



**DECISION AND STATEMENT OF REASONS OF PETRA HENNIG MCFATRIDGE 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/22/3383

Parties

Mr Li Xin Liu Sun (Applicant)

Mr Roger De Albuquergue (Respondent)

28/3 Craighouse Gardens, Edinburgh, EH10 5TY (House)

PROCEDURAL BACKGROUND:

1. The application under Rule 109 of the Procedural Rules being an application for an eviction order under S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) was received by the Tribunal on 12 September 2022.
2. The following documents were ultimately lodged in connection with the application:- S 11 Notice to Local Authority and email sending same, Notice to Leave dated 14.8.2022 with statement it was sent by email and personally delivered the same day, Copy Room Rent Agreement from 31.8.to 30.12.2020, various text messages between the parties regarding notice by the tenant to leave the property and finally a statement from the

Applicant's sister regarding her wishing to move into the property. The application was initially rejected by a decision dated 13.10.2022 and reinstated by the review decision of 31.10.2022.

3. The Tribunal repeatedly sought further information from the Applicant and on 16.12.2022 the Tribunal wrote in the following terms: Please provide evidence how and when the Notice to Leave was given to the tenant. You have stated you gave 28 days notice. The entry in part 4 of the Notice to Leave states the date of the Notice as 14.8.22 and the date when proceedings can be raised as 13.9.22. The calculation for the date to be entered in part 4 is defined in S 62 of the Private Housing (Tenancies) (Scotland) Act 2016. This must take into account the period for service stated in S 62 (5) and the calculation of the date stated in S 62 (4) of the Private Housing (Tenancy) (Scotland) Act 2016. In order to calculate whether that has been followed the Tribunal requires to know how and when the Notice was served. Please keep in mind also that the provision of paragraph 10 of schedule 1 of the Coronavirus (Scotland) Act 2020, which allowed the Tribunal discretion to deal with wrongly calculated periods in a Notice to Leave has been repealed by the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022 and thus the previous situation of a requirement of precise calculations of such dates is now restored. You may wish to take some legal advice on the matter and in particular consider the decision of Holleran v McAllister EV/18/3231, which is available in the register of published decisions on the Tribunal's website. In light of this please either make written representations stating on what legal basis you think the Notice to Leave could be considered to be valid or, if you agree with the above, please consider whether to withdraw the application and re-raise it with a valid Notice to Leave. Your statement about the issue of reasonableness in terms of considerations of S 54 of the Act do not cover the above issue.

The Applicant replied on 19.12.2022: I gave him the notice to leave by both email on 14/08/22 and delivered it to him in person the same day, attached the email and the evidence of the notice on his bedroom door inside the property. Ps furthermore the tenant Roger De Albuquerque breached the terms of the rent agreement as he has refused to pay his deposit so far even though I've requested many times which is one month rent, also he has been making loud noises by cooking at 3 - 4am almost every morning, the other tenant who is sharing the property with him has been awoken every morning and unable to sleep, attached the other tenant ' complaint email on 22/09/22, I will attach it in a separate email as I don't know how to attach all in one here.

4. These documents and all correspondence in the case are referred to for their terms and held to be incorporated herein.

DECISION

I considered the application in terms of Rule 8 of the 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."

After consideration of the application, the attachments and correspondence from the Applicant, I consider that the application should be rejected in terms of Rule 8 (c) of the Rules of Procedure on the basis as the Tribunal has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION:

Applicable Legislation:

S 62 of the Private Housing (Tenancies) (Scotland) Act 2016 states:

62 Meaning of notice to leave and stated eviction ground

This section has no associated Explanatory Notes

(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.

S 54 of the said Act states:

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,

(ii) 84 days after it begins if subsection (3) does not apply.

(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, or

(b) the only eviction ground, or grounds, stated in the notice to leave is, or are, one or more of the following—

(i) that the tenant is not occupying the let property as the tenant's home,

(ii) that the tenant has failed to comply with an obligation under the tenancy,

(iii) that the tenant has been in rent arrears for three or more consecutive months,

(iv) that the tenant has a relevant conviction,

(v) that the tenant has engaged in relevant anti-social behaviour,

(vi) that the tenant associates in the let property with a person who has a relevant conviction or has engaged in relevant anti-social behaviour.

(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).

S 52 of the Act states:

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.

S 73 of the Act states:

73 Minor errors in documents

(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.

(2) This section applies to—

...

(d) a notice to leave (as defined by section 62(1)).

Findings and Reasons:

1. In terms of S 52 (3) of the Act an application must be accompanied by a copy of the

Notice to Leave. I consider that this means that a valid Notice to Leave must be submitted with the application. The issue here is whether or not the Notice to Leave was a valid Notice to Leave and thus fulfills the requirement of S 52 (3) of the Act.

