



**DECISION AND STATEMENT OF REASONS OF JAN TODD, LEGAL MEMBER
OF THE FIRST-TIER TRIBUNAL WITH DELEGATED POWERS OF THE
CHAMBER PRESIDENT**

Under Rule 8 and 5 of the First-tier Tribunal for Scotland Housing and Property
Chamber Rules of Procedure 2017 ("the Procedural Rules")

in connection with
Case reference FTS/HPC/EV/22/2178

Parties

Mr Brian McMillan, Mrs May McMillan (Applicant)

Miss Carren Livingstone (Respondent)

Mrs May McMillan (Applicant's Representative)

279 Beechwood Road, Blackburn, West Lothian, EH47 7PF (House)

1. On 2nd July 2022, an application was received from the Applicant. The application was made under Rule 65 of the Procedural Rules, being an application for an order of eviction under S18 of the Housing Scotland Act 1988 of the Respondent from the Property.
2. The following documents were received from the Applicant's representative:-
 - a. A copy tenancy agreement
 - b. Copy Notice to Quit dated 1st May 2022
 - c. Copy s33 notice dated 2nd July 2022

d. Copy AT6 dated 1st May 2022

3. The Tribunal requested further information from the applicant by letter dated 12th August 2022. The Tribunal asked for the following information:-
4. Before a decision can be made, we need you to provide us with the following:
 1. Can you advise if Ms May McMillan is to be a joint applicant or is just a representative? It is noted that Ms McMillan is a joint owner so please advise if she is to be a joint applicant using the details on the form? If not please provide a written mandate from Ms McMillan agreeing that Mr McMillan has her authority to let out the property and raise this action and please let us have a mandate from Mr Brian McMillan authorising Ms May McMillan to act as his representative in these proceedings?
 2. Please advise if there are further pages of the tenancy agreement as only one page has been sent and this contains no detailed conditions? If this is the full extent of the lease then the duration appears to be for 6 months from 1st April 2016 meaning the first end or ish date would be 1st October and then it would renew until terminated on either 1st April or 1st October. As a notice to quit must be served asking the tenant to leave on a termination or ish date please advise how the notice to quit can be valid if it refers to an and end date of 1st July 2022?
 3. Your application refers to Rule 65 which is an application under S18 of the 1988 Act and relies on an AT6 form and must state one of the grounds in Schedule 5 to the Act. You have lodged an AT6 form but it refers to the landlord wishing to sell the property which is not a ground in schedule 5. You also refer in the application to s33 and have lodged a s33 notice which is a notice seeking possession after terminating the Short Assured Tenancy. If you wish to rely on s33 please confirm and amend your application to Rule 66. Please also advise why the s33 is dated 2nd July 2022 which appears to be supported by the Scottish Courts and Tribunals Service www.scotcourtsribunals.gov.uk postdate the time the tenant has to leave? Do you have a correctly dated version of the S33 notice?
 4. If you are relying on s33 then please supply a copy of the AT5 noticed that requires to be served prior to the lease being entered into.
 5. Please provide evidence of how and when the notice to quit and s33 notice

was served e.g. by recorded delivery in which case please provide evidence of posting and receipt?

6. Please provide evidence of serving the s11 notice on the local authority such as copy e-mail or proof of posting. All grounds of eviction are now discretionary and so evidence of the landlord's intention to sell the property can be submitted as grounds supporting submissions as to why the Tribunal may consider it reasonable to grant an eviction and so we will keep that evidence with the case pending receipt of your response to the above queries. Please reply to this office with the necessary information by 26 August 2022. If we do not hear from you within this time, the President may decide to reject the application.

5. The Applicant responded on 15th August and again on 22nd August confirming that she wished to be added as a second applicant; providing a copy of a s11 notice, providing a 2nd page of the tenancy and providing one page of an AT5 notice.

6. The tribunal wrote again on 21st September 2022 saying:-

‘Before a decision can be made, we need you to provide us with the following:

1. Please advise as to the basis upon which you consider that the Notice to Quit is competent? The tenancy agreement states that it commenced on 1 April 2016 and runs for 6 months. In the absence of any provision in the lease to the contrary, the lease appears to continue to run for periods of 6 months at a time. The Notice to Quit must terminate the lease at an ish date, which appears to be 1 April and 1 October each year. Please advise as to the basis upon which you consider that the Notice to Quit can seek to terminate the lease as at 1 July?

2. Please confirm whether you wish to proceed with your application under Rule 65 or 66. Rule 65 refers to seeking a repossession order under s18 of the Housing (Scotland) Act 1988 on the basis of service of an AT6, however your AT6 does not rely on a ground contained within the said 1988 Act. Rule 66 refers to an application proceeding in terms of s33 of the 1988 Act, by service of a Notice to Quit and s33 Notice. Please confirm which Rule you wish your application to be considered under and if not Rule 65 as you have submitted, please amend your application accordingly.

