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

Flat 0-1 1438 Paisley Road West Glasgow G52 1SS
Case Reference: FTS/HPC/EV/20/1075

Javaid Huq , 186 Kilmarnock Road, Glasgow, G41 3PG ("the applicant")
Kirsty McIlvar and Evan Paul Shepherd Flat 0-1 1438 Paisley Road West Glasgow G52 1SS
("the respondent")

1. On 15 April 2020 the application dated 14 April 2020 was received by the First-tier Tribunal for Scotland Housing and Property Chamber (the Tribunal). The application was made 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). The following documents were lodged in connection with the application:- Tenancy Agreement, Notice to Leave, Notice to Local Authority, rent statement. The documents referred to above are referred to for their terms and held to be incorporated herein.

2. The Tenancy agreement lodged shows the Landlord in terms of the Private Residential Tenancy agreement is the applicant in this case. The respondent is the tenant of the

property. The tenancy commenced on 2 December 2019 with a rental charge of £600 per month payable in advance on the second day of the month.

3. The Notice to Leave is dated 3 March 2020 and in terms of Part 4 of the Notice to Leave the first day on which proceedings can be raised with the First tier Tribunal Housing and Property Chamber is stated in the Notice to Leave as 3 April 2020.

4. The ground of eviction referred to in the Notice to Leave and the application is Ground 12 of Schedule 3 of the Act. The ground of eviction stated in the application is Ground 12.

DECISION

5. 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."

6. 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 FTT has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION

Relevant legislation:

Rule 109 (b) of the Procedural Rules states an application for an eviction order under S 51 of the Act has to be accompanied by:

i.   evidence showing that the eviction ground or grounds has been met

ii.   a copy of the notice to leave given to the tenant as required under section 52(3) of the 2016 Act

iii. a copy of the notice given to the local authority as required under section 56 (1) of the 2016 Act

S 52 of the Act states: 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 54 of the Act states: 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).

7. I consider that the requirement in s 52 (3) of the Act and Rule 109 (b) (ii) of the Procedure Rules is not met in this case. The Tribunal can only entertain an application if it is accompanied by a Notice to Leave. I consider that this requirement means that a valid Notice to Leave has to be submitted with the application.

8. In this case the Notice to Leave was dated 3 March 2020 and signed for recorded delivery on 4 March 2020. The Notice to Leave states that it relies on Ground 12 of Schedule 3 of the Act. The entry in part 2 is :"rent arrears in three consecutive months". The entry in part 3 reads: "statement of account." The entry in part 4 states: An application will not be submitted to the Tribunal for an eviction order before 3 April 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 Notice to Leave was allegedly accompanied by a statement of account. This was not submitted in evidence.

9. The application was lodged with the Tribunal by email on 15 April 2020 and is dated 14 April 2020. The entry in part states in part 5 Possession/Eviction Grounds states: "Tenant is in rent arrears over three consecutive months". A tenancy statement was submitted in evidence dated 14 April 2020 showing arrears of rent for the period of rent due in

advance for the respective following months: for 2.1.2020 for 2.1.2020 to 1.2.2020, 2.2.2020 for 2.2.2020 to 1.3.2020, 2.3.2020 for 2.3.2020 to 1.4.2020, then a payment of £280 on 17 March 2020 and a further rental charge of 2.4.2020 for 2.4.2020 to 1.5.2020 with arrears starting on 2.1.2020 and a total of arrears of £2,120.00

10. The Notice to Leave cannot be valid for the following reasons: Ground 12 (1) of Schedule 3 of the Act requires the following: "12 Rent Arrears (1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months." Sheriff I Fleming in the Upper Tribunal decision [2019] UT 59 Abdul Majid v Adele Gaffney and Andrew Robert Britton of 17 October 2019 stated in para 9" … *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 months 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.* " and in para 14: "… *It is clear that the words "expects" relates to the date on which the application will be made. That is entirely distinct from the eviction ground. 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 it could 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 a as a basis for overcoming the security of tenure…..*" This clearly sets out that the requirement of a valid Notice to Leave is that at the time the Notice to Leave is served the ground on which the notice is based must exist. In terms of the Notice to Leave however ground 12 clearly requires three months consecutive rent arrears. The Notice to Leave was signed and dated 3 March 2020. The first time the tenancy statement shows arrears is on 2 January 2020. By 3 March 2020 the tenants cannot have been in arrears for three or more consecutive months because

the arrears only first started on 2 January 2020 and thus two months and one day prior to the date on the Notice to Leave. Applying the calculation as set out in the above decision of the Upper Tribunal the time the condition of ground 12 in terms of service of a Notice to Leave would be fulfilled in this case would be 2 April 2020 and not 3 March 2020. At the time the Notice to Leave was served the conditions for ground 12 did not yet exist.

11. For the reasons stated above the application was not validly made. The Tribunal cannot entertain the application. The application is 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
Legal Member
5 May 2020