



**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

Case Reference: FTS/HPC/EV/22/3320

Mr Stephen Broadley (Applicant)

Ms Elizabeth Keenan (Respondent)

Mrs Marilyn Kent (Applicant's Representative)

158 Croftside Avenue, Glasgow, G44 5ND (House)

1. On 12th September 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 Notice to Leave addressed to the Respondent, and a copy of the S11 notice to the local authority.
3. The Tribunal requested further information from the applicant by e-mail dated 10th October 2022. The Tribunal asked for the following information in respect of this application:-
4. *Your application has been considered by a legal member of the Tribunal who*

has requested the following information:

- 1. A copy of the tenancy agreement*
- 2. A signed and dated copy of the Notice to Leave served on the tenant*
- 3. Evidence of service of the notice to leave showing when and how it was served*
- 4. Evidence of service of the section 11 notice on the local authority showing when and how it was served*
- 5. Letter of authority from the Applicant appointing you as his representative*
- 6. Any documentation demonstrating compliance with the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020*

Upon receipt of the above information, a final decision can then be taken on whether the application is valid and whether it should be accepted and referred to the tribunal for full determination. Please reply to this office with the necessary information by 24 October 2022. If we do not hear from you within this time, the President may decide to reject the application.

5. The Applicant's representative responded on 13th October 2022 advising that they had responded with the documents requested. Along with their letter was a signed copy of the Notice to leave dated 8th August 2022 and confirming no action would be taken until after 8th September. In addition in part 3 of the Notice to leave the Applicant had laid out the reasons for the ground of eviction, ground 12 being met namely "Miss Keenan is in rent arrears for May, June & July 2022. August's rent is also due on the 15th August. Each payment is £625.00 pcm. By next Monday she will be £2,500.00 in rent arrears." In addition the Applicant's representative attached copy Pre Action letters, a mandate from the applicant authorizing them to represent her and copy e-mail dated 8th August sending the notice to leave to the Applicant.
6. The Tribunal wrote again to the Applicant on 9th November 2022 asking "*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: We refer to the above eviction application and to our letter of 10 October 2022 and your reply of 12 October 2022. We asked you for a copy of the tenancy agreement and you have not provided this. Please provide a copy of the tenancy agreement within 7 days to enable the application to be considered further. Please reply to this office with the necessary information by*

16 November 2022. If we do not hear from you within this time, the President may decide to reject the application.”

7. The Applicant responded on 10th November with a copy of the lease and advising that it had previously been enclosed as a link but that the Tribunal could not open that so she was attaching it.
8. The lease notes the Tenants are Morgan Keenan and Lindsay Keenan, that it starts on 15th May 2019 and the rent is £595 payable on 15th May and thereafter monthly on 15th of each month.
9. On 8th December 2022 the Tribunal wrote again to the Applicants representative as follows:-

“Your application has been reviewed by the In-House Convenor who has raised the following matters

The notice to leave (NTL) based on ground 12 appears to have been served on 8 August 2022. In order for that notice to be valid, the tenant must have been in arrears for three consecutive months at that date.

Please provide evidence that the tenant has been in arrears of rent since at least 8 May 2022. You have not provided any rent statement which shows such evidence. The tenancy agreement shows rent becoming due on the 15th day of each month. The first payment showing as missed in the rent statement is simply showing as the payment due in May 2022 which was presumably only due to be paid on 15 May. If the tenant has not been in arrears since on or before 8 May 2022 and remained in arrears until 8 August 2022 then your notice to leave will not be valid and your application will fall to be rejected. We would refer you to the Upper Tribunal decisions in the cases of Rafique v Morgan (2022) UT 07 and Majid v Gaffney (2019) UT 59. These Upper Tribunal decisions considered whether it is competent for a notice to leave to be served before a tenant has been in arrears for that required period of three consecutive months. The decisions confirmed that a notice to leave cannot be served until a tenant has been in arrears consecutively for a period of three months. The amount of the arrears has no bearing on it. The crucial element here is the period of time during which of the arrears have existed consecutively.

This tribunal is bound to follow decisions which interpret relevant legal provisions issued by the Upper Tribunal. Upon receipt of the above information, a final decision can then be taken on whether the eviction application is valid

and whether it should be accepted and referred to the tribunal for full determination.

Please reply to this request within two weeks of the date of the letter. If you fail to respond to this letter then the tribunal may reject your eviction application. We would strongly suggest that you obtain independent legal advice on the matters contained in this letter. Please reply to this office with the necessary information by 22 December 2022. If we do not hear from you within this time, the President may decide to reject the application.

There was no response received and a reminder was sent on 18th January to which the Applicant advised a response had been sent on 12th December and provided a copy of this on 19th January. The Response stated “Hi Alex, Thanks for your email. The tenant's rent payments were due on the 15th of each month. Her 1st payment not to be paid was the 15th May 2022, and we have received nothing since. I have attached screenshots of conversations that I had with the tenant on the 8th August where you can see she is requesting that I send her Notice to Leave that day so she can take it to the Citizens Advice Bureau, Job Centre and Welfare Rights Office so she can get the financial help quicker. I have also sent you an up to date rent statement up to November 2022 where you can see that the tenant has made no rent payments, even though she is in receipt of getting Universal Credit to pay her rent with. We understand that the Notice to Leave was sent 7 days before it should have been, but surely that she hasn't made any rent payments since May (7 months) will be taking into consideration?”