3. Please provide evidence of how the Form AT6, Notice to Quit and s33 notice were served on the tenant?

4. Please provide evidence of how the s11 notice was sent to the local authority

(i.e. copy email or proof of posting). Please note that the Tribunal administration staff cannot provide you with any legal advice. Accordingly, if you are unclear as to the above you may wish to obtain your own independent legal advice. Please reply to this office with the necessary information by 5 October 2022. If we do not hear from you within this time, the President may decide to reject the application.”

7. The Applicant responded on 4th October 2022 to this request stating:-

“Thank you for your letter of 21st September 2022 in connection with the above. In response to the points raised, please find below:- 1. I attached for you information a copy of the Notice to Quit issued on 1st May 2022 which I appreciate does not fulfil the current legislation under this term therefore, I would like to proceed to seek a repossession order under point 2 (denoted below).

2 I wish to expedite my application under Section 65, Ground 15 that my said property between 23/09/2019 and 26th July 2022 had been utilised for illegal practices involving Police Scotland intervention. 3 As requested Form AT6, Notice to Quit and S33 notice. 4. As requested, evidence of S11 attached”

8. The Tribunal wrote again on 8th November 2023

“I refer to your recent application which has been referred to the Chamber President for consideration. Please note that your application cannot be accepted in its present condition. If you wish to proceed under Rule 65 you must provide the following 1. A valid Notice to Quit which has been served on the Respondent, with evidence of service. 2. A valid AT6 notice which specifies the ground for possession, with evidence of service. The AT6 lodged does not specify a valid ground. 3. Evidence of the eviction ground. Please note that from ground 15 you need evidence that the tenant has been convicted of a criminal offence, not just charged or arrested, or evidence that they have engaged in antisocial behaviour. Please note that the police information you have submitted is not sufficient. 4. An amended application form as the form lodged refers to section 33 – termination of short assured tenancy. If you wish to proceed under Rule 66 you must provide the following 1. A valid notice to quit with evidence of service 2. A valid section 33 notice with evidence of service If you are unable to provide the documents required you should withdraw the application and re-submit it once the correct notices have been served.

Otherwise, your application is likely to be rejected. You may wish to take legal advice before you respond Please reply to this office with the necessary information by 22 November 2022. If we do not hear from you within this time, the President may decide to reject the application”.

9. The Applicant did not respond directly to this request although she emailed the Tribunal expressing concern at how long and complicated the process was. A further reminder was sent on 13th December 2022 requesting a response and the Applicant responded on 22nd December as follows:-

“Good Afternoon, Yes I would still like the property back at Beechwood Road. I am finding the process very complicated. I have already submitted all the evidence you have requested in your letters. I may have got a bit mixed up with dates etc. We require to sell the property as we cannot afford to keep it and our circumstances require us to sell. This is proving to be a very stressful process and we feel we are not getting any assistance. The guidelines are so complicated. Can you advise me if we have to start the whole process over again or can we continue with this application with amendments.”

10. Prior to the Tribunal being able to respond to this the Applicant wrote again saying:- *“Good Afternoon, I have been trying to evict Miss Livingstone from our property at 279 Beechwood Road. Blackburn for some time now. Initially when we made the request it was due to our financial situation and we required the property back to sell it. Being new to these procedures we made an error with dates the first-time round. Since then, we have had continuous complaints from neighbours due to anti-social behaviours from the tenant and suspected drug dealing from the property. On a visit to the property, we noticed that the front door had been damaged due to Police gaining entry to the property for suspected drug dealing. We applied to the FOI Act with Police Scotland and we submitted the report to yourselves for consideration. At this time, you responded by saying it was not enough evidence as Miss Livingston had not been convicted of the offences. We have recently found out that Miss Livingston has now been convicted for these offences from the premises and is currently serving a payback order. In light of this information, we would like Miss*

Livingstone evicted from the property due to her illegal activities. You can imagine the stress this is putting on myself and my husband knowing that the tenancy is being used in this way. If you do not consider this, then we will have no option but to serve Notice again to Miss Livingstone ensuring we submit paperwork on the correct dates. If my understanding is correct, then we would have to give 6 months' Notice on or before April 2023 which would allow us to have her evicted by October 2023. This is a long time to have Miss Livingstone in the property to continue to commit offences and there is the possibility that there could be more damage to the property due to her criminal activities. My husband and I were left the property as inheritance from his late mother and hoped to sell this for our retirement as he does not have a pension. We are now living in fear of repercussions from Miss Livingstone, her family and her associates. Any support and advice would be greatly appreciated."

