



**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

34 Carrick Street, Girvan, KA26 9EQ ("the Property")

Case Reference: FTS/HPC/EV/20/1149

**Louise Mair, Waterpark Farm, Kilmaurs, Kilmarnock, KA3 2LU ("the
Applicants")**

Anthony Hudson, 34 Carrick Street, Girvan, KA26 9EQ ("the Respondent")

1. By application received on 4 May 2020 the Applicant seeks an eviction order in terms of Rule 109 of the Rules and Section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act"). The Applicant lodged a private residential tenancy agreement and Notice to Leave together with copy email in support of the application. The Notice to Leave and email are dated 1 March 2020. The date specified in Part 4 of the Notice as the earliest date an application can be made to the Tribunal is 31 March 2020.
2. On 20 May 2020 the Tribunal issued a request for further information to the Applicant. The Applicant was advised that the date specified in Part 4 of the Notice to leave appeared to be incorrect, and was asked to clarify the position regarding the validity of the Notice. In response the Applicant stated that it appeared that the date which ought to have been specified was 1 April 2020.

She also stated that, as the application was not lodged with the Tribunal until 34 days after the date specified, it would be reasonable for the Tribunal to consider the application

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 Notice to Leave which accompanies the application is dated 1 March 2020. A copy email to the Respondent has also been submitted which appears to establish that the Notice was emailed to the Respondents on the same date. Part 4 of the Notice states that "An application will not be submitted to the Tribunal for an eviction order before 31 March 2020. This is the earliest date that Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the let property)". The relevant sections of the 2016 Act are as follows:-

52 Applications for eviction orders and consideration of them

...

- (2) The Tribunal is not to entertain an application for an eviction order if it is made in breach of—
 - (a) subsection (3), or
 - (b) any of sections 54 to 56 (but see subsection (4)).
- (3) An application for an eviction order against a tenant must be accompanied by a copy of a notice to leave which has been given to the tenant.

54 Restriction on applying during the notice period

- (1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.
- (2) The relevant period in relation to a notice to leave—

(a) begins on the day the tenant receives the notice to leave from the landlord, and

(b) expires on the day falling—

(i) 28 days after it begins if subsection (3) applies,

...

(3) This subsection applies if—

...

(a) on the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than six months.

...

(4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3).

62 Meaning of notice to leave and stated eviction ground

(1) References in this Part to a notice to leave are to a notice which—

(a) is in writing,

(b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal,

(c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and

(d) fulfils any other requirements prescribed by the Scottish Ministers in regulations.

...

(4) The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.

(5) For the purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.

7. For the purposes of section 62(1)(d), the relevant regulations are the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017, schedule 5 of which sets out the prescribed form for a notice to leave. Part 4 of that form is set out as follows:

Part 4 THE END OF THE NOTICE PERIOD

An application will not be submitted to the Tribunal for an eviction order before (insert date). This is the earliest date that

the Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the Let Property).

8. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, states:

26 Service of documents

(1) This section applies where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person (whether the expression “serve”, “give”, “send” or any other expression is used).

(2) The document may be served on the person—

...

(c) where subsection (3) applies, by being sent to the person using electronic communications

(3) This subsection applies where, before the document is served, the person authorised or required to serve the document and the person on whom it is to be served agree in writing that the document may be sent to the person by being transmitted to an electronic address and in an electronic form specified by the person for the purpose”

(6) Where a document is served as mentioned in subsection in subsection (2)(c) it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.

9. The Legal Member notes that the Notice to leave was emailed to the Respondents on the 1 March 2020. This constitutes service under Section 26(2)(c) of the 2010 Act. Accordingly, under section 26(5), the Notice to Leave “is to be taken to have been received 48 hours after it is sent unless the contrary is shown.” This is confirmed, in respect of a notice to leave, by section 62(5) of the 2016 Act, which states: “For the purposes of subsection (4) it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent”. Therefore the notice submitted with the application can be taken to have been served on 3 March 2020. This means that the notice period expired on 31 March 2020.
10. In terms of section 62(4) of the 2016 Act the Notice must state a date being “the day falling after the day on which the notice period defined in section 54(2) will expire.” In this case, that date was 1 April 2020. Therefore, in order to

comply with section 62(4), the date which ought to have been specified in the notice was 1 April 2020.

11. The opening words of Section 62 indicate that a Notice to Leave has to fulfil the four requirements specified in Sections (a) to (d) of that section. It follows that a Notice to Leave which does not fulfil these requirements is not a “Notice to leave” in terms of the 2016 Act. As the application to the Tribunal has to be accompanied by a “Notice to Leave”, it appears that the Applicant has failed to comply with Section 52 of the 2016 Act and as a result the Tribunal cannot entertain the application.
12. The Applicant argues that, as the application was not in fact submitted to the Tribunal until 34 days after 31 March 2020, it would be reasonable for the Tribunal to accept the application. This suggests that the Tribunal has discretion to accept an application which is not accompanied by a valid Notice to Leave. With the exception of the provisions of Section 73 of the 2016 Act, no such discretion exists. Section 73 relates to “Minor errors in documents” and states, “(1) An error in the completion of a document to which this section applies does not make the document invalid unless the error materially affects the effect of the document.” This section applies to “(2)(d) a notice to leave (as defined by section 62(1))”.
13. The Legal Member notes that for a “minor error” in a Notice to Leave to be disregarded, the error cannot materially affect the effect of the Notice. This is the only basis on which the Tribunal can conclude that the Notice is valid, notwithstanding the error. The explanatory note to Section 73 states “Section 73 provides that any errors in specified documents do not invalidate the document if they are sufficiently minor that they do not materially affect the effect of the document”. The Legal Member is satisfied that the word “effect” denotes the effect that the Notice is intended to have. In terms of Section 62 of the 2016 Act, a Notice to leave is supposed to give the tenant certain information. That information includes the date on which the landlord expects to become entitled to make an application to the Tribunal. The Legal Member is satisfied that where a notice is issued which does not give that information (or gives the wrong information) then the error clearly affects the effect of the notice.
14. The Legal Member notes that the Applicant argues that the Respondent was not prejudiced, since the application was not in fact submitted until 34 days after 31 March 2020. This raises the question as to whether the Applicant’s error “materially” affected the effect of the Notice. However, the Legal member is not persuaded by the argument. The validity of the Notice cannot be determined by circumstances which occurred after it was served. The Notice

was invalid at the point that it was emailed to the Respondent. It did not contain the requisite information. That defect cannot be cured by events which occurred after the tenant received it. The Legal Member is also satisfied that date on which an application to the Tribunal can be made is fundamental and an error in the notice in relation to that date cannot be considered to be a minor error.

15. The Legal Member determines that the error in the Notice to leave does materially affect the effect of the Notice. The Notice is accordingly invalid. It is not a notice to leave in terms of Section 62 of the 2016 Act. The Applicant has therefore failed to comply with the requirements of the 2016 Act and the Tribunal cannot entertain the application.

16. 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.

Josephine Bonnar
Legal Member
22 July 2020