



**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 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/22/2645

Parties

Crucible Residential properties LTD (Applicant)

Mr David Gibbs (Respondent)

C/O Dandara Living, Dandara LTD (Applicant's Representative)

224 Stoneywood Brae, Aberdeen, AB21 9FA (House)

1. On 2nd August 2022, an application was received from the applicant. The application was made under Rule 109 of the Procedural Rules, being an application for an order for eviction of the Tenant by the Landlord. The Applicant was seeking eviction in terms of Ground 12 there were rent arrears of over 3 months.
2. The Applicant lodged a copy of the tenancy agreement, a Notice to Leave addressed to the Respondent, and a copy of the S11 notice to the local authority, debt statement.

3. The Tribunal requested further information from the applicant by e-mail dated 6th September 2022. The Tribunal asked for the following information in respect of this application:-

“I refer to your recent application which has been referred to the Chamber President for consideration. Before a decision can be made, we need you to provide us with the following: Your application has been referred to a legal member. The legal member responds as follows: 1. Please provide your comments on the validity of the Notice to Leave. It appears that when the Notice to Leave was served the Respondent was not 3 consecutive months in arrears. 2. Please provide proof of service of the section 11 Notice on the local authority and the Notice to Leave on the Respondent. 3. Please provide proof of compliance with the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020. 4. The tenancy agreement provides for rent payments at 6 monthly intervals. Please explain how and when this was changed. 5. Please provide written authorisation from the Applicant for you to act in this matter. Please provide the information requested within 14 days failing which the application may be rejected”.

4. The Applicant's representative responded on 7th September 2022 and provided copy e-mail enclosing notice to leave dated 20th January 2022; further copy of the notice to leave, various emails to the tenant regarding the arrears and copy rent statement. The also provided a fresh s11 notice and copy email to the local authority.
5. The Tribunal wrote again to the Applicant on 13th October 2023 asking “Before a decision can be made, we need you to provide us with the following: We refer to the letter issued by the Tribunal on 6 September 2022 and note your response, which has been considered by a legal member who has requested the following information: 1. A full rent statement for the period of the tenancy to demonstrate when the arrangement to pay by monthly instalments of £770 changed. Upon receipt of the above information, a final decision can then be taken on whether the eviction application is valid and whether it should be accepted and referred to the tribunal for full determination. If you fail to provide the necessary information the tribunal may reject your application. Please reply to this office with the necessary information by 27 October 2022. If we do not hear from you within this time, the President may decide to reject the application

6. The Applicant replied on 27th October and provided a full rent statement showing rent due monthly.

7. On 29th November 2022 the Tribunal wrote again to the applicant requesting:-

Before a decision can be made, we need you to provide us with the following: 1. Please provide written submissions on the validity of the Notice to Leave. It appears that rent was payable monthly in advance. Rent was not paid on 7 November, 7 December and 7 January. The Notice to Leave was served on 20 January. As at the date of service there were not 3 complete months over which the tenant had been in arrears. Please reply to this office with the necessary information by 13 December 2022. If we do not hear from you within this time, the President may decide to reject the application.”

8. No response was received and the Tribunal wrote again on 29th December saying:-

*“Before a decision can be made, we need you to provide us with the following: It is noted that you have failed to respond to our request of 29 November 2022 seeking further information regarding the validity of the notice to leave which you served. The notice to leave (NTL) based on ground 12 appears to have been served on 20 January. In order for that notice to be valid, the tenant must have been in arrears for three consecutive months at that date. Please provide evidence that the tenant has been in arrears of rent since at least 20 October 2021. You have not provided any rent statement which shows such evidence. The tenancy agreement shows rent becoming due on the 7th day of each month. The first payment showing as missed in the rent statement is simply showing as the payment due on 7 November 2021. If the tenant has not been in arrears since on or before 20 October 2021 and remained in arrears until 20 January 2022 then your notice to leave will not be valid and your application will fall to be rejected. We would refer you to the Upper Tribunal decisions in the cases of *Rafique v Morgan (2022) UT 07* and *Majid v Gaffney (2019) UT 59*. These Upper Tribunal decisions considered whether it is competent for a notice to leave to be served Supported by the Scottish Courts and Tribunals Service www.scotcourtribunals.gov.uk before a tenant has been in arrears for that required period of three consecutive months. The decisions confirmed that a notice to leave cannot be served until a tenant has been in arrears consecutively for a period of three months. The amount of the arrears has no bearing on it. The crucial element here is the period of time during which of the arrears have existed consecutively. This tribunal is bound to follow decisions which interpret relevant legal provisions issued by the*

Upper Tribunal Upon receipt of the above information, a final decision can then be taken on whether the eviction application is valid and whether it should be accepted and referred to the tribunal for full determination. Please reply to this request within two weeks of the date of the letter. If you fail to respond to this letter then the tribunal may reject your eviction application.”