11. The Tribunal wrote again on 10th January 2023 asking for further information to ascertain if the application could be accepted:- *Before a decision can be made, we need you to provide us with the following: 1. The application cannot proceed under Rule 66 as you have not provided a valid S 33 notice and confirmation of service and you have not provided a valid Notice to Quit because the date given in the Notice to Quit was not an ish date. If you wish to proceed on the basis of the Short Assured Tenancy provisions under S 32 and 33 of the Housing (Scotland) Act 1988 you would have to restart the process with valid relevant documents and a fresh application. 2. You have asked the Tribunal to add ground 15 to the application under rule 65 and you state you have now obtained information the tenant has been convicted. A valid application requires evidence that the ground or grounds are met. You have not provided evidence of a relevant conviction. If the Tribunal allows the matter to proceed to a Case Management Discussion (CMD) on that ground and on the basis of rule 65, it will be for the Tribunal members at the CMD to decide whether or not they consider that the Tribunal has power to deal with the application despite there not being a valid Notice to Quit and a valid AT6 notice. The AT6 Notice lodged by you did not state a valid ground in terms of schedule 5 of the Housing (Scotland) Act 1988 and any notice for a date of 1.7.2022 has now expired in terms of S 19 (7) of the Act. The CMD is likely to be scheduled for a date about 2 months after an application has been accepted and only at*

the CMD would you find out if the application is then allowed to proceed further in terms of S 18 (6A) and 19 (1) (b) of the Housing (Scotland) Act 1988 or is dismissed. If you wish to proceed on that basis you would have to submit evidence of the ground applying and make representations on why the Tribunal should consider that it is reasonable to dispense with the requirement of an AT6 notice and ask the Tribunal to proceed to a CMD on that basis. Alternatively you can withdraw the application and start the process afresh lodging the appropriate documentation. You are strongly advised to consult a solicitor or another advice service. They may be able to advise you on the Notice periods and requirements under ground 15 of the Act and the Tribunal as an independent judicial body is not allowed to give advice to parties. Please within the 2 week period stated now either provide evidence that the ground you seek to rely on applies and make representations regarding reasonableness of dispensing with the requirement for an AT6 notice and ask the Tribunal to allow the matter to be considered at a Case Management Discussion or withdraw the application and, if required, start a fresh application with valid documentation. Please reply to this office with the necessary information by 24 January 2023. If we do not hear from you within this time, the President may decide to reject the application.”

12.No response was received. A further reminder was issued on 16th February from the Tribunal and no response has been received to either of the last letters.

13.Applicant has failed to respond to the Tribunal’s requests for further information and has failed to produce the required documentation or information necessary to accept this application.

DECISION

14.I considered the application in terms of Rule 5 and 8 of the Procedural Rules. Those Rules provide:-

15.

"Rejection of application

Rule 5 (1) An Application is held to have been made on the date that it is lodged if on that date it is lodged in the manner as set out in rules 43, 47, to 50, 55, 59,61,65, to 70,72,75 to 91, 93 to 95,98 to 101,103 or 105 to 111 as appropriate.

(2) the Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.

(3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President, may request further documents and the application is to be held made on the date that the First Tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement.

(4) the application is not accepted where the outstanding documents requested under paragraph (3) are not received within such reasonable period from the date of request as the Chamber President considers appropriate.

(5) Any request for service by advertisement must provide details of any steps taken to ascertain the address of the party and be accompanied by a copy of any notice required under these Rules which the applicant attempted to serve on the other party and evidence of any attempted service.

(6) the First Tier Tribunal may direct any further steps which should be taken before the request for service by advertisement will be granted.

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."

16. After consideration of the application, the attachments and correspondence from the applicant, I consider that the application should be rejected on the basis that I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 5(4) and Rule 8(1) (c) of the Procedural Rules.

REASONS FOR DECISION

17. The Tribunal has requested further information from the applicant in order to consider whether or not the application must be rejected as frivolous within the meaning of Rule 8(1) (a) of the Procedural Rules. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court*, (1998) Env. L.R. 9. At page 16, he states:-
"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 I have to consider in this application in order to determine whether or not this application is frivolous, misconceived, and has no prospect of success.

18. The applicant has failed to respond in full to the Tribunal's request for further

information and documents, in breach of Rule 5 and as a result information the Tribunal requires in order to determine whether or not the application is frivolous, misconceived, and has no prospect of success has not been made available. In terms of Rule 5 the application should not be accepted as outstanding documents have not been received. I consider that the applicant's failure to respond to the Tribunal's request gives me good reason to believe that it would not be appropriate to accept the application in circumstances where the applicant is apparently unwilling or unable to respond to the Tribunal's enquiries in order to progress this application.

19. The Applicant has not provided a valid notice to quit or confirmed she wishes to ask the Tribunal to allow the application to dispense with the requirement of an AT6. The Applicant has not provided the information required to see if the application can proceed accordingly, for this reason, this application must be rejected upon the basis that I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1) (c) of the Procedural Rules.

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.



Jan Todd
Legal Member
23rd March 2023