



**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

Innisfree, Cairnbaan, Lochgilphead PA31 8SQ ("the property")

Case Reference: FTS/HPC/EV/20/0225

**Gillian Hall, 128 East Parade, York and Valerie Ludow 11 Hope Street, South
Queensferry ("the Applicants")**

John Dixon, Innisfree, Cairnbaan, Lochgilphead ("the Respondent")

1. By application dated 19 January 2020 the Applicants seek order for recovery of possession of the property in terms of Rule 66 of the Rules. The Applicants lodged a number of documents in support of the application including copy tenancy agreement dated 28 April 2016, AT5 Notice, Section 33 Notice and Notice to Quit, both dated 13 January 2020. The term of the tenancy in the agreement is stated to be "12:00 noon on 10 May 2016 and ends at 12:00 noon on 9 November 2016". No information is provided as to the method and date upon which the Notice to Quit and Section 33 notice were given to the Respondent. The Notice to Quit states that the Respondent is called upon to vacate the property on 9 April 2020. The section 33 Notice does not stipulate a date upon which the Respondent is to vacate the property.

DECISION

2. 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.”

3. **After consideration of the application and supporting documentation from the Applicant, 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

4. '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.
5. The application lodged with the Tribunal seeks recovery of possession of a short assured tenancy in terms of Section 33 of the Housing (Scotland) Act 1988 ("the 1988 Act"). Section 32 of the 1988 Act states "(1) A short assured tenancy is an assured tenancy – (a) which is for a term of not less than six months." The term stipulated in the tenancy agreement does not appear to be for a full period of 6 months. Reference is made to the case of *McCabe v Wilson* 2006 HousLR 431.. In this case the Sheriff concluded, in relation to a tenancy term of "six months commencing on the 7th of April 2005 and terminating on the 6th of October 2005", that "read as a whole therefore condition 2 only makes sense if the parties intended all of the first day, 7th April, to be treated as part of the lease as well as all of the last day. Only then could the lease be said to be, as parties stated, for a period of 6 months". The Legal member notes that condition 7 of the tenancy agreement lodged with the application does not state that it is to be for 6 months. Furthermore, it specifically states that the start and end time of the least is 12 noon. No inference can therefore be taken that the parties intended all of the first and last days of the least to be included. The Legal member therefore concludes that the tenancy lodged is not a short assured tenancy as it is not for a term of not less than six months. Accordingly the application in terms of Rule 66 of the Rules and Section 33 of the 1988 Act is not competent.
6. The Legal member notes that the Notices lodged with the application are dated 13 January 2020. No information is provided as to the date upon which the notices were served on the Respondent, although it is to be assumed that this would be after this date. The Section 33 Notice is silent as to the date upon which the Respondent is to vacate, although Section 33 requires that at least 2 months notice be given. The Notice to Quit calls upon the

Respondent to vacate on 9 April 2020. The application was lodged on 22 January 2020. The Applicant is not entitled to seek an order for recovery of possession of the property until the date stipulated in the Notice to Quit has passed and the Respondent has had 2 months notice in terms of the section 33 Notice. The application is therefore premature. The Legal Member therefore concludes that, even if the tenancy agreement had been a short assured tenancy in terms of the 1988 Act, the application would be rejected on the basis that it is premature as it has been submitted before the Applicant is entitled to do so.

7. The Legal Member therefore 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.

Jösephine Bonnar
Legal Member
7 February 2020