



**DECISION AND STATEMENT OF REASONS OF JOSEPHINE BONNAR,
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 Rules")**

Case Reference: FTS/HPC/EV/23/2817

91 Clippens Road, Linwood ("the Property")

Marble Properties Ltd, 272 Bath Street, Glasgow ("the Applicant")

Adoibi Cookey, Tejiri Cooley, 91 Clippens Road, Linwood ("the Respondent")

1. The Applicant seeks an eviction order in terms of Rule 109 of the Rules and Section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act"). The Applicant lodged a tenancy agreement, Notice to Leave and rent statement in support of the application. The Notice to Leave is dated 17 July 2023. The date specified in Part 4 of the Notice is 16 August 2023. A copy email dated 17 July 2023 was also submitted. The Tribunal issued a request for further information, seeking clarification of the validity of the Notice to leave. In response, the Applicant stated they would serve a new Notice but did not withdraw the application.

DECISION

2. The Legal Member considered the application in terms of Rule 8 of the Chamber Procedural Rules. That Rule provides:-

Rejection of application

(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.

3. After consideration of the application and the documents submitted by the Applicant in support of same, the Legal Member considers that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Rules.

Reasons for Decision

- 4. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in R v North West Suffolk (Mildenhall) Magistrates Court, (1998) Env LR9. He indicated at page 16 of the judgment; "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 the Legal Member has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success.
- 5. The Notice to Leave which accompanies the application is dated 17 July 2023. The Applicant provided an email which appears to establish that it was sent on the same date. Part 4 of the Notice states that "An application will not be submitted to the Tribunal for an eviction order before 16 August 2023. This is the earliest date that Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the let property)". The relevant sections of the 2016 Act are as follows:-

52 Applications for eviction orders and consideration of them

...

(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.

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) The relevant period in relation to a notice to leave—

(a) begins on the day the tenant receives the notice to leave from the landlord, and

(b) expires on the day falling—

(i) 28 days after it begins if subsection (3) does apply

(4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3).

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.

...

(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 purposes of subsection (4), it is to be assumed that the tenant will receive the Notice to leave 48 hours after it is sent

6. For the purposes of section 62(1)(d), the relevant regulations are the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017, schedule 5 of which sets out the prescribed form for a notice to leave. Part 4 of that form is set out as follows:

Part 4 THE END OF THE NOTICE PERIOD

An application will not be submitted to the Tribunal for an eviction order before (insert date). This is the earliest date that the Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the Let Property).

7. The Legal Member notes that the date specified in the Notice to leave is 16 August 2023. This date is clearly incorrect. In terms of section 62(4) of the 2016 Act, the Notice must state a date being **“the day falling after the day on which the notice period defined in section 54(2) will expire.”** In terms of Section 62(5), the Applicant is also required to make provision for a 48-hour period between the notice being sent and the “assumed” date of receipt. The 28 day notice period started on 19 July 2023 and expired on 16 August 2023. The date in Part 4 should therefore be 17 August 2023.
8. The opening words of Section 62 indicate that a Notice to Leave has to fulfil the four requirements specified in Sections (a) to (d) of that section. It follows that a Notice to Leave which does not fulfil these requirements is not a “Notice to leave” in terms of the 2016 Act. The Notice submitted with the application does not fulfil the requirement specified in Section 62(b), as the Notice wrongly indicates that the Applicant expected to be able to make an application to the Tribunal on 16 August 2023. As a result, the Notice which has been submitted is not a Notice to leave in terms of Section 62. As the application to the Tribunal has to be accompanied by a “Notice to Leave”, the Applicant has failed to comply with Section 52 of the 2016 Act and, as a result, the Tribunal cannot entertain the application.
9. The Legal Member also notes that the rent statement lodged with the application appears to show that the arrears of rent started on 21 May 2023, when the payment due on that date was not paid. In the case of Abdul Majid against Adele Gaffney and Andrew Robert Britton 2019 UT 59, the Upper Tribunal refused the Applicant’s request for permission to appeal. The Applicants had submitted an application to the Tribunal for an eviction order on

ground 12. The Tribunal rejected the application because the Respondent had not been in rent arrears for three or more consecutive months at the date of service of the Notice, on 1 July 2019. In refusing the application for permission to appeal, the Upper Tribunal stated, at paragraph 9 "...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 arrears for three or more consecutive months." Paragraph (14) "... 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. 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 security of tenure that the 2016 Act."

10. Having regard to the 2016 Act, and the decision of the Upper Tribunal in *Majid v Gaffney*, the Legal Member concludes that the Notice to Leave is also invalid because the Respondent had been in arrears of rent for less than 2 consecutive months at the date of service of the Notice.

11. The Legal Member determines that, as the Notice to Leave submitted with the application is invalid, the application is frivolous, misconceived and has no prospect of success. The application is rejected on that basis.

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.



Legal Member

1 December 2023