

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision with Statement of Reasons of H Forbes, Legal Member of the First-tier Tribunal with delegated powers of the Chamber President of the First-tier Tribunal for Scotland (Housing and Property Chamber)

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

Chamber Ref: FTS/HPC/EV/21/2653

Re: 18 West Benhar Road, Harthill, ML7 5PB ("the Property")

Parties:

Jesmond Sathiyakumar ("the Applicant")

Alban Bartley-Jones ("the Respondent")

Tribunal Member:

Ms H Forbes (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be dismissed on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules and that it would not be appropriate to accept the application in terms of Rule 8(1)(c).

Background

1. The application was received by the Tribunal under Rule 109 on 26th October 2021. The Applicant's representative included a copy of a Notice to Leave served in terms of Ground 12 of Schedule 3 of the Private Housing (Tenancies) Scotland Act 2016 ("the 2016 Act") and dated 13th April 2021 and a rent statement showing unpaid rent from 12th February 2021 onwards.
2. The application was considered by the Tribunal and further information was requested by letter dated 18th November 2021, as follows:

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

1. A signed mandate from the applicant authorising you to act on their behalf;

2. Notification to the local authority as required by section 56 of the Private Housing (Tenancies) (Scotland) Act 2016 together with proof of service of notice;
3. Proof of service of Notice to Leave upon the tenant;
4. An explanation as to why the owner of the Property is different from the landlord and applicant. The landlord is usually the owner. Please provide written consent from the owner authorising the applicant to act as landlord;
5. It appears that, at the time of serving the Notice to Leave, there may have been less than 3 months' rent arrears. Your attention is drawn to the Upper Tribunal case of Majid v Gaffney [2019] UT 59 UTS/AP/19/0037. In the event that you accept that at the time of service of the Notice there was less than three months' rent outstanding, please provide a written explanation as to why you believe it would be reasonable for your application to be considered, with reference to the relevant provisions of the Private Housing (Tenancies) (Scotland) Act 2016.

The Applicant was given until 2nd December 2021 to respond, failing which the application may be rejected.

3. By email dated 22nd November 2021, the Applicant's representative responded as follows:

Please find attached further information required for the above tribunal application.

1. Email from landlord.
 2. Snapshots of email sent to council and also automatic reply from council.
 3. Short video showing hand delivery of notice to leave. This was also emailed to the tenant as per communication section of tenancy agreement. (Video Will Be Sent In Separate Email).
 4. Our client has advised the property was purchased by his wife as an investment and due to the clients husband having experience of the rental sector it was agreed he should act as landlord.
 5. Up to date rent record highlighting no rent payments received February, March & April. Notice to leave was served in April.
4. The application was considered by a legal member and a further request for information sent out on 16th December 2021, requiring a response by 30th

December 2021, requesting the following information, failing which the application may be rejected:

1. Can you please provide a copy of the tenancy agreement which does not appear to have been submitted?
2. You have provided evidence of sending the S11 notice but not the notice itself and we require both, can you please now provide a copy of the notice itself?
3. Can you please provide written authorisation from the owner Ms Shyla Kumar to the Applicant to let out the property and raise this action and can you please provide a mandate for the Applicant to then authorise you to act for him in this matter?
4. With regard to the evidence of the delivery of the notice to leave as you have already been advised the Tribunal unfortunately cannot accept video evidence. Can you please provide details of when and how the notice was delivered to the tenant and if you have any other evidence that you can provide of this such as photographs or confirmation of receipt please provide that as well?
5. Finally with regard to the rent arrears which forms the ground of your action you have confirmed that 3 payments became due and owing on 12th February , 12th March and 12th April but not that the arrears were outstanding which only happens when rent is outstanding for a month after it is due. The Notice to leave was dated 13th April 2021. If the lease confirms that payment is made in advance then it does would not appear that at least three months of arrears were established if that was the date of service. Having regard to the Upper Tribunal decision in the case of Majid v Gaffney and Britton 2019 UT 59 please clarify the basis upon which the Tribunal can consider the application as in that decision the Upper Tier Tribunal upheld that at least 3 months arrears had to be owing at the date of service and at the 13th April only 2 months arrears are potentially due and owing? You may wish to take legal advice on this matter and provide any submissions you wish the Tribunal to consider.

5. By email dated 22nd December 2021, the Applicant's representative responded:

It looks like we omitted one month when we submitted our initial application for notice to leave. This was done as the tenant advised that he would not pay anymore rent and he has kept his word as he has not paid since January 2021. Can we resubmit our evidence and date from May 2021 therefore the 6 months are up, or do we have to start from scratch and give another 6 months from now? We would appreciate very much your understanding as in another 6 months the arrears will be 16 months (taking the month upfront into consideration).

6. The application was considered by a legal member and a further request for information sent out on 7th January 2022, requiring a response by 17th January 2022, requesting the following information, failing which the application may be rejected:

Your further information has been considered by a legal member. Unfortunately, we are unable to provide you with advice as to the best way forward. It would not be appropriate to resubmit your evidence with a different date, as suggested. It appears from the rent statement that rent arrears commenced in February 2021 and not in January 2021. If all the outstanding information is provided, and the case proceeds to a case management discussion, you will be expected to address the Tribunal on why it should depart from the decision in the Upper Tribunal case of *Majid v Gaffney and Britton* 2019 UT 59, as previously mentioned. While the final decision is one for the individual Tribunal members, similar cases have been refused, so you may wish to consider your position in this regard, and whether you wish to withdraw your application. A further Notice to Leave can be served at any time. You may wish to take legal advice on the provisions in relation to notice periods in terms of the Private Housing (Tenancies) (Scotland) Act 2016.

7. By email dated 7th February 2022, the Applicant's rep responded:

We would like to appeal to the tribunal as all we done was apply after 3 months non – payment, however the tenant advised that he would pay no more rent and one year later he has kept to his plan, resubmitting the application (which we have done) this takes us to July and it will be a full 18 months without rent. We have an ongoing case with right of access to this one which also keeps getting changed so in my opinion the tenant just does not want to pay any rent. Please let me know if I can appeal or if I have to wait for the other notice to run its course.

8. The application was considered by a legal member on 22nd February 2022.

Reasons for Decision

9. The Tribunal 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;·

(c) they have good reason to believe that it would not be appropriate to accept the application;

(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."

10. '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"*.
11. The Notice to Leave in this case specifies a ground for eviction which was not satisfied as at the date of the service, as the Respondent was not, at that time, in three months' arrears of rent. That being the case, the Notice to Leave is invalid and the case must be dismissed.
12. Applying the test identified by Lord Justice Bingham in the case of ***R v North West Suffolk (Mildenhall) Magistrates Court*** (cited above) the application is frivolous, misconceived and has no prospect of success. The application is accordingly rejected.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal 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.

H Forbes

Legal Member/Chair

22nd February 2022
Date