Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF PETRA HENNIG MCFATRIDGE 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/24/2119

Parties

CE Property Management Ltd (Applicant)

Ms Sherree McGarry (Respondent)

21 B West Main St, Darvel, KA17 0DX (House)

1. The application was made to the First-tier Tribunal (the FTT) under rule 109 and S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) using ground 12A of schedule 3 of the Act. The application was dated 23.4.24 and received by the FTT on 8.5.24.
2. The application was accompanied by a partial tenancy agreement copy showing as the start date of the tenancy 24.2.23 and a rent of £325 payable in arrears (clause 7), an AT6 document, a Notice to Leave dated 20.1.24 with a date of 21.2.24 in part 4 and stating

only ground 12A, email serving same dated 20.1.24, reminder letter to the tenant dated 4.4.24. Following a request by the FTT for a S 11 notice and proof of service, this was provided on 13.5.24.

3. The FTT wrote to the Applicant on 4.6.24 raising in particular the following two matters: "FTS/HPC/EV/24/2119 1. You have ticked Ground 12A on the Notice to Leave, but the information in the email attaching the Notice to Leave states that the Respondent has been in arrears for 3 months, which is Ground 12. On the information provided, it does not seem that Ground 12A was met at the time of serving the Notice to Leave, and it may be the case that Ground 12 was not met at the relevant time. As you have not provided a rent statement showing rent due, rent paid and a running total of rent arrears, it is not possible to ascertain whether either ground was met. Your attention is drawn to the Upper Tribunal cases of Majid v Gaffney [2019] UT 59, and Rafique v Morgan [2022] UT 07 which provide that the tenant must have been in arrears for three full months, in respect of Ground 12, and not simply owing rent. If the Ground was not met at the time the Notice was served, please consider withdrawing the application and serving a further Notice, or provide your written representations as to why the application should be accepted, also addressing the points in relation to which ground you intend to proceed under. 2. It is not clear why a Form AT6 was served, as that form is only relevant to assured tenancies. 3. We would require a full copy of the tenancy agreement with a Rule 109 application.
4. On 5.6.24 the Applicant replied and provided an amended application stating as the ground of the application ground 12 rather than ground 12A. The Applicant stated: "FTS/HPC/EV/24/2119 1. We wish to proceed under Ground 12. The tenant is in rent arrears of over 3 months. She has been the tenant since our purchase of the property on 17/09/2023. The property was purchased at auction with the tenant in place. We have received zero rent from her throughout that period, which now exceeds 8 full months. Notice to leave documentation was served on the tenant on 20/01/24 which is after the 3 month period, and after several efforts to agree a payment plan and/or recover the unpaid rent arrears. The tenant was in rent arrears of over 3 full months at that time. Please find attached amended form E In respect of a rent statement please find attached document titled 'Reminder 08052024'. This shows the rent arrears for the period up to and including May 2024. A reminder letter was sent to the tenant for each month missed,

the majority of which were sent by email (as per tenants request). Additionally some were sent by mail and/or hand delivered. 2. Please disregard form AT6 if it is not required. 3. The document provided in our initial application is the only copy we have of the rent agreement the tenant signed. I appreciate that this is only part of the document. We have attempted to obtain a full copy of the agreement via our solicitor and the auction house however this was ultimately unsuccessful. The only other evidence we have is an email trail between both parties dated 19th October 2023 in which the tenant confirmed the terms of the original agreement were still agreeable to her and her intention to remain at the property. Is this sufficient? Please see attached document titled 'Response from tenant'."

5. The file documents are referred to for their terms and held to be incorporated herein.

DECISION

6. I considered the application in terms of Rule 8 of the Procedural Rules. That Rule provides:-

"Rejection of application

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."

7. After consideration of the application, the attachments and correspondence from the Applicant, I consider that the application should be rejected in terms of Rule 8 (c) of the Rules of Procedure on the basis as the Tribunal has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION

Relevant Legislation
Rules of Procedure:

Rule 109. Where a landlord makes an application under section 51(1) (for an eviction order) of the 2016 Act, the application must—

(a)state—

(i)the name, address and registration number (if any) of the landlord;

(ii)the name, address and profession of any representative of the landlord;

(iii)the name and address of the tenant **[**F72(if known)**]**; and

(iv)the ground or grounds for eviction;

(b) be accompanied by:

i. evidence showing that the eviction ground or grounds has been met
ii. a copy of the notice to leave given to the tenant as required under section 52(3) of the 2016 Act
iii. a copy of the notice given to the local authority as required under section 56 (1) of the 2016 Act

Ground 12A schedule 3

Substantial Rent arrears

12A(1)It is an eviction ground that the tenant has substantial rent arrears.

(2)The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—

(a)the tenant has accrued rent arrears under the tenancy in respect of one or more periods,

(b)the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months' rent under the tenancy when notice to leave is given to the tenant on this ground in accordance with section 52(3), and

(c)the Tribunal is satisfied that it is reasonable to issue an eviction order.

(3)In deciding under sub-paragraph (2) whether it is reasonable to issue an eviction order, the Tribunal is to consider—

(a)whether the tenant being in arrears of rent over the period or periods in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit,

(b)the extent to which the landlord has complied with the pre-action protocol prescribed by the Scottish Ministers under paragraph 12(4)(b) (and continued in force by virtue of section 49 of the Coronavirus (Recovery and Reform) (Scotland) Act 2022).

