the Notice to Leave, which is only required when a landlord intends to seek an eviction order in relation to a PRT, also falls to be disregarded. The tenancy agreement lodged with the application is described as a short assured tenancy. However the Applicant has not provided an AT5 Notice or a Notice to Quit. There is a section 33 Notice, but this is dated 16 September 2020 so presumably was not issued with the other Notices. It also states that an application cannot be submitted to the Tribunal until 28 February 2021. It therefore appears that the Applicant intends for the application to proceed under Rule 65 of the Rules, although they failed to confirm this when asked to do so by the Tribunal.
7. Prior to making an application in terms of Rule 65 of the Rules, a landlord requires to issue a tenant with a Notice to Quit and AT6 Notice, unless the Applicant seeks to rely on Section 18(6) of the 1988 Act. This states that "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 1 of Schedule 5 to the 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**". In *Royal Bank of Scotland v Boyle* 1999 HousLR it was held that, where an invalid Notice to Quit had been served and the Pursuer sought to rely on Section 18(6) of the Act, "(1) that the essential ingredients of the grounds for recovery of possession in Schedule 5 to the 1988 Act must be referred to in the tenancy agreement, and while this could be done by an exact citation of the grounds, and maybe also by providing a summary containing the essential ingredients of the grounds, incorporation by reference would not necessarily be appropriate". In the present application, the tenancy agreement lodged with the application narrates in full all of the grounds for possession contained within Schedule 5. It therefore appears that the application could proceed under this section, if the application is based on one of the grounds specified in Section 18(6).

8. The Legal member proceeded to consider the application and the AT6 Notice lodged with same. Both of these refer to ground 1 of Schedule 3 of the 2016 Act. This is not a ground for recovery of possession under the 1988 Act, and is therefore not a ground covered by the provisions of section 18(6). As a result, the Applicant cannot rely on these provisions. The Legal Member also notes that the AT6 is invalid as the ground for possession is not a relevant ground and the date specified in Part 4 is clearly incorrect, as it suggests that the application can be made to the Tribunal three weeks before the date of the notice itself.
9. As the AT6 Notice is invalid, and the ground for recovery of possession stated in the AT6 and the application is not a valid ground in terms of the 1988 Act, the Applicant has not complied with the requirements of the legislation and the application cannot proceed under Rule 65
10. The Legal member therefore concludes 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, Legal Member
30 September 2020