



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 of the Private Housing (Tenancies)(Scotland) Act 2016**

**Chamber Ref: FTS/HPC/EV/21/1664**

**Re: Property at Flat 1/3 308 Clyde Street, Glasgow, G1 4NP (“the Property”)**

**Parties:**

**Mr Amer Rafique and Mrs Nosheen Rafique, c/o Pacitti Jones, 2-6 Havelock Street, Glasgow, G11 5JA (“the Applicant”)**

**Mr Ryan Morgan, Flat 1/3 308 Clyde Street, Glasgow, G1 4NP (“the Respondent”)**

**Tribunal Members:**

**George Clark (Legal Member) and Leslie Forrest (Ordinary Member)**

**Decision (in absence of the Respondent)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be dismissed.**

**Background**

1. By application, dated 7 July 2021, the Applicant sought an Eviction Order against the Respondent, under Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”). The Eviction Ground relied on was Ground 12 of Schedule 3 to the 2016 Act, namely that the Respondent has been in rent arrears for three or more consecutive months.
2. The application was accompanied by a copy of a Private Residential Tenancy Agreement between the Parties, commencing on 28 September 2020, at a rent of £750 per month, payable in advance, and a copy Rent Ledger showing arrears of £6,750, only one payment of rent having been made by the Respondent, namely the first month’s rent, in September 2020.

3. The Applicant also provided the Tribunal with a copy of a Notice to Leave, dated 30 December 2020, with evidence of service on the Respondent on the following day. The Notice to Leave informed the Respondent that the Applicant was seeking eviction under Ground 12 of Schedule 3 to the 2016 Act and in the Section which requires applicants to state particulars of how they believe the ground has arisen, the Applicant's agents stated - "Over 3 months rent arrears, ongoing lack of contact and no repayment plan set up". The Applicant's agent did not provide any supporting evidence but stated that "Rent account ledger can be supplied on request".
4. The Notice to Leave confirmed that an application would not be submitted to the Tribunal for an Eviction Order before 6 July 2021.
5. On 27 July 2021, the Tribunal wrote to the Applicant's agents, pointing out that the Respondent had not been in arrears for three or more consecutive months on the date that the Notice to Leave was served. According to the rent statement lodged, the arrears started on 28 October. There might have been three instalments missed, but there were not three full months of arrears. The Tribunal asked the Applicant's agents to advise the basis upon which the Tribunal could entertain the application and added that they might wish to consult the Upper Tribunal decision in *Majid v Gaffney* ([2019] UT59).
6. On 10 August 2021, the Tribunal asked the Applicant's agents to provide a written submission outlining a legal argument as to why the application should be entertained in circumstances where the Notice to Leave was served before there were three consecutive months of rent arrears or, if they accepted that the Notice to Leave was invalid, a submission outlining a legal argument as to why the application should be considered despite an invalid Notice to Leave having been served. The Applicant's agents were also asked, alternatively, to confirm whether they wished to withdraw the application and make a fresh application once a Notice to Leave had been served and the appropriate period of notice had expired.
7. The Applicant's agents submitted their legal argument to the Tribunal on 23 August 2021. They pointed out that Section 51(1) of the 2016 Act provides that the Tribunal **shall** issue an Eviction Order if it finds that one of the Eviction Grounds named in Schedule 3 to the 2016 Act applies. Section 51(2) goes further and states that the Schedule 3 provisions alone are exhaustive of the circumstances in which the Tribunal is entitled to find that the Eviction Ground in question applies. This sub-section is clear and directive of what the Tribunal may consider in determining whether an Eviction Ground applies. In relation to Ground 12, provided the two "limbs" (a) and (b) are met, the Tribunal must issue an Eviction Order. The test in "limb" (a) is the level of rent arrears at the day on which the Tribunal first considers the application on its merits, not the arrears at the date of the Notice to Leave. The view of the Applicant's agents was that the criteria in Ground 12 had been met, and the Tribunal must therefore issue a Eviction Order. Parliament had not made provision for discretion or consideration of other matters if the grounds for this specific eviction ground are met.

