

Housing and Property Chamber
First-tier Tribunal for Scotland



**DECISION AND STATEMENT OF REASONS OF ALASTAIR HOUSTON, 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

3 Fens Farm Cottage, St Boswells, Melrose, TD6 0DX ("the Property")

Case Reference: FTS/HPC/EV/19/1237

MR ANDREW KER ("the Applicant")

MR ANDREW FINN ("the Respondent")

1. The application was made under Rule 109 of the Rules being an application for a Private Residential Tenancy Eviction Order. The application was accompanied by copies of a notice to leave dated 13 March 2019 and notice under Section 11 of the Homelessness etc (Scotland) Act 2003. The application specified that the Applicant was seeking an order on Grounds 11 and 12 of Schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") as a result of late and non-payment of rent, a failure to pay the rent by standing order and a failure on the part of the Respondent to make payment for the cost of the gas used in the Property.
2. The notice to leave specified Ground 11 of Schedule 3 of the 2016 Act. Part 3 of the notice it specified that rental payments were consistently late and that rent had not been paid by standing order/direct debit as required by the tenancy agreement. A request for further information dated 25 April 2019 was sent to the Applicant. This requested further evidence of how the ground had arisen.
3. The Applicant provided a copy of a bank statement and a letter from the bank confirming that no further payments had been received from the Respondent since 21 February 2019. An email from Ms Yvonne Keddie of the Galbraith Group accompanied the documentation. It confirmed that the Respondent had not made payment to the Applicant of the gas charged for the Property.
4. Another request for further information was sent to the Applicant on 17 May 2019.

Submissions as to the competency of the application in light of the notice to leave were requested in light of the terms of Ground 11 and the decision of the Tribunal in *Thyme Property Developments Ltd v Mitchell (EV/18/0946)*. The Applicant replied on the 18 May 2019 and relied upon the lack of mention within the guidance on the Tribunal website of Ground 11 not being used in respect of rent arrears, the total amount of rent outstanding, the fact that the Respondent was not in arrears over 3 consecutive months at the time of issuing the notice to leave and also stated the alleged liability for gas usage to be over £500. Further, the Applicant confirmed that the notice to leave was posted to the Respondent on 13 March 2019.

Decision

5. The circumstances in which an application is to be rejected are governed by 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."

6. **After consideration of the application, the attachments and correspondence from the Applicant's solicitor, 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

7. In this application, the Applicants are relying on the notice to leave dated 13 March 2019. As they are relying on Ground 11 of Schedule 3 of the 2016 Act,

the relevant notice period in terms of Section 54 of the 2016 Act is 28 days.

8. The Applicant confirmed that the notice was posted to the Respondent on the 13 March 2019. Section 62 of the 2016 Act states:-

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—

.....

(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,

.....

(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.

In the present case, the Respondent would have been assumed to have received the notice on 15 March 2019. Section 54(2) of the 2016 Act states:-

(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,

The first day of the relevant notice period would therefore also be 15 March 2019. Part 4 of the notice to leave specified that an application would not be submitted to the Tribunal before 10 April 2019. This is prior to the expiry of the 28 day notice period. It is the opinion of the Tribunal that an incorrect date within Part 4 invalidates the notice to leave.

9. Furthermore, and in any case, the application confirms that the Applicant is seeking to rely on rent arrears. Ground 12 of Schedule 3 of the 2016 Act is the relevant Ground relating to rent arrears. This is not mentioned in the notice to leave, which only specifies Ground 11 as being relied upon. Ground 11 is as follows:-

11(1)It is an eviction ground that the tenant has failed to comply with an obligation under the tenancy.

(2)The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—

(a)the tenant has failed to comply with a term of the tenancy, and

(b)the Tribunal considers it to be reasonable to issue an eviction order on account of that fact.

(3)The reference in sub-paragraph (2) to a term of the tenancy does not include the term under which the tenant is required to pay rent.

Irrespective of any omission from the Guidance available on the Tribunal's website, it is clear from the terms of Ground 11 that it does not include a breach of the term of the tenancy agreement which requires a tenant to pay rent. An eviction order could therefore only be granted on the basis of Ground 12. Section 52(5) of the 2016 Act is as follows:-

(5)The Tribunal may not consider whether an eviction ground applies unless it is a ground which—

(a)is stated in the notice to leave accompanying the landlord's application in accordance with subsection (3), or

(b)has been included with the Tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought.

The Tribunal does not consider that permission to include Ground 12 within the application should be granted. The circumstances as described by the Applicant relate to a mandatory ground for eviction. The reason given by the Applicant for not including Ground 12 within the notice to leave is inadequate – the Applicant chose to serve the notice at that time. It would not be reasonable nor in the interests of justice to grant permission.

11. The Tribunal does not consider that sufficient evidence of a breach of the tenancy agreement, other than relating to the term containing the obligation to pay rent, has been provided. The form in which notice to leave is to be given is prescribed by Regulation 6 and Schedule 5 of The Private Residential Tenancies (Prescribed Notices and Forms)(Scotland) Regulations 2017 ("the 2017 Regulations"). Part 3 of the form of notice set out in Schedule 5 of the 2017 Regulations requires a landlord to state particulars of how the ground relied upon has arisen. In the present application, there is no mention in the notice to leave of any breach of an obligation by the Respondent to make payment of the cost of gas usage to the Applicant. The notice to leave is wholly lacking in specification relating to Ground 11. For this, and the above reasons, the notice to leave is deficient and can not be relied upon as a basis of an application for an eviction order.
12. '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. Accordingly, the present application is rejected on the basis that it is frivolous.

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.

A Houston

Mr Alastair Houston

Legal Member

4 June 2019