2. The issue in this case is the notice period. The expiry of the period stated in S 54 (2) (b) (ii) of the Act will be 84 days after the date of service as the tenant had been entitled to occupy the property for more than 6 months and one of the grounds stated in the Notice to Leave, ground 5, requires an 84 day notice period. The notice period is not 28. The date of 13.9.2022 for a notice to leave issued on 14.8.2022 stated in part 4 of the Notice to Leave is thus incorrect. The date to be entered into the Notice to Leave, if accepting the notice was hand delivered on 14.8.2022, should have been 7.11.2022, this being 84 days notice period and stating the date after the expiry as the date when proceedings could first be raised. As was explained to the Applicant in the correspondence from the Tribunal, paragraph 10 of schedule 1 of the Coronavirus (Scotland) Act 2020, which allowed the Tribunal discretion to deal with wrongly calculated periods in a Notice to Leave has been repealed by the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022.
3. The legislation sets out explicitly the dates and periods which have to be observed to create a valid Notice to Leave. This is further described in detail in the guidance notes on the Notice to Leave. A tenant, having so been advised, must then be able to rely on the accuracy of the information provided in the Notice to Leave. The date stated on the notice is not the correct date. The calculation overlooks the provision of S 62 (4) of the Act, which states: *“(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.”*
4. The Tribunal has considered whether S 73 of the Act may be applicable in this case to assist the applicant. This 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.
5. In the Tribunal’s view, the word “effect” in section 73 (and in the explanatory note) denotes the effect the notice is intended to have if it is completed without error. It follows from section 62(1)(b), (c) and (d) that a notice to leave completed without error will give the tenant certain information, namely: 1. 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 FTT, being the day after the notice period expires (section 62(1)(b)). This date is stated in part 4 of the prescribed form, in which the tenant is expressly advised that “An application will not be submitted to the Tribunal for an eviction order before [the date]”, 2. The eviction ground on which the landlord intends to seek an order (section 62(1)(c)), which is indicated by ticking the appropriate box in part 3 of the prescribed form, 3. Details and evidence of the eviction ground (section 62(1)(d) and part 3 of the prescribed form, 4. The tenant’s details (section 62(1)(d) and part 1 of the prescribed form), 5. The name, address and telephone number of the landlord or his agent (section 62(1)(d) and part 2 of the prescribed form). All these parts of the form require to be completed.

6. In the Tribunal’s view, an error in completion “affects the effect” of the notice to leave if, as a result of the error, the notice does not give the tenant that information. In this case, the error clearly “affects the effect” of the notice to leave, because a correct notice would have informed the Respondent of the correct date on or after which an application to the Tribunal could be submitted. That was not done.
7. The notice should, at the very least, correctly inform the tenant of the “why” (the statutory ground) and the “when” of the proceedings that the landlord anticipates raising.
8. To state an earlier date than the date on which, in terms of the Act, the landlord is entitled to raise proceedings is not, in the view of the Tribunal, “an obviously minor error” which could then be dealt with in terms of S 73 of the Act by the Tribunal. It is an error which causes the notice to fail in achieving one of its fundamental purposes.
9. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating “13 September 2022” in part 4 of the notice to leave materially affects the effect of the notice and makes it invalid. It is not a “notice to leave” under section 62. Therefore, the document which accompanied the application to the First-tier Tribunal was not, for the purposes of section 52(3), “a copy of a notice to leave”, and accordingly, given section 52(2)(a), the Tribunal cannot entertain the application.
10. The Applicant explained why the Tribunal should consider it reasonable to allow the application to proceed in terms of S 52 (4) of the Act, which states: “(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.” The email of 24.11.2022 stated: “I wish to make a submission to the tribunal in terms of section 52(4) that it would be reasonable for the tribunal to consider my application despite not having provided the tenant with sufficient notice.” In the email of 8.12.2022 the Applicant stated: “Here attached the latest statement/notice to leave written and signed by tenant Roger Albuquerque on 04/12/22 confirming he is moving out 31/12/22. Since he has been giving a number of notices to leave over the year, yet failed to leave each time, no doubt he should be evicted immediately regardless any ground nor time scale. Thank you for your attention, I look forward to hearing from you.”

11. The Tribunal considered whether S 52 (4) of the Act could be of assistance to the Applicant. All S 52(4) allows is to consider an application made in breach of S 54 if it considers it is reasonable to do so. However, stating the wrong date in the Notice to Leave is not a breach of S 54 but a breach of S 62 (1) (b), which prescribes the information to be included in the Notice to Leave. Had the Notice to Leave stated the correct date but had the application been made before that date, then the Tribunal could have considered whether it would have been appropriate to consider the application made e.g. due to time pressure because of antisocial behavior. S 54 relates, as the title states, to “Restriction on applying during the notice period” and it is only a non compliance with that which the Tribunal has discretionary power to consider. The breach in this case is not of S 54 but of S 62 and the Tribunal has no discretionary power to entertain this application as the date stated in the Notice to Leave had been wrongly stated in terms of that provision. As stated above, the only other power potentially applicable, that in S 73, does not apply in this case.

12. For the above reasons the application has to be rejected.

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.

Petra Hennig-McFatridge



Petra Hennig McFatridge

Legal Member

10 January 2023