8. The Applicant's agents submitted that the legal point outlined above had not been considered by the Sheriff in *Majid v Gaffney* and was not addressed in arguments or in the decision. If Parliament had wished the Tribunal to have discretion in this Eviction Ground beyond the parameters set in Schedule 3, then it could have done so, as it did for various other Grounds and variables/circumstances, but it did not do so for Ground 12 beyond the "2-limb" test in paragraphs (a) and (b) of Paragraph 12(1) of the Schedule. If Parliament had wished to state that any error in or issue with a Notice to Leave would render an application for eviction invalid, it would have provided expressly for this. There are certain grounds on which the Tribunal shall not consider an application for eviction, and these are set out in Section 52 of the 2016 Act. For example, by Section 52(2) it is mandatory that the Tribunal shall not consider an application if the Notice to Leave is not attached to it.
9. The Applicant's agents referred to Section 73 of the 2016 Act, which deals with minor errors in the Notice to Leave which do not render it invalid. Where a Notice to Leave is served after three months' rent payments are due and in arrears and the notice for an application and ultimately the Tribunal's decision on eviction are all dated well after the three month period for arrears, the tenant is on full notice of the ground for eviction and has been fully informed and is deemed to know the law, and that the Tribunal will be obliged to issue an Eviction Order if the tenant does not take the adequate and reasonable time afforded to reduce the arrears such that the "limbs" in Ground 12 are not met, so that an Eviction Order becomes a matter for the discretion of the Tribunal and not a mandatory matter, where the Tribunal cannot look to the terms of the Notice to Leave, provided it has been attached to the application.
10. On 27 September 2021, the Tribunal advised the Applicant's agents that the Tribunal President had agreed to accept the application, but that this did not mean that the Tribunal had accepted the Applicant's argument, which would be subject to discussion at a Case Management Discussion.
11. On 8 September 2021, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the Respondent was invited to make written representations by 29 September 2021. The Respondent did not make any written representations to the Tribunal.

### **Case Management Discussion**

12. A Case Management Discussion was held on the morning of 11 October 2021. The Applicant was represented by Ms Rosslyn Lithgow and Mr Kevin Taylor of Pacitti Jones Legal Ltd, Glasgow, the Applicant's agents. The Respondent was not present or represented.
13. The Tribunal Chair advised the Applicant's agents that the success or otherwise of the application was dependent on the Tribunal's decision on their legal argument regarding the Notice to Leave. The Tribunal was satisfied that the requirements of Paragraph 12 of Schedule 3 to the 2016 Act had otherwise been met. The evidence showed that the Respondent was 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 and that the Respondent had been in arrears for a continuous period up to and including the date of the Case Management Discussion, of three or more consecutive months. If, therefore, the Tribunal accepted the legal argument, it would issue an Eviction Order against the Respondent. If, however, the Tribunal did not accept that argument, it would dismiss the application.

14. Mr Taylor referred the Tribunal to the legal argument set out in Paragraphs 7-10 above. His position was that the 2016 Act did not introduce a two-tier test, as it did not state that the Ground to be relied on had to be met at the date on which a Notice to Leave was served. Sheriff Fleming had said at paragraph 14 of his Decision in *Majid v Gaffney* that "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" but had not identified the statutory provision to which he was referring. There was no provision in the 2016 Act which supported the Sheriff's conclusion. If Parliament had wanted to say that the Ground must apply at the date of the Notice to Leave, it is odd that it is not stated anywhere in the body of the Act or in Schedule 3 to the Act. The Act clearly states that the provisions of Schedule 3 are exhaustive of the circumstances in which the Tribunal is entitled to find that the Ground in question applies.
15. Sheriff Fleming at paragraph 14 of his Decision in *Majid v Gaffney* had said that in his 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". Mr Taylor argued that it was necessary to reference material outwith the bounds of the 2016 Act itself in order to address the Sheriff's statement and he referred the Tribunal to a portion of the Official Report of proceedings at the Second Stage of consideration of the Bill which became the 2016 Act and in particular to comments made by the Bill's sponsor, Margaret Burgess MSP, who said "That is why I have always made clear that a landlord could choose to serve notice on a tenant after one or two months. Of course, the eviction ground will not be satisfied at that point, but the landlord is saying that if the eviction ground applies at the end of the notice period, he or she can go to tribunal without further delay." [Official Report page 17 column 1 para 4]. This comment, Mr Taylor argued, was counter to Sheriff Fleming's view that it could not have been intended by Parliament that a landlord could serve a notice specifying a ground not yet available.
16. The Tribunal Chair drew Mr Taylor's attention to the prescribed form that a Notice to Leave must take and to Part 3 which requires the Applicant to "State particulars of how you believe the ground(s) have arisen." Mr Taylor responded that nothing in the 2016 Act states that the Ground must apply when the Notice to Leave is given and, if the problem lies in a misunderstanding of the prescribed Form of Notice to Leave, the Tribunal has the discretion to regard the fact that it was served early, when three rental payments had been missed, but the full three month period had not elapsed, as a minor error.

17. Mr Taylor concluded that there was one test, namely are the Ground 12 requirements met.
18. Questioned by the Tribunal, Ms Lithgow confirmed that a further Notice to Leave had been served on the Respondent on 25 August 2021, as a protective measure on behalf of the Applicant, in case the Tribunal was not prepared to hold that the decision in *Majid v Gaffney* decision was incorrect.
19. Ms Lithgow and Mr Taylor then left the Case Management Discussion and the Tribunal considered all the evidence, written and oral, before it.