(4)For the purpose of this paragraph—

(a)references to a relevant benefit are to—

(i)a rent allowance or rent rebate under the Housing Benefit Regulations 2006 (S.I. 2006/213),

(ii)a payment on account awarded under regulation 93 of those Regulations,

(iii)universal credit, where the payment in question included (or ought to have included) an amount under section 11 of the Welfare Reform Act 2012 in respect of rent,

(iv)sums payable by virtue of section 73 of the Education (Scotland) Act 1980,

(b)references to delay or failure in the payment of a relevant benefit do not include any delay or failure so far as it is referable to an act or omission of the tenant.

1. The application was made on ground 12A of schedule 3 of the Act and would require, in terms of S 52 (3) of the Act, to be accompanied by a Notice to Leave and in terms of S 56 by a Notice to the Local Authority. The FTT considers that the meaning of this section is that the Notice to Leave has to be a valid Notice to Leave. The same requirements are also stated in rule 109, which is the rule under which the application is made.
2. The Notice to Leave provided is dated 20.1.24 and was served by email on that date on the Respondent only. It states as the only eviction ground on the notice ground 12A. In terms of the tenancy agreement the rent of £325 per month is payable in arrears on or before the 24th day of each month. No rent statement was provided. However, the reminder letter shows that as of 20.1.24 the Respondent was only liable for arrears for the period of 2.11.23 to 2.1.24, which is less than 6 months. The requirement of ground 12A is not that the tenant has been in arrears of rent for a period of at least 6 months but that the tenant is in arrears of rent which cumulatively equates to, or exceeds, an amount that is the equivalent of 6 months rent under the tenancy when the notice to leave is given. The amount of rent under the tenancy agreement is £325 per month. The amount equating to 6 times the amount of rent is

thus £1,950. The amount of rent outstanding in terms of the reminder letter as at 20.1.24 would have been 3x £325 for the payments due, as stated by the Applicant, on 2.11.23, 2.12.23 and 2.1.24. This is not equivalent to or exceeding the some equivalent to 6 months rent and thus ground 12 A was not met on the date the notice was served on the Respondent.

3. Although in the context of ground 12, which relates to 3 months consecutive rent arrears, the matter of how to establish the level and duration of arrears of rent for the required period or sum on the relevant day of the Notice to Leave being given to the tenant has been fully and comprehensively dealt with by the Upper Tribunal in at least two decisions, which are binding on the FTT. What is relevant to this case in this context is that the UT held that the ground must be met on the day when the Notice to Leave is given to the tenant.
4. In the decision [2019] UT 59 Majid v Gaffney Sheriff Fleming sets out the requirements of a valid Notice to Leave in cases of rent arrears and states in para 9 "[9] *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.*" and goes on to say: "[*13] The basis for the decision of the First-tier Tribunal is that the Notice to Leave specified a ground for eviction which was not satisfied as at the date of the service. That being the case the notice itself is invalid. [14] The appellant appears to be conflating two separate statutory provisions. In terms of section 62(1)(b) reference is made to a date on which the landlord "expects to become entitled to make an application for an eviction order to the First-Tier Tribunal". It is clear that the word "expects" relates to the date on which the application will be made. That is entirely distinct from the eviction ground.* ***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 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 the security of tenure that the 2016 Act.*** *There is no arguable ground of law. Permission to appeal is refused.*" The issue was further recently confirmed in the decision of Sheriff Kelly in [2022] UT07 Rafique v Morgan.
5. Having regard to these decisions, the clear requirement for a valid Notice to Leave in arrears cases is that as at the date the Notice to Leave is served on the tenant the requirement for the ground must be met. In cases of an eviction under ground 12A thus the question is whether on the date the Notice to Leave was given to the tenant **the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months' rent under the tenancy.** The UT also defined that there is a requirement of a tenant being in arrears of rent, not simply owing rent.

6. As the amount of arrears on the date the notice was served was less than 6 times the monthly rent, the ground of 12A was not met at that time. The FTT is bound by the clear decisions of the Upper Tribunal on this matter. The Notice to Leave was issued incorrectly and is thus invalid. It would not be appropriate to accept an application based on a Notice to Leave which is invalid.
7. The Tribunal considered whether S 52 (5) of the Act may assist the Applicant. S 54 (5) states: *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.
8. This will allow the potential addition of a ground not initially stated on the Notice to Leave. However, S 52 (3) states: "*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."* This means that without a valid Notice to Leave, an application to the FTT cannot be made and if the application cannot be made, no additional grounds can be added. Similarly, Rule 109 iv)b) requires that an application is accompanied by a Notice to Leave, which the FTT considers must be at least on the face of it a valid Notice to Leave. As set out above, applying the UT decisions to the case it is clear that the Notice to Leave issued on 20.1.24 cannot be valid because it clearly does not meet the requirement that the ground stated on the notice is met when the notice was issued. In this case there is no valid Notice to Leave and thus the application cannot be accepted and a change in the grounds for the application cannot retrospectively validate the invalid Notice to Leave.
9. The application is accordingly rejected.
10. For the avoidance of doubt it should be stressed that this decision does not prevent the Applicant from making a fresh application once all requirements as set out in the rules of procedure and the Act are met.

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.

Petra Hennig McFatridge
Legal Member
1 July 2024