



**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 and 5 of the First-tier Tribunal for Scotland Housing and Property
Chamber Rules of Procedure 2017 ("the Procedural Rules")

in connection with

29 Cummertrees, Annan, DG12 5QD (The Property)

Case Reference: FTS/HPC/CV/21/1713

Miss Elizabeth Birkbeck, Estate Office, Hoddum, Lockerbie (Applicant)

Hann & Co Solicitors (Applicant's Representative)

Mr Joseph Nelder 29 Cummertrees, Annan, DG12 5QD (Respondent)

1. On 15th July 2021, an application was received from the applicant. The application was made under Rule 111 of the Procedural Rules, being an application for an order for payment of rent arrears by the Tenant.
2. The following documents were enclosed with the application:-
 - Copy tenancy agreement
 - Rent Statement
3. The Applicant had also submitted an application for an order for eviction under Rule 109 reference number EV/21/1705 which was conjoined with the is application and the Tribunal requested further information from the

applicant by letter dated 30th July 2021 for both applications. The Tribunal asked for the following information:-

“1, The certificate of posting of the notice to leave as we note you have provided a track and trace which shows it signed by “Anderson” not the name of the tenant we would like to see proof it was sent to this address.

2. Can you please provide a copy of the title deed for these applications?

3. In the application and Notice to leave you are relying on 3 grounds, firstly ground 11 a breach of the tenancy agreement. You have mentioned the clauses of the lease you feel are breached but have not given details in the application of how they were breached could you please give a brief description of how each clause has been breached. Please note that payment of rent does not fall within ground 11 and cannot be used as a breach of tenancy as it is a separate ground ie Ground 12.

4. With regard to anti-social behaviour this is ground 14 however you refer to a Ground 17 which does not exist in the 2016 Act schedule 3. Please clarify if you want to amend the ground referred to and please provide a brief description of why the Applicant feels this ground is met and accompany with any statements or other evidence to support this ground if necessary.

5. With regard to Ground 12 your rent statement is not clear. You mention that 3 months are missed however the rent statement shows a credit of £5,600 paid in September can you please provide a clearer rent statement showing the sum due each month, the sums paid each month, and the running balance. Please also note that at least three months of arrears have to be established at the date of service. The Upper Tribunal decision in the case of Majid v Gaffney and Britton 2019 UT 59 confirmed that at least 3 months arrears had to be owing at the date of service of the Notice to Leave you mention that 3 months rent was due and owing but it is not clear that the full 3 months rent was outstanding at the date of service your comments with a clearer rent statement are required.

6. With regard to the application for rent arrears a clear rent statement is required to clarify what the credit of £5600 applies to. Please reply to this office with the necessary information by 13 August 2021. If we do not hear from you within this time, the President may decide to reject the application

4. No response was received from the Applicant

5. The Tribunal wrote again on 30th August asking for a response to its letter of 30th July and a response was received on 15th September enclosing a copy of the tenancy agreement, various photographs and letters to the tenant.
6. The Tribunal wrote again on 6th October saying:-
“Thank you for your response to our earlier letter dated 30th July 2021. We note you requested further time to lodge details of why the applicant believes Grounds 11 and 14 are met and a clearer rent statement, but note we have not yet received this. Please let us have the required information as set out in paragraphs 3, 4 and 5 of our letter of 30th July as soon as possible so that both your application for eviction and rent arrears can be considered further. Please reply to this office with the necessary information by 20 October 2021. If we do not hear from you within this time, the President may decide to reject the application.”
7. A response was received from the Applicant’s solicitors’ on 12th October stating:- *“The tenant has been in contact with the landlord and has made a significant payment towards his arrears. I understand that the parties have been in positive discussions regarding other matters of concern. In the circumstances, I wonder if consideration of this matter can be continued for say 3 weeks for parties to discuss possible resolution. My client is considering taking a view on her applications but need further time.”*
8. The Tribunal wrote again on 9th November saying:- *“Your application has been referred to a legal member. The legal member request further information as follows: • Please confirm whether or not the application is being withdrawn or insisted upon. Please provide the information requested within 14 days (by 23 November 2021) failing which your application may be refused.”*
9. There was no response to this letter and there has therefore been no response to some of the substantive requests for further information sought by the Tribunal and for clarification if the Applicant wishes to proceed either from the Applicant themselves or their representative.

DECISION

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

Those Rules provide:-

11.

"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."

12. 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

13. 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.

14. The applicant has failed to respond to the Tribunal's substantive requests for further information, in breach of Rule 5 and as a result information the Tribunal requires in order to determine whether or not the application is frivolous, misconceived, and has no prospect of success has not been made available. The Applicant asked for 3 weeks to consider how she wished to proceed on 12th October and on 9th November 2021 the Tribunal wrote sending a reminder and asking if the Applicant wished to proceed or withdraw and there has been no response. More than 8 weeks have now passed without any further contact from the Applicant or her representative. In terms of Rule 5 the application should not be accepted as outstanding documents have not been received and I consider that the applicant's failure to respond to the Tribunal's request gives me good reason to believe that it would not be appropriate to accept the application in circumstances where the applicant is apparently unwilling or unable to respond to the Tribunal's enquiries in order to progress this application.

15. 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 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
8th December 2021