



**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")**

Case Reference: FTS/HPC/ EV/24/4395

126 Norman Rise, Dedridge, Livingstone. ("the property")

Gary McFarlane, 10 Easter Inch Steading, Bathgate ("the Applicant")

1. The Applicant seeks an order for possession of the property in terms of Rule 66 of the Rules and Section 33 of the Housing (Scotland) Act 1988 ("the 1988 Act"). A tenancy agreement, AT5, Notice to Quit, and Section 33 Notice were lodged in support of the application. The Notice to Quit calls upon the Respondent to vacate the property on 1 July 2024.
2. The Tribunal issued a request for further information about the validity of the Notice to Quit and the AT5 Notice. The Tribunal noted that the Notice to quit appeared to be invalid as the date specified in the Notice is not an ish date. The AT5 is incomplete and does not appear to be in the format prescribed in the Assured Tenancies (Forms) (Scotland) Regulations 1988 ("the 1988 Regulations").
3. The Applicant did not respond to the initial request. In response to a reminder, his agent stated that the AT5 is valid, even if notes are missing. He also stated that the Notice to Quit is valid because the tenancy continued on a month to month basis after the initial term as evidenced by the fact that the rent is paid monthly and the tenant only required to give one months notice. A further letter was issued to the Applicant advising that he had not fully addressed the issues raised and that both AT5 and Notice to quit appeared to be invalid. He was advised that a response to the request was required or the application may be rejected. He did not respond.

DECISION

4. 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.

- 5. 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

6. '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".
7. The Applicant seeks recovery of possession of a short assured tenancy. Rule 66 and Section 33 of the 1988 Act can only be used if a valid short assured

tenancy has been created. In terms of Section 32 1(b), a tenancy is only a short assured tenancy if an AT5 notice has been issued to the tenant before the creation of the tenancy. In terms of Section 32(2)(a), the AT5 notice must be “in such form as may be prescribed”. The Schedule to the 1988 Regulations outlines the format and content of an AT5 notice. The Notice lodged with the application is not in this format. It is incomplete and the notices to the tenant are missing. The Legal Member is therefore satisfied that the AT5 notice is not valid and, as a result, a short assured tenancy has not been created.

8. The tenancy agreement lodged with the application states that the initial term of the tenancy is 1 August 2015 to 1 February 2016. There is no provision that the tenancy will continue on a month to month basis after the initial term. Clause 31 stipulates that it will continue for the same period after the initial term, if not terminated by either party. It therefore appears that the tenancy has continued by tacit relocation with an ish date on 1 August and 1 February each year. The frequency of rent payments and the required notice periods are irrelevant. The Notice to Quit calls upon the Respondent to vacate the property on 1 July 2024, which is not an ish. As a landlord cannot terminate the tenancy contract before the ish date, the Legal Member is satisfied that the Notice to quit is invalid.
9. Before an order for possession can be granted under Section 33 of the 1988 Act, the tenancy contract between the parties must be terminated by service of a valid Notice to Quit. This is to prevent tacit relocation from operating, as required by Section 33(b). As the Respondent has not been served with a valid Notice to Quit, the application for an order for possession cannot succeed.
10. As the tenancy is not a short assured tenancy in terms of Section 32 of the 1988 Act, the Applicant cannot seek an order for possession of the property in terms of Section 33. Even if a valid short assured tenancy had been created, an applicant cannot seek an order for possession without first terminating the tenancy contract. As the Notice to Quit is invalid, 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

18 March 2025