



**DECISION AND STATEMENT OF REASONS BY THE LEGAL MEMBER OF
THE FIRST-TIER TRIBUNAL WITH DELEGATED POWERS OF THE
CHAMBER PRESIDENT**

Under Rule 8(a) of the First-tier Tribunal for Scotland Housing and Property
Chamber Rules of Procedure 2017 ("the Procedural Rules")

in connection with

118a High Street, Montrose, Angus, DD10 8JE

Case Reference: FTS/HPC/EV/19/3148

The Parties:-

**Mr Paul Bertolotto and Mrs Gemma Bertolotto, both residing at 17 Scotston
Farmhouse, Laurencekirk, Aberdeenshire, AB30 1ND ("the Applicant")**

**Dick Watson Construction, Fasque House Construction, Fettercairn,
Aberdeenshire, AB30 1DN ("the Applicant's Representative")**

**Mr Malcolm Milne, 118a High Street, Montrose, Angus, DD10 8JE ("the
Respondent")**

1. By application dated 14th September 2019 the Applicants applied to the Tribunal under Rule 65 of the Procedural Rules for an order for recovery of possession of a short assured tenancy. The application form confirmed that the Applicants sought an order under section 18 of the Housing (Scotland) Act 1988. The following documents were enclosed with the application:-
 - (1) Tenancy Agreement between the parties dated 1st July 2015 and Form AT5;
 - (2) Notice to Quit dated 25th March 2019 giving notice to terminate the tenancy as at 1st June 2019; and
 - (3) Notice under section 33(1)(d) of the Housing (Scotland) Act 1988

advising that the landlord required possession of the house as at 1st June 2019.

2. On 7 October 2019 the Tribunal wrote to the Applicant's Representative advising that the application was incomplete. In particular the Tribunal requested the Applicant provide a copy of the Form AT6 served upon the Respondent together with a copy of the notice given to the local authority under section 11 of the Homelessness (Scotland) Act 2003. The Applicants were asked to submit the information by 14th October 2019.
3. On 8 November 2019 the Tribunal wrote again to the Applicant's representative requesting that he provide the documentation requested in the letter of 7th October 2019. In addition, the Tribunal advised that it appeared the Notice to Quit did not reflect the ish date in the lease and asked for the Applicants' views on its validity. The Applicants were asked to respond by 22 November 2019.
4. On 9 December 2019 the Tribunal wrote to the Applicants again requesting the information required by the previous correspondence by 23 December 2019, failing which the application may be rejected.
5. There has been no response from the Applicants nor the Applicant's Representative to any of the aforesaid correspondence.

DECISION

6. 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

7. The Legal Member considered the application together with the attachments and the subsequent correspondence from the Applicant's Representative.
8. '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.
9. In this case the application proceeds under Rule 65 of the Procedural Rules. The provisions of Rule 65 states that an application under that rule must be accompanied, amongst other documentation, by a copy of the notice served on the tenant by the landlord of the intention to raise proceedings for possession of the house (the Form AT6) and a copy of the notice given by the local authority by the landlord under section 11 of the Homelessness

(Scotland) Act 2003. The Applicants had provided a Notice to Quit and a notice under section 33(1)(d) of the Housing (Scotland) Act 1988, but no Form AT6. They had been asked by the Tribunal to clarify if they in fact sought an order under section 33 of the Act (Rule 66) however they had failed to respond. They had also failed to provide a copy of the notice served on the local authority, despite requests by the Tribunal to do so. Accordingly the Legal Member concluded that the application did not conform to the requirements of Rule 65.

10. The Legal Member therefore determined that the application had no prospect of success on the basis that the requirements of Rule 65 had not been met despite repeated requests to the Applicants' Representative and the application could therefore be held to be futile and misconceived as a result. Accordingly 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.
11. The Legal Member also wished to highlight a fundamental flaw in the Notice to Quit would have rendered an application under Rule 66 for an order under section 33 of the 1988 Act futile. The Notice in this case purports to terminate the tenancy on 1st June 2019. However the term of the tenancy as stated in the tenancy agreement is from 1st July 2015 to 1st January 2016. There is no provision for the tenancy to continue thereafter other than by tacit relocation therefore it continues on a six monthly basis. On that basis the Notice to Quit is invalid. The Applicant would therefore require to serve a valid Notice to Quit in order to bring the contractual tenancy to an end before he could rely upon section 33.

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

✓ Legal Member

15 January 2020