



Decision 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/24/2027

Parties

Docherty Properties Limited (Applicant)
Peter McMillan (Respondent)

97 Craighbank Street, Larkhall, ML9 1JR (the Property)

1. By application received by the Tribunal on 7 May 2024 the Applicant sought an eviction order against the Respondent under Rule 109 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”).
2. On 23 May 2024 the Tribunal emailed the Applicant’s representative raising a query regarding the Notice to Leave, amongst other matters. In particular the Tribunal wrote:-

“The copy Notice To Leave (“NTL”) you have provided is dated 2 April 2024 and indicates you will not apply to the tribunal until after 1 May 2024...Can you please have regard to the relevant provisions in the Private Housing (Tenancies) (Scotland) Act 2016 (and particularly sections 54(2), 62(4) and 62(5) of that Act) and explain why the NTL meets the requirements of those sections with particular regard to both the required period of notice to be given and the effective date to be inserted into a NTL and whether it should be regarded as valid. You should also note the specific terms of section 62(5) which indicate it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent. The period of notice which you have given seems to have failed to provide the required period of notice and has also seemingly ignored both the assumption about when a notice is received and the requirement relating to the effective date to be inserted into such a notice. If your notice has not given the required period of notice, on what basis can the tribunal proceed if it is invalid?”

3. On 26 May 2024 the Applicant responded to the Tribunal’s query in the following terms:-

“Application to tribunal and Section 11 notice to SLC was made on 03/05/24. Notice was served by email and receipt confirmed in correspondence with tenants included in the previous attached document... The tenants were served

a NTL specifying 28 days for breach of their tenancy agreement and antisocial behaviour as detailed in the NTL. Notice to leave was provided to the tenants on 02/04/24 with an application to the Tribunal on 03/05/24 being 31 days. Had the tenants indicated they required any additional time to vacate the property then this would have been given proper consideration. Instead, the tenants made it clear from the outset that they had no intention of leaving the property as detailed in the previously attached documentation.”

4. On 19 June 2024 the Tribunal sent a further email to the Applicant regarding, amongst other matters, the Notice to Leave. In particular the Tribunal wrote:-

“Your response to the question regarding the relevant provisions of the e Private Housing (Tenancies) (Scotland) Act 2016 (and particularly sections 54(2), 62(4) and 62(5) of that Act) does not deal with the query raised. Your response seems to ignore the requirements in the relevant sections that the notice to leave is deemed to be received 48 hours after it is sent, that the notice period does not start until then and that the effective date to be inserted into the notice (i.e the date upon which a landlord indicates in the notice that they will apply to a tribunal) is the day after the notice period ends. In your case, on the basis that notices were sent by email on 2 April 2024, the date to be inserted into your notice should have been 3 May 2024 and not 1 May 2024. Please explain why you believe this notice is valid and that this application should be allowed to proceed.”

5. The Applicant responded by email on 21st June 2024 in the following terms:-

“The application should proceed on the basis that the tenant confirmed receipt of the Notice to Leave and that no action was taken until 30 days had passed. The Notice states that the 1 May being the 28 days notice and does not state that the action would commence on the 1 May. The tenant has acknowledged receipt of the Notice and state categorically that they have no intention to move until they receive an eviction notice as detailed in the supporting documentation. Based on subsequent communication received from the tenant they have made it clear that they have no intention to leave and are now 2 months in rent arrears, with no indication that any further rent will be received. Any further delays in processing the eviction application will further increase the arrears and cost to the applicant. A separate Notice to Leave and application to the Tribunal will be raised regarding the rent arrears however this should in no way delay this application for eviction based on the breach of the tenancy agreement and it is the contention of the applicant that delays in processing the eviction will lead to further damage and deterioration of the condition of the property. As at today being the 21 June, it has been 80 days and the tenants are still in place with no intention to leave despite being 2 months in rent arrears.”

6. Due to an administrative oversight the Applicant’s response of 21st June was not identified by the Tribunal until a further request for a response to the Tribunal’s email of 19th June 2024 was sent to the Applicant on 6 August 2024. The Applicant sent a further copy of the response by email that same day.

7. Rule 8(1)(a) of the Rules allows an application to be rejected by the Chamber President if "they consider that an application is vexatious or frivolous". "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".
8. I consider that this application is frivolous and has no reasonable prospect of success in its current form. Section 62 of the Private Housing (Tenancies) (Scotland) Act 2016 clearly defines the criteria for a Notice to Leave. In particular section 62(1) states that the notice must specify the day on which the landlord expects to become entitled to make an application for an eviction order to the Tribunal. In accordance with sections 62(4) and 62(5), the specified day must be the day falling after the day on which the notice period defined in section 54(2) will expire, and it must be presumed that the tenant will receive the notice to leave 48 hours after it has been sent. The notice period does not therefore commence until 48 hours after the notice has been sent to the tenants.
9. The grounds for possession stated in the notice to leave in this case are grounds 11 and 14 of Schedule 3 of the 2016 Act. In terms of section 54(2) the relevant notice period for an application relying upon those grounds is 28 days. The notice to leave was emailed to the tenants on 2 April 2024. Taking into account the provisions of section 62, the date that should have been specified in the notice to leave is 3 May 2024, not 1 May 2024. The notice does not therefore comply with the requirements of a notice to leave under Section 62 of the 2016 Act.
10. In terms of section 52(2) of the 2016 Act an application to the Tribunal for an eviction order must be accompanied by a valid notice to leave. Accordingly, I conclude that the application cannot be entertained by the Tribunal in this case.
11. Whilst I appreciate the frustration for the Applicant, there is no remedy available that would correct the defect in the notice to leave where a reduced notice period has been given. The fact that the application was not in fact submitted to the Tribunal until 3 May 2024 is irrelevant in circumstances where the requirements of section 62 are clear and unavoidable in terms of the calculation of the notice period.
12. The application is therefore futile and falls to be rejected.

NOTE: What you should do now.

If you accept this decision there is no need to reply. If you disagree with this decision you should note the following: An Applicant aggrieved by this 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 seek permission to appeal within 30 days of the

date the decision was sent them. Information about the appeal procedure can be forwarded on request.

Ruth O'Hare, Legal Member
2 September 2024