

**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

32/6, 2F2 King Road, Edinburgh, EH15 1DY

**Case Reference: FTS/HPC/EV/19/2608**

**The Parties:-**

**Mrs Phyllis Thorburn, 1-3 Salamander Yards, Edinburgh, EH6 7HB ("the Applicant's Representative")**

**Mr Archibald Thorburn, 1-3 Salamander Yards, Edinburgh, EH6 7HB ("the Applicant")**

**Mr David Grant, 32/6 2F2 King Road, Edinburgh, EH15 1DY ("the Respondent")**

1. By application dated 19 August 2019 the Applicant applied to the Tribunal under Rule 66 of the Procedural Rules for an order for recovery of possession of a short assured tenancy under section 32 of the Housing (Scotland) Act 1988. The following documents were enclosed with the application:-
  - (1) Tenancy Agreement between the Applicant and Respondent dated 17 March 2015;
  - (2) Form AT5 dated 17 March 2015;
  - (3) Notice to Quit dated 13<sup>th</sup> June 2019;
  - (4) Notice under section 33 of the Housing (Scotland) Act 1988 dated 13<sup>th</sup> June 2019;
  - (5) Sheriff Officer certificate of service dated 14<sup>th</sup> June 2019
2. By letters dated 2 September 2019 and 9 October 2019 the Applicant was asked to clarify aspects of his application in relation to ownership and the tenancy term. In particular the Applicant was asked on what basis he considered the tenancy to be for a term of six months in view of the initial term of 17<sup>th</sup> March 2015 to 16<sup>th</sup> September 2015 and on what basis he considered it continued on a monthly basis

thereafter in the absence of explicit provision in the tenancy agreement. The Applicant responded to advise that he considered the tenancy to have included the full day of 17<sup>th</sup> March and the full day of 16<sup>th</sup> September, therefore it was a term of six months. Further he produced bank statements which he stated were evidence of the tenancy having continued on a monthly basis, as they showed the Respondent having made monthly payments of rent both during and after the initial term.

## DECISION

3. 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

4. The Legal Member considered the application together with the attachments and the subsequent correspondence from the Applicant's Representative.
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. 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.
6. The Applicant has provided a Notice to Quit which purports to terminate the tenancy as at the 16<sup>th</sup> August 2019. Clause (1) of the Tenancy Agreement between the parties provides that the initial term of the tenancy is from 17<sup>th</sup> March 2015 to 16<sup>th</sup> September 2015. There is no provision for the tenancy to continue thereafter on a monthly basis. The Tribunal did not accept that the payment of rent monthly by the Respondent established a legal basis for the tenancy to continue in those terms in the absence of explicit provision or variation in writing of the tenancy agreement. The payment of rent in those terms was under a separate contractual obligation in Clause 2 of the agreement to pay the rent monthly in advance. The tenancy therefore continued in line with the original term.
7. The Notice to Quit is therefore invalid as the 16<sup>th</sup> August 2019 is not a valid ish date. Accordingly the Legal Member determined that the application had no prospect of success on the basis that the contractual tenancy between the parties continued and therefore the provisions of section 33 of the Housing (Scotland) Act 1988 could not be met. 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.
8. For the avoidance of doubt the Legal Member did not make any determination of whether the initial term of the tenancy was six months. However she would wish to highlight that this is an issue that the Tribunal will require to consider in further detail if the Applicant pursues a future application under Rule 66.

## 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.**



Ruth O'Hare  
Legal Member

31<sup>st</sup> October 2019