



**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/22/4507

Parties

Mr Joseph Sander (Applicant)

Ms Marion Buchanan (Respondent)

41 Whistleberry Wynd, Hamilton, ML3 0SE (House)

1. On 29th December 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 a copy letter to the tenant dated 22nd November 2022 advising her he is seeking possession of the Property and an s33 notice dated 6th November 2022. In a response to further information the Applicant advised the s33 notice had been sent to the local authority in satisfaction of the

requirements of S56 of the 2016 Act.

3. The Tribunal requested further information from the applicant by e-mail dated 16th January 2023. 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:

1. *You have not served a valid Notice to Leave as required in terms of the Private Housing (Tenancies) (Scotland) Act 2016. There is a specific form which must be used, and your application cannot be accepted without a valid Notice to Leave. A section 33 notice is not applicable to this type of tenancy. If you have not served a proper Notice to Leave, allowing for the correct period of notice, please confirm that you are withdrawing the application.*

For your future information, we require the following to accompany a valid application: (i) A copy of the tenancy agreement (ii) Evidence to support the ground(s) of eviction, such as a rent statement showing rent due, rent paid and running total of rent arrears (iii) A section 11 notice to the local authority with evidence of service (iv) Evidence of service of the Notice to Leave upon the Respondent. Please reply to this office with the necessary information by 30 January 2023. If we do not hear from you within this time, the President may decide to reject the application."

4. The Applicant responded on 17th January and wrote *"I can confirm a valid Notice to Leave as required in terms of the Private Housing (Tenancies) (Scotland) Act 2016 has been served upon our tenant. The notice period of 28days has now considerably been contravened with the Notice having been served on the 6th Nov 2022 with the reason for the notice having been made clear to the tenant. I can confirm that no rental contributions what so ever are forth coming since Sep 2022 and my own financial budget for this property is seriously in jeopardy. We seek assistance First-tier Tribunal for Scotland such that it can assist us with our bone fide request for eviction to be granted. The tenant is completely abusing the situation and we seek that judgement be made to retrieve the arrears. A copy of the tenancy agreement is attached. A snippet*

of the bank account where rental funds are received is attached. Correspondence with South Lanarkshire Council has been established and they have confirmed that the matter is in the hands of the "Housing and Technical Resources for action" A letter has been sent to Marion Buchannan and email correspondence to her address has been sent."

- 5.** The Tribunal wrote again to the Applicant on 6th February saying: - *"Before a decision can be made, we need you to provide us with the following: Your further information has been assessed by a Legal Member of the Tribunal who has made the following comment: 1. You state that you have served a valid Notice to Leave. Please provide a copy of this Notice, as the Notice provided is not valid. 2. If you do not have a valid Notice to Leave, as mentioned above, please withdraw the application. 3. If you do intend to produce a valid Notice to Leave, please also provide: (i) a copy of the section 11 notice to the local authority with evidence of service; (ii) a rent statement that shows rent due, rent paid and a running total of rent arrears; (iii) evidence of service of the Notice to Leave upon the Respondent, such as email or posting evidence. It is noted that the tenancy agreement only provides for service by email.' Please reply to this office with the necessary information by 20 February 2023. If we do not hear from you within this time, the President may decide to reject the application."*
- 6.** The Applicant responded on 16th February stating: *Thank you for your reply, which is disappointing from the point of view in regards to making some progress with my application. I attach the letter of Notice to Leave that was emailed and sent to Marion Buchanan by post on the 11th November at which stage she had been in arrears for more than three consecutive months. Furthermore I attach correspondence attempts by myself to try and get this matter addressed. Please note that Marion has before hand responded to me on the same email address and I believe she is intentionally not responding despite having full sight of the correspondence. The email correspondence attached shows the rental amounts that have been received and those that have been missed, I have in previous correspondence with yourself provided a snippet from Bank Account statements showing the rental amounts that have been received. Email Sent on 17th Jan 2023. I also attach the Section 11 correspondence that I have had with the Local Council Housing Authority. Currently I am now in serious debt of more than 6months rental due and seek that you address this accordingly and urge the Chamber President to give me a say in Court regarding this matter"*.

7. The Tribunal wrote again to the Applicant on 7th March advising that he had not submitted a valid application as his notice to leave was invalid, advising what was missing from his “notice” and advising that the application should be withdrawn and resubmitted when a fresh valid notice to leave has been served or he should advise why the tribunal should consider the application.
8. *The Applicant responded once more on 20th March this time submitting a fresh notice to leave with copy email, S11 notice, proof of posting and rent statement. The notice to leave was dated 6th March 2023 advising the proceedings would not be raised before 6th April and accompanied by an email sent to the tenant on 6th March. The Applicant did not confirm he wished to withdraw the existing application.*
9. *The Tribunal wrote again on 14th April and stated “1. You appear to accept that the Notice to Leave served with the original application was invalid and have now served a new Notice to Leave. The new Notice to Leave cannot be considered with the current application. You must withdraw the current application and submit a fresh application. If you do not do so the current application will be rejected. Please reply to this office with the necessary information by 28 April 2023. If we do not hear from you within this time, the President may decide to reject the application.”*
10. The Applicant has responded to this and has not confirmed he wishes to withdraw the application instead he has expressed his frustration at the process and asked how it can be progressed.

DECISION

11. I considered the application in terms of Rule 5 and 8 of the Procedural Rules.

Those Rules provide:-

12.

"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."

13. 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 5(4) and Rule 8(1) (c) of the Procedural Rules.

REASONS FOR DECISION

14. 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.

15. 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.

16. 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.

17. The Applicant has lodged the application on 29th December 2022. He has not however lodged it with a valid notice to leave. The notice he has provided consists of a letter to the tenant which states *“Dear Ms Buchanan, Please note that I am seeking to secure possession of the property which you are currently renting out as a private residential tenancy, at the above address, as set out in the Private Housing (Tenancies) (Scotland) Act 2016(a) (the Act) The eviction grounds being, that you have been in rent arrears for more than 3 consecutive months, as such you are being given minimum 28 allowance. As such we seek you vacate the property by Friday the 9th Jan 2023.”*
18. The notice does not meet the requirements of S62 of the Act.
19. The Tribunal indicated to the Applicant on several occasions his notice did not appear to be valid and invited him to withdraw the application and resubmit with a fresh notice to leave in the correct form. The Applicant has now submitted a fresh notice to leave but has not withdrawn this application. The fresh notice to leave postdates this application and therefore cannot be accepted as part of an application made on 29th December 2022. As the notice to leave is not valid the application must be rejected as any application reliant on an invalid notice to leave is futile and has no prospect of success.
20. It is open to the Applicant of course to make a fresh application now the time specified in the fresh notice to leave has elapsed.
21. 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 5(4) and 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