## Reasons for Decision

20. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to determine the application without a Hearing.
21. The Tribunal considered the Decision of Sheriff Fleming in *Majid v Gaffney*. The facts of that case were very similar to those of the present application, in that a Notice to Leave had stated that three successive rental payments had not been made, but, as the rent was payable in advance, the arrears were only two months when the Notice was served, one day after the third payment had fallen due. Accordingly, as in the present case, Ground 12 of Schedule 3 to the 2016 Act did not apply as at the date of service of the Notice to Leave. Sheriff Fleming stated that the Appellant in the *Majid* case appeared to be conflating two separate statutory provisions. Section 62(1)(b) of the 2016 Act requires that a Notice to Leave specifies the day on which the landlord under the tenancy in question “expects to be entitled to make an application for an eviction order” and the view of the learned Sheriff was that the word “expects” relates to the date on which the application will be made. This, he said, was entirely distinct from the eviction ground and he concluded “The statutory position is clear which is that the ground of eviction must be satisfied at the date of service of the Notice to Leave” and that, if it was not, the Notice was invalid.
22. The Tribunal agreed with the view expressed by Sheriff Fleming that the word “expects” in Section 62(1)(b) of the 2016 Act must refer not to a date by which a landlord anticipates (or hopes) that the specified Eviction Ground will have been met, but to the earliest date on which the landlord can apply to the Tribunal, that date being determined by the notice periods applied by Section 54(2) of the Act to each of the Eviction Grounds. This view is fortified by the specific provision of Section 62(4) of the 2016 Act that “The day to be specified in accordance with Section 62(1)(b) is the day falling after the day on which the notice period defined in Section 54(2) will expire”. The calculation of that date, therefore, cannot be by reference to some future date by when a landlord anticipates the Ground, under which he or she intends to apply for an Eviction Order, to be met.

23. Regulation 6 of The Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 stipulates that a Notice to Leave must be in the form set out in Schedule 5 to the Regulations, The Tribunal considered the statutory form of Notice to Leave set out in that Schedule. Part 3 requires the landlord to “State particulars of how you believe the ground(s) have arisen”. The view of the Tribunal was that this clearly does not sanction the use of the form by a landlord in circumstances where the Eviction Ground has not yet been met.
24. Accordingly, the Tribunal agreed that the statement by Sheriff Fleming that “the statutory position is clear” was correct, although he did not in his Decision specify the Sections of the 2016 Act that led him to that conclusion. The Notice to Leave on which the present application depended was, therefore, invalid and the application must be dismissed. The error in the Notice to Leave was fundamental and could not be said to be a “minor error” and excused by the Tribunal under Section 73(2)(d) of the 2016 Act. It had been served one month too early. It could not have been the intention of Parliament that an application for Eviction Order could be made following the service of a Notice to Leave, in circumstances in which the Notice to Leave was invalid.
25. In the *Majid* case, Sheriff Fleming expressed his view that “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 a significant abuse”. In the present case, Mr Taylor had asked the Tribunal to hold that the Sheriff had been wrong in that view. He referred the Tribunal to the Official Report of the Infrastructure and Capital Investment Committee of the Parliament’s proceedings of 10 February 2016 at the Second Stage of the progress of the (then) Bill, and the comment of Margaret Burgess MSP that she had “always made clear that a landlord could choose to serve notice on a tenant after one or two months. Of course, the eviction ground will not be satisfied at that point, but the landlord is saying that if the eviction ground applies at the end of the notice period, he or she can go to the tribunal without further delay”.
26. The Tribunal accepted, following the decision in *Pepper v Hart* [1993] AC 593 that if primary legislation is ambiguous or obscure the courts may in certain circumstances take account of statements made in Parliament by Ministers or other promoters of a Bill in construing that legislation”, but the Tribunal decided that it was not appropriate to take cognisance of the views expressed by an MSP at the Committee stage of the progress of the 2016 Act, as it had determined that the relevant provisions of the 2016 Act are not ambiguous..
27. The view of the Tribunal was that, in order to found an application for an Eviction Order, the Notice to Leave which has to precede it must specify an Eviction Ground that has already been met. To take the contrary view would have consequences that could seriously undermine the protection for tenants that the 2016 Act was intended to provide and there would be a danger that a practice might develop whereby landlords routinely served speculative and

perhaps even omnibus Notices to Leave, setting out a number of Grounds, none of which had yet been established.

28. The Decision of the Tribunal was unanimous.

### **Right of Appeal**

**In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal 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.**

# G. Clark

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Legal Member/Chair

11 October 2021  
Date