



**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

Kendrum Park House, Bridge of Tilt, Blairatholl, Pitlochry ("the property")

Case Reference: FTS/HPC/EV/21/0363

**Edward Richards, Patricia Richards, 73 Enfield Crescent, Enfield ("the
Applicants")**

**Peter Aylward, Kendrum Park House, Bridge of Tilt, Blairatholl, Pitlochry ("the
Respondent")**

1. By application received on 17 February 2021 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 22 August 2020.
2. The Tribunal issued a request for further information to the Applicants. The Applicants were asked to explain the basis upon which the Tribunal could consider the application as the Notice to Quit appeared to be invalid. The Applicants were advised that the date specified in the Notice did not appear to coincide with an end of the tenancy. In the response, the Applicants representative stated that that if the lease had continued by tacit relocation the end date would be 22 September. However, their view was that tacit relocation

was not operating and that clause 1 of the agreement allowed for the tenancy to be terminated on 2 months notice without reference to an ish.

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." These provisions establish that a tenant under a short assured tenancy cannot be evicted prior to the ish. Furthermore, in order to comply with subsections (a) and (b), the landlord must serve a valid Notice to Quit which terminates the tenancy contract at the ish.
7. The term of the tenancy stipulated in the tenancy agreement which has been lodged by the Applicant, is 23 September 2011 until 22 September 2012. The agreement states that if the tenancy is not brought to an end by either party on the termination date it will "continue thereafter but may be terminated at any time thereafter by either party giving not less than two months written notice". As a general rule, assured and short assured tenancy agreements make specific provision for the tenancy to continue for shorter periods than the initial term, usually from month to month. In such cases, there will be an ish date each month on the same day of the month as the original termination date. Where the agreement is silent, and neither party brings the tenancy to an end at the ish date, the tenancy continues by tacit relocation. In the present case the agreement makes reference to the tenancy being terminated on two months notice but this provision does not seem to establish that the tenancy continued for further two monthly terms. If this is the effect of that provision, the ish dates after the initial term would be 22 November, 22 January, 22 March, 22 May, 22 July and 22 September of each year, and 22 August 2020 would

not have been an ish. However, the Legal Member is of the view that the tenancy has simply continued by tacit relocation. Had the original term been from 22 September 2011 to 22 September 2012 (or had the agreement specifically stated that the lease would continue on a year to year basis) this would have resulted in an ish on the 22 September each year, until the tenancy was terminated. However, as the initial term goes from 23 September to 22 September, it is arguable that the annual ish date might not fall on the same date each year. For example, the ish date in 2013 might have been 21 September, and in 2014, 20 September, and so on. Whether or not this is the case, it is clear that the 22 August 2020 (being the date specified in the Notice to Quit) is not an ish. This Notice is therefore invalid and the tenancy contract has not been terminated. Before raising proceedings for recovery of the property in terms of Section 33 of the 1988 Act, a landlord 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.

8. 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 March 2021