



**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/24/1573

**Parties**

**RKMAC Properties Limited (Applicant)**

**Mr William Omelasz, Avril Banks (Respondent)**

**40 Woodside Avenue, Dundee, DD4 9AY (House)**

1. The application was made to the First-tier Tribunal (the FTT) on 6.4.24 under rule 109 and S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) using ground 12 of schedule 3 of the Act.
2. The application was accompanied by a Notice to Leave dated 12.1.24 with a date of 6.4.24 in part 4 and stating no specific reason on the list of grounds but referring in part 3 to "Since the 1<sup>st</sup> November 2023 only part of the rental agreement has been paid. You have breached the terms of your tenancy agreement", a tenancy agreement commencing 1.3.23 and a rent statement to April 2024.

3. The FTT wrote to the Applicant on 1.5.24 in the following terms: *“1. You have provided a copy of the Notice to Leave but it appears to be in an unusual format and does not indicate in the usual tickbox list which eviction ground is being referred to – this is a necessary requirement of a valid Notice to Leave in terms of the legislation. It may be that the document has just been copied in such a way that part of the information at the left-hand side of the Notice has been cut off. Please provide a fresh copy or alternatively an explanation for this. 2. Please provide proof of the method by which the Notice to Leave was served and the date of service. The Tribunal needs to be satisfied that the correct period of notice was given to the Respondents before your application can progress. 3. Please provide a copy of the Section 11 notice sent to the local authority notifying them of your Tribunal application and proof of the method and date of service on the local authority. 4. Please provide any evidence that the ‘pre-action protocol’ was followed here eg. copies of communications sent to the Respondents regarding rent arrears, debt and other advice available, etc. 5. Landlord Registration details could not be found for this Property. Please provide an explanation or any evidence that a Landlord Registration is in place.”*
4. No reply was received.
5. The FTT wrote again on 6.6.24, requesting the same information and adding *“Your application has been assessed by a Legal Member of the Tribunal with the delegated authority of the Chamber President. The Legal Member has previously requested the following information or documentation by email sent to the email address which you provided in the application form. We have not received a response, so we are sending this by mail. If the Applicant no longer wishes to progress the application, it would be very helpful if they would formally withdraw the application.”*
6. On 11.6.24 the Applicant replied *“As I have obviously sent you the wrong information regarding the above can you please return all the paperwork which I sent to you , especially the original lease which was sign by Mr Omelasz. Once I receive this I will get my solicitor to deal with this application on my behalf.”*
7. On 11.7.24 the FTT asked the Applicant to confirm whether or not the application was being withdrawn. The Applicant stated on 12.7.24 *“Yes we wish to continue with the eviction as the tenant still refuses to pay the full rent that was aggregated”* but provided no further information or documentation.
8. The file documents are referred to for their terms and held to be incorporated herein.

## DECISION

9. 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."*

10. 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

1. The application was made on ground 12 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 (b) (ii) , which is the rule under which the application is made.
2. 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.
3. 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 confirmed in the decision of Sheriff Kelly in [2022] UT07 Rafique v Morgan.

4. 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. The Notice to Leave provided is dated 12.1.24 and states no explicit eviction ground. Even if one accepts for the benefit of the Applicant that the ground described in part 3 would indicate ground 12 of schedule 3 of the 2016 Act, which is the ground stated in the application, then the Notice to Leave would be invalid because at the time the Notice to Leave was dated and likely served, the tenant had not been in arrears of rent for three consecutive months. In terms of the tenancy agreement the rent of £675 per month is payable in arrears on or before the 1st day of each month. The rent statement shows that the first time only £500 rather than £675 rent was paid was on 1.11.23. However, as rent is paid in advance, the first date actual arrears arose would be 23.11.23 applying the £500 payment pro rata for the relevant month. Thus the date when the tenant would be in arrears for the required 3 consecutive months would be 23.2.24. On the date of the Notice to Leave, 12.1.24, the tenant had not been in arrears of rent for the required period.
5. If one relied on the statement that the tenant had breached the tenancy agreement and assumed that the Notice to Leave was issued for ground 11 the Notice to Leave would also be invalid as the only reason for breach of the tenancy stated was the insufficient rent payment and ground 11 (3) of schedule 5 of the 2016 Act specifies "The reference in sub-paragraph (2) to a term of the tenancy does not include the term under which the tenant is required to pay rent".
6. 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.*
7. 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 (b) (ii) 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 12.1.24 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.

8. S 56 of the Act specifies that a landlord may not make an application to the FTT for an eviction order against a tenant unless the landlord has given notice of the landlord's intention to do so to the local authority in whose area the let property is situated and S 56 (2) provides that this notice is to be given in the manner and form under section 11 (3) of the Homelessness etc (Scotland) Act 2003. The requirements of such a notice is set out in Regulation 2 and Schedule 1 of The Notice to Local Authorities (Scotland) Regulations 2008 as amended by The Notice to Local Authorities (Scotland) Amendment Regulations 2017. Schedule 1 of the 2008 regulations sets out the format of the form that has to be used. Rule 109 (b) (iii) requires the inclusion of such a document as a lodging requirement. Such a form has not been included in the application documents.
9. The application does not meet the lodging requirements. The FTT had repeatedly asked the Appellant for further information and clarification and this was not forthcoming.
10. It would not be appropriate for the FTT to accept an application that does not meet the lodging requirements for the type of rule under which it is made. The application is accordingly rejected.
11. 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 McFatrige

Petra Hennig-McFatrige

Legal Member  
8 August 2024