10. The Tribunal wrote once more on 13th February 2023 saying “Before a decision can be made, we need you to provide us with the following: •

- *The tribunal acknowledges receipt of your email over 19 January 2023, enclosing the email you sent initially on 12 December 2022.*
- *Your email of 12 December does not address the issues raised in the tribunal's letter of 8 December. You seem to accept that the notice to leave was served before the appropriate ground was available to you and provide no information*

which would allow the tribunal to ignore the binding precedent decisions of the Upper Tribunal mentioned in its letter to you.

•If you accept that your notice to leave has been issued too early, then the tribunal is bound to follow the interpretation set by the Upper Tribunal and will require to reject your application unless you are now content to withdraw it

Please advise whether you are now content to withdraw this application or provide full detailed legal submissions setting out your reasons why the tribunal should not follow the precedents mentioned in the previous letter. •Again, we would strongly suggest that you obtain independent legal advice on the matter is contained in this letter.

Please reply to this office with the necessary information by 24 February 2023. If we do not hear from you within this time, the President may decide to reject the application.

11. The Applicant's representative responded as follows:-

"I do not wish this application to be withdrawn on the basis of the following: In my email of the 12th December I attached 2 screenshots of a conversation between me and Ms Keenan where she is asking me to send her NTL on the 8th (7 days early) so she could take it to the relevant places to get help with her rent as soon as she could as she realised she was in financial trouble. You can clearly see me telling me that we would need to go down the 1st Tier Tribunal route as it was getting close to her being 3 months in rent arrears. Had she not asked me to send her the NTL via email on the 8th, we would have waited till the 16th August to send it which as we are nearly a year down the line wouldn't have made a blind bit of difference as she has not paid a single penny up to date. I have attached these screenshots again. We have sent in another application for a different address/tenant to the tribunal with a similar NTL date issue, and the screenshots between myself and the tenant were accepted and eviction granted so we cannot understand why this one has not been especially with the amount of rent arrears the tenant has. Furthermore, we are 3 months away from when Ms Keenan did not make her rent payment for May 2022, and still she has made no attempt to pay anything towards her rent arrears and lives in our landlords house rent free because of a NTL given to her 7 days before its "allowed" as per HER request to help HER out. At what point is the landlords

opinion, financial position and mental state taking into account?? How would you feel if this was your property? I have attached an up to date rent statement for you showing the substantial rent arrears that have accumulated. Our landlord is now in dire straits with his mortgage payments and has a young family & elderly parents to look after. His mortgage company have a "process" just like you and he needs to pay his mortgage and even they cannot understand why the Tribunal would let this matter drag on for so long. We have given you everything bar the kitchen sink and we have done so very promptly and have been more than patient. All our landlord wants is his property back. We wish you to take these points on board when making your decision."

12. DECISION

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

Those Rules provide:-

14.

"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."

15. 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

16. 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.

17. 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.

18. 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.

Paragraph 12 of Part 3 to Schedule 3 provides:

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

(2)The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if— (a) at the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits, the tenant— (i) is 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 on that day, and

(ii) has been in arrears of rent (by any amount) for a continuous period, up to and including that day, of three or more consecutive months, and (b) the Tribunal is satisfied that the tenant's being in arrears of rent over that period is not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.”

19. The Applicant has lodged an application with a Notice to Leave that relies on Ground 12. Part 3 of the Notice to Leave sets out the details of how the ground is met and states “Miss Keenan is in rent arrears for May, June & July 2022. August's rent is also due on the 15th August. Each payment is £625.00 pcm. **By next Monday** she will be £2,500.00 in rent arrears”. It is noted that in the tenancy agreement rent is due on 15th of each month so if the rent became first due on 15th May and was not paid, the first month it was in arrears was 15th June and it would only have been in arrears for 3 months by 15th August. The Notice was sent on 8th August 2022 and so the arrears had not amounted to 3 months and the ground had not been met at that point.
20. The Applicant has submitted that the Tribunal should ignore the fact that the sole ground of eviction set out in the Notice to leave and referred to in the application is not met at the time the Notice to leave is served. They submit that the Respondent asked them to serve the Notice to leave and otherwise they would have waited until the arrears of rent were over 3 months. They advise in their last letter from their Representative “*Furthermore, we are 3 months away from when Ms Keenan did not make her rent payment for May 2022, and still she has made no attempt to pay anything towards her rent arrears and lives in our landlords house rent free because of a NTL given to her 7 days before its "allowed" as per HER request to help HER out. At what point is the landlords opinion, financial position and mental state taking into account?? How would you feel if this was your property?*”
21. The matter of whether ground 12 can be considered to be met where the arrears of rent only amount to 3 months of arrears by the time of the case management discussion or hearing has been dealt with in 2 upper tribunal decisions both of which concluded that the intention of Parliament was that the ground had to be met at the time of service of the notice to leave and not sometime after that.
22. In the case of *Majid v Gaffney* (2019) UT 59. Sheriff Fleming stated “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.”
23. Also at page 5 of the decision Sheriff Fleming goes on to state:-

24. **“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 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.”
25. A further challenge against this interpretation was heard by the Upper Tribunal in the case of Raffique v Morgan UTS/21/0037 and Sheriff Tony Kelly came to the same conclusion.
26. Decisions of the upper tier Tribunal are binding on the First Tier Tribunal and as the facts in this case are similar to those in the aforementioned cases there is no discretion on the tribunal to accept an application where it is clear and accepted that the rent arrears do not amount to 3 months in arrears at the date of service of the Notice to Leave. Ground 12 does not apply and so the Notice to leave is invalid.
27. It is open to the Applicant of course to reserve a Notice to Leave and raise a further application in due course.
28. 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

Jan Todd
Legal Member
7th March 2022