



Decision with Statement of Reasons of Alan Strain, Legal Member of the First-tier Tribunal with delegated powers of the Chamber President of the First-tier Tribunal for Scotland (Housing and Property Chamber)

Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules")

Chamber Ref: FTS/HPC/EV/24/2651

Re: 10c Johnstone Street, Airdrie, ML6 6AZ (Property)

Parties

Smartnopoly Limited (Applicant)

Mr Anthony Donoughue (Respondent)

McGoogans (Coatbridge) Ltd (Applicant's Representative)

Tribunal Member:

Alan Strain (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules.

Background

1. The application was received by the Tribunal under Rule 109 on 11 June 2024. The Grounds for recovery of possession were stated to be Ground 5 and 12 under the **Private Housing (Tenancies) (Scotland) Act 2016 (Act)**.

First Further Information Request

2. The application was considered by the Tribunal and further information was requested from the Applicant's Representative by email of 4 July 2024. In particular, the Applicant's Representative was asked to provide (amongst other things) evidence

of service of the Notice to Leave on the Respondent and also to comment on the notice period provided in the Notice to Leave as it did not appear to give the required 84 days under section 54 (2)(b) (ii) of the Act.

The Applicant's Representative responded by email of 4 July 2024 stating that the Notice to Leave had been served on 31 January 2024 and the tenant had more than 84 days notice. It also stated that evidence of service had been provided.

No evidence of service was provided.

Second Further Information Request

The Tribunal again considered the application and issued a further request for information by email on 6 August 2024. In that email the Tribunal requested that the Applicant's Representative provide evidence of service of the Notice to Leave by email on the Respondent as was contractually required under Clause 4 of the Parties' lease. The Tribunal also informed the Applicant's Representative that the Notice to Leave appeared invalid as it was dated 31 January 2024 and gave notice that proceedings would not be raised before 2 March 2024. This was less than the 84 days required under section 54 (2)(b) (ii) of the Act.

The Tribunal queried the entitlement of the Applicant to raise proceedings under Ground 5 as the Applicant is a limited company.

The Tribunal also asked for a rent statement to be provided in the format dates and amounts of rent due, dates and amounts of rent paid and a running total of arrears to show that Ground 12 had been established at the point of service of the Notice to Leave.

The Applicant's Representative responded by email of the same date. In that email it was stated that the fact the Applicant is a limited company is of no relevance and that the Respondent has received more than 84 days notice (without any further elaboration). A rent statement was provided (not in the format requested) which showed that as at 20 November 2023 the Respondent had paid rent to date. Arrears then started to accumulate from 5 December 2023.

Reasons for Decision

3. The Tribunal considered the application in terms of Rule 8 of the Chamber 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;*
- (c) they have good reason to believe that it would not be appropriate to accept the application;*

(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."

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. 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"*.

5. Rule 109 of the Tribunal Procedure Rules provides:

Application for an eviction order

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 (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; and

(iii)a copy of the notice given to the local authority as required under section 56(1) of the 2016 Act; and

(iv)a copy of Form BB (notice to the occupier) under schedule 6 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (if applicable), and

(c)be signed and dated by the landlord or a representative of the landlord.

No Evidence of Service of Notice to Leave

The Applicant seeks to rely upon a Notice to Leave providing notice of Grounds 5 and 12, which is dated 31 January 2024, without any proof of service by email on the Respondent.

The Applicant is contractually required to provide notice to the Respondent by email (Clause 4 of the Parties' lease contains this provision).

Absent any evidence of service by email no valid notice to leave has been served on the Respondent and the application cannot succeed.

Insufficient Notice under section 54 (2)(b) (ii) of the Act

The Applicant seeks to rely upon Ground 5. As the Respondent has been entitled to occupy the Property for more than 6 months at the date of the Notice to Leave the Applicant must provide the Respondent with 84 days notice and must specify that in the Notice to Leave.

The Notice to Leave produced and relied upon by the Applicant is dated 31 January 2024. The Notice to Leave states that proceedings will not be raised before 2 March 2024. This is less than the 84 days required under section 54 (2)(b) (ii) of the Act.

As insufficient notice has been provided under the Act the Notice to Leave is invalid.

Ground 5 not established

In any event the Applicant cannot rely upon Ground 5. The Applicant is a limited company. It cannot have relatives as defined under Schedule 3 of the Act:

(4) For the purposes of this paragraph, a person is a member of the landlord's family if the person is—

(a) in a qualifying relationship with the landlord,

(b) a qualifying relative of the landlord,

(c) a qualifying relative of a person who is in a qualifying relationship with the landlord, or

(d) in a qualifying relationship with a qualifying relative of the landlord.

(5) For the purposes of sub-paragraph (4)—

(a) two people are in a qualifying relationship with one another if they are—

(i) married to each other,

(ii) in a civil partnership with each other, or

(iii) living together as though they were married,

(b) "a qualifying relative" means a parent, grandparent, child, grandchild, brother or sister,

The application could not succeed on Ground 5.

Ground 12 not established

Schedule 3 of the Act Ground 12 provides that it is an eviction Ground that the tenant has been in rent arrears for 3 or more consecutive months.

The Ground must be established at the date of the Notice to Leave (***Majid v Gaffney (2019) UT 59*** and ***Rafique v Morgan (2022) UT 07***). From consideration of the rent statement produced it is evident that as at 20 November 2023 the Respondent had paid rent to date and there were no arrears at that date. Arrears then started to accumulate from 5 December 2023.

As the Notice to Leave is dated 31 January 2024 the Tribunal considered whether or not Ground 12 was established at that date. Clearly it was not.

5. Applying the test identified by Lord Justice Bingham in the case of ***R v North West Suffolk (Mildenhall) Magistrates Court*** (cited above) the application is frivolous, misconceived and has no prospect of success. The application is accordingly rejected.

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.

Alan Strain

8 August 2024

Legal Member/Chair

Date