



**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 Procedure Rules")**

in connection with

2 Russell Court, Dunfermline, Fife, KY11 4XW ("the property")

Case Reference: FTS/HPC/EV/20/1187

**Janine Gachet, 23 Libris Place, Stanley Road, Knutsford, WA16 0GP ("the
Applicant")**

Karen Boyle, 2 Russell Court, Dunfermline, Fife, KY11 4 XW ("the Respondent")

1. By application received on 5 May 2020 the Applicant seeks an order for recovery of possession of the property in terms of Rule 66 of the Procedure Rules and Section 33 of the Housing (Scotland) Act 1988("the 1988 Act"). The Applicant lodged documents in support of the application including copy tenancy agreement, AT5 Notice, Notice in terms of Section 33 of the Housing (Scotland) Act 1988 and Notice to Quit. The Notices stipulate that the Respondent is to vacate the property on 5 April. A Sheriff Officer Certificate of service was also submitted confirming that the Notices were served on the Respondent on 3 February 2020.
2. On 28 May 2020 the Tribunal issued a request for further information to the Applicant. The Applicant was asked to explain the basis upon which the Tribunal could consider the application as the Notice to Quit appeared to be invalid. The Applicant was advised that the date specified in the Notice did not appear to coincide with an ish of the tenancy. In her response the Applicant

stated that the date specified in the Notice is an ish date of the tenancy and referred to a previous decision of the Tribunal under Chamber reference FTS/HPC/18/0018 in support of her argument.

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 an order for recovery of possession on termination of a short assured tenancy in terms of Section 33 of the 1988 Act. Section 33 states(1) states " Without prejudice to any right of a landlord under a short assured tenancy to recover possession of the house let on the tenancy in accordance with Sections 12 to 31 of this Act, the First-tier Tribunal shall make an order for possession of the house if the Tribunal is satisfied – (a) that the short assured tenancy has reached its ish, (b) that tacit relocation is not operating and (d) the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house." In order to comply with subsections (a) and (b) the landlord must serve a Notice to Quit to terminate the tenancy contract at the ish.
7. The term of the tenancy stated in the tenancy agreement which has been lodged by the Applicant is "12 months from 5th August 2016 ("start date") and will end on 4th August 2017 ("end date"). If the agreement is not brought to an end by either party on the end date it will continue thereafter on a monthly basis until terminated by either party". It appears therefore that there is an ish or end date on the 4th of each month after the initial term. The Notice to Quit lodged with the application purports to terminate the tenancy contract on 5 April 2020, which is not an ish date of the tenancy. This is disputed by the Applicant. Reference is made to a previous decision of the Tribunal under Chamber reference FTS/HPC/18/0018 which also concerned an application under Rule 66. The application for an order for possession was refused on the grounds that the Notice to Quit was invalid. The Tribunal noted that the term of the tenancy which had been lodged was as follows, "The tenancy starts on 4th October 2013 (the entry date) including the whole of the day to 28 October 2014 (this being the ish date of the tenancy)." "The tenancy will be automatically

renewed for a period of one year starting on the day after the ish date unless the landlord and tenant agree in writing that the renewed tenancy should be for a different period". On the basis of this clause the Tribunal determined that the tenancy continued after the initial terms from 29 October 2014 (the day after the ish) until 29 October 2015 and thereafter, with an ish on 29 October each year. As the Notice which had been lodged specified 28 October 2020, the Notice was invalid and the application was refused.

8. The Legal Member is not bound by a decision at first instance of the First –tier Tribunal. In any event, the Tribunal’s decision is consistent with a finding that the Notice to Quit in the present application is invalid. The Tribunal reached its conclusion on the specific conditions of the tenancy contract which had been lodged. This (somewhat unusually) stipulated that the tenancy would continue after the initial terms **from the day after the ish** for the period of a year. In the present application the more usual provision is made for the tenancy to continue **from the ish date** (4 August 2017) on a month to month basis. It follows that the tenancy had an ish on the 4th of each month from 4 September 2017 onwards. As the date specified in the Notice is 5 April 2020, the Notice is invalid and the tenancy contract has not been terminated. Accordingly, the Applicant has not complied with the requirements of Section 33 of the 1988 Act.
9. In order to raise proceedings for recovery of the property in terms of Rule 66 of the Rules the Applicant must first bring the contractual tenancy to an end. The Notice to Quit which has been lodged is invalid and does not terminate the contractual tenancy. As a result, the Applicant has failed to comply with the requirements of Section 33 of the 1988 Act. 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
12 June 2020