9. The Applicant responded on 10th January 2023 and stated *“Good morning The application was made on the 20th January 2022 on the understanding that the 3 months payment dates having been missed by the tenant. The rent was due on 7th November 2021, 7th December 2021 and 7th January 2022 meaning that the account was in arrears as per the due dates for the rent. Can you please confirm that the case is that the 3 months arrears did not come into effect until 6th February 2022, this being the end of the monthly rental period? Upon receipt of this information we will review the case further”*
10. The Tribunal responded on 8th February advising that they could not provide legal advice and asking for a final response to the previous request and warning the applicant that the case may be rejected.
11. The Applicant responded on 28th February and confirmed *“Good afternoon Upon looking at all relevant information and our lease as well as the legislation and Acts applicable, we have determined that the rent arrears would only be consecutively in arrears on 6th February 2022, being 3 full rental month periods therefore our initial appeal has been lodged too early. The 3 months arrears would only come into effect on 7th February 2022 and our application should have been lodged after that date. The application was logged only 2 weeks after the due date not allowing the tenant the full time to pay the rent payable. He has subsequently not paid any further payments to date and we will seek to reapply for an eviction order once we are able to do so”*.
12. The Tribunal then asked if the Applicant was withdrawing the application as they appear to accept the notice to leave was not valid and on 10th April the Applicant advised *“Having reviewed everything we do not wish to withdraw the application and will await the tribunal decision”*.

13. 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 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. Section 52 of the Private Housing Tenancy (Scotland) Act 2016 provides:

“52 Applications for eviction orders and consideration of them

(1) In a case where two or more persons jointly are the landlord under a tenancy, an application for an eviction order may be made by any one of those persons.

(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.**

(4) Despite subsection (2) (b), the Tribunal may entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable to do so.

(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.

19. Section 54 provides:

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) Section 62 provides:

“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.

(2) In a case where two or more persons jointly are the landlord under a tenancy, references in this Part to the tenant receiving a notice to leave from the landlord are to the tenant receiving one from any of those persons.

(3) References in this Part to the eviction ground, or grounds, stated in a notice to leave are to the ground, or grounds, stated in it in accordance with subsection (1)(c).

(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.

Paragraph 12 of Part 3 to Schedule 3 provides:

“12 (1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.

(2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if— (a) at the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits, the tenant— (i) is in arrears of rent by an amount equal to or greater than the amount which would be payable as one month's rent under the tenancy on that day, and (ii) has been in arrears of rent (by any amount) for a continuous period, up to and including that day, of three or more consecutive months, and (b) the Tribunal is satisfied that the tenant's being in arrears of rent over that period is not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.”

20. The Applicant has lodged an application with a Notice to Leave that relies on Ground 12. Part 3 of the Notice to Leave sets out the details of how the ground is met and states “3 months rent arrears – 7th of November 2021, 7th of December 2021, 7th of January 2022 were payment due dates and no payments have been received. Total outstanding rent arrears amount is £2310. No contact has been made by the tenant despite our efforts in trying to contact Mr David Gibbs.” The Notice was sent on 20th January 2022 and so the arrears had not amounted to 3 months and the ground had not been met at that point.
21. The Applicant appears to have accepted that they served the notice too early but have not withdrawn the application and are awaiting the Tribunal's decision.

22. The matter of whether ground 12 can be considered to be met where the arrears of rent only amount to 3 months of arrears by the time of the case management discussion or hearing has been dealt with in 2 upper tribunal decisions both of which concluded that the intention of Parliament was that the ground had to be met at the time of service of the notice to leave and not sometime after that.
23. In the case of *Majid v Gaffney* (2019) UT 59. Sheriff Fleming stated “The First-tier Tribunal may only order eviction if one of the grounds specified in Schedule 3 to the 2016 Act applies. It is clear from the terms of the Notice to Leave that ground 12 is being relied upon; as at the date of the Notice to Leave the tenant must have been in rent arrears for three or more consecutive months. Therefore, if the tenant was first in arrears of rent as at 30 April 2019 then the expiry of the three month period would be 30 July 2019. As at 1 July 2019 the tenant was not in rent arrears for three or more consecutive months. The tenant must have been in arrears for the specified period of time, not simply owing rent. Ground 12 does not apply as at the date of service of the Notice to Leave.”
24. Also at page 5 of the decision Sheriff Fleming goes on to state:-
25. **“The statutory provision is clear which is that the ground of eviction must be satisfied at the date of service of the Notice to Leave. If it is not it is invalid.** If it is invalid decree for eviction should not be granted. The decision of the First-tier Tribunal sets out the position with clarity. It could in my view never have been intended by Parliament that a landlord could serve a notice specifying a ground not yet available in the expectation that it may become available prior to the making of an application. Such an approach would be open to significant abuse. Either the ground exists at the time when the Notice to Leave is served or it does not. If it does not the Notice to Leave is invalid and it cannot be founded on as a basis for overcoming the security of tenure that the 2016 Act. There is no arguable ground of law. Permission to appeal is refused.”
26. A further challenge against this interpretation was heard by the Upper Tribunal in the case of *Raffique v Morgan* UTS/21/0037 and Sheriff Tony Kelly came to the same conclusion.
27. Decisions of the upper tier Tribunal are binding on the First Tier Tribunal and as the facts in this case are similar to those in the aforementioned cases there is no discretion on the tribunal to accept an application where it is clear and accepted that the rent arrears do not amount to 3 months in arrears at the date of service of the Notice to Leave. Ground 12 does not apply and so the Notice to leave is invalid.
28. It is open to the Applicant of course to reserve a Notice to Leave and raise a further application in due course.
29. 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
3rd May 2023