Housing and Property Chamber
First-tier Tribunal for Scotland

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

Reference number: FTS/HPC/EV/20/0897

101 3R Strathmartine Road, Dundee ("the Property")

The Parties:

Elizabeth Mahady, 4 osprey Place, Kingennie, Dundee ("the Applicant")

Suzanne Carter, 101 3R Strathmartine Road, Dundee ("the Respondent")

1. By application received on 12 March 2020, the Applicant seeks an order for possession in terms of Rule 66 of the Rules and Section 33 Housing (Scotland) 1988. A copy tenancy agreement, Notice to Quit, Section 33 Notice and Post officer certificate of posting dated 20 September 2019 were lodged with the application.

2. On 8 July 2020, the Tribunal issued a further request for information. The Applicant was asked to provide a track and trace report, or other evidence that the Notices had been delivered. On 20 July 2020, the Applicant provided a copy of an email to the Respondent, as advised that the Notices had been sent with this email. She also provided a further copy of the post office certificate of posting. On 20 August a further letter was issued to the Applicant asking again

for the track and trace report and advising that email was not a competent method of service for Notices under the 1988 Act. The Applicant responded saying - "I understand now that the notices cannot be served by email. I have attached a screen shot from the post office website showing the tenant didn't collect it from the post office. I understand it is my duty to serve the notices however, it is not my obligation to ensure that the tenant receives it as I cannot control the delivery or in this case the tenant chose not to collect it as per the legislation". A track and trace report was attached which states that on 11 October 2019 "Retention exceeded. Forwarded to National Returns Centre"

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 the documents submitted by the Applicant 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 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 was lodged with a Notice to Quit and Section 33 Notice. A copy of a post office receipt appears to establish that they was sent by recorded delivery post to the Respondent on the 20 September 2019. The track and trace report which has been produced indicates that the item was not delivered or collected by the Respondent and on 11 October 2019 it was sent to the National Returns Centre, to be returned to the Applicant, as undelivered. This is accepted by the Applicant. The Applicant also sent the Notice by email. The copy email is undated but does refer to a 2 month notice being attached. The Applicant argues that the landlord is not obliged to ensure that the Notices are delivered to or received by the tenant. It is enough that they have been served on them by recorded delivery post.

7. Section 33 of the 1988 Act states that, before an order for possession can be granted the tribunal has to be satisfied that "(b) tacit relocation is not operating, and (d) that 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 33(b) the landlord must serve a valid Notice to Quit. To

comply with 33(d) a section 33 Notice must be “given”. Section 54 of the 1988 Act states, “ A notice served under this Part of this Act on a person or notice so given to him may be served or given - (a) by delivering it to him; (b) by leaving it at his last known address; or(c) by sending it by recorded delivery letter to him at that address. The Legal Member is satisfied that service of the Notices by recorded delivery is a competent method of service, but email is not. However, there are other methods of service available and a landlord is not obliged to use recorded delivery post.

8. The Legal Member notes that the reason for sending documents by recorded delivery post is so that the sender has evidence that it was sent and of the date on which it was sent. In addition, the sender can track the delivery of the item, and take appropriate action if the item does not reach its destination. The Legal Member is satisfied that the track and trace report, submitted by the Applicant, is evidence that the Notices sent by post were not delivered or received by the Respondent. The Legal member is not persuaded by the Applicant’s argument. The purpose of the Notices is to make the tenant aware that his contractual tenancy is being terminated and that the landlord wants to recover possession of the property. It is not just a formality. It also provides the tenant with the option of vacating the property, at the appointed date, rather than waiting for tribunal proceedings to be taken. It is not enough that the Notices were sent. They have to be served or given. In other words, they have to actually be delivered to the tenant or to his home address.

9. As an order under Section 33 cannot be granted unless a Notice to Quit has been served, and a Section 33 Notice given to the tenant, the Legal Member determines 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.

J Bonnar

Josephine Bonnar
Legal Member
4 September 2020