



**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/22/4271

Parties

Mr Christopher Davis, Mrs Helen Davis (Applicant)

Miss Siobhan Kenning (Respondent)

Cluny Estate Agents (Applicant's Representative)

Flat 7, 80 High Street, Elgin, Moray, IV30 1BJ (House)

1. The application was made on 28.11.22 to the First-tier Tribunal (the FTT) under rule 109 and S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) using ground 12 of schedule 3 of the Act.
2. Various documents were provided with the application. These include a Tenancy

Agreement commencing 18.3.22 with a clause stating payment of rent of £600 per calendar month (Clause 8) is due in advance on the 8th day of the month, a S 11 notice and a Notice to leave dated 23.9.22 with an entry in part 4 of 24.10.22 as the first day when proceedings can be raised.

3. The FTT wrote to the Applicant's representative on 22.12.22 requesting further information in the following terms: "In order for the Tribunal to be able to process your application further please provide the undernoted information /documentation: Please consider the information on the attached letter regarding The Cost of Living (Protection for Tenants) (Scotland) Act 2022 and provide a reply with your position on the matter. Please state the number of the ground you are relying in on the eviction application in part 5 It appears rent arrears first arose on 18.7.2022. Please make representations how a Notice to Leave issued on 23.9.2022 in this case complies with the requirement set out in the case Majid v Gaffney [2019] UT 59 where Sheriff Fleming set out in paragraph [9] "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..." Please reply to this office with the necessary information by 5 January 2023. If we do not hear from you within this time, the President may decide to reject the application."
4. On 29.12.22 the applicant's agent replied to the issue raised as follows: "Further to your email for further information on the above case: 1. The grounds we are relying on is 'in rent arrears for three or more consecutive months' 2. As the rent is raised in advance, when September's payment was defaulted this constituted the third rent owed. I appreciate by the sounds of the case mentioned, it would appear we have to wait for that full month to expire before starting our application. Something that hasn't been made clear to me until now. Does it hold any weight if I were to tell you the tenant is currently £3100 in arrears at present?"
5. The file documents are referred to for their terms and held to be incorporated herein.

DECISION

6. 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."

7. 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

Relevant Legislation

Rules of Procedure:

Rule 109. Where a landlord makes an application under section 51(1) (for an eviction order) of the 2016 Act, the application must—

(a) state—

(i) the name, address and registration number (if any) of the landlord;

(ii) the name, address and profession of any representative of the landlord;

(iii) the name and address of the tenant [F72 (if known)]; and

(iv) the ground or grounds for eviction;

(b) 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

Ground 12 schedule 3

Rent arrears

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

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

(a) for three or more consecutive months the tenant has been in arrears of rent, and

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

1. The application is made on ground 12 of schedule 3 of the Act and would require, in terms of S 52 (3) of the Act, to be accompanied by a Notice to Leave and in terms of S 56 by a Notice to the Local Authority. The FTT considers that the meaning of this section is that the Notice to Leave has to be a valid Notice to Leave. The same requirements are also stated in rule 109, which is the rule under which the application is made.
2. The Notice to Leave provided is dated 23.9.22 and relies on the ground "You are in rent arrears over three consecutive months". In terms of the tenancy agreement the rent of £600 per month is payable in advance on or before the 18th day of each month. The rent statement lodged with the application shows a £0 balance prior to 18.7.22, when no payment was made on the due date. The arrears increase from then onwards. The applicant explained his understanding of the legislation in his email of 29.12.22. However, the matter has been fully and comprehensively dealt with by the Upper Tribunal in at least two decisions, which are binding on the FTT.
3. In the decision [2019] UT 59 Majid v Gaffney Sheriff Fleming sets out the requirements of a valid Notice to Leave in cases of rent arrears and states in para 9 "[9] *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.*" and goes on to say: "[13] *The basis for the decision of the First-tier Tribunal is that the Notice to Leave specified a ground for eviction which was*

not satisfied as at the date of the service. That being the case the notice itself is invalid. [14] The appellant appears to be conflating two separate statutory provisions. In terms of section 62(1)(b) reference is made to a date on which the landlord "expects to become entitled to make an application for an eviction order to the First-Tier Tribunal". It is clear that the word "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 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." The issue was further recently confirmed in the decision of Sheriff Kelly in [2022] UT07 Rafique v Morgan.

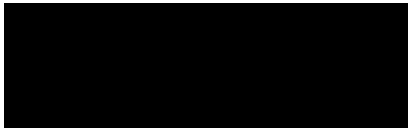
4. Having regard to these decisions, the clear requirement for a valid Notice to Leave in arrears cases is that as at the date the Notice to Leave is served on the tenant the tenant is in arrears of rent for three or more consecutive months. On 23.9.22 the tenants had not been in arrears of rent for that required period.
5. Taking the first date when a deficit is shown on the rent statement, 18.7.22, then the expiry of the three months period would be 18.10.22. The documents lodged show that the Notice to Leave is dated 23.9.22. At that time the tenant had not been in arrears of rent for a period of three or more consecutive months. This is exactly the same situation which was addressed in the UT decision Majid v Gaffney. The FTT is bound by the clear decisions of the Upper Tribunal on this matter. The Notice to Leave was issued incorrectly and is thus invalid. It would not be appropriate to accept an application based on a Notice to Leave which is invalid.
6. The application is accordingly rejected.
7. The applicant should note that this decision does not prevent the applicant from making a further application to the FTT in future based on a new Notice to Leave.

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
25 January 2023