



**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/24/3894

Parties

Mr Graeme Stewart (Applicant)

Mr Tsonko Ivanov, Mr Nikola Stoyanov (Respondent)

2/19 Moir Street, Glasgow, G1 5AE (House)

1. The application was made on 22.8.24 to the First-tier Tribunal (the FTT) under rule 109 and S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) initially stating ground 8 but later clarifying that the application was to be made under ground 12 of schedule 3 of the Act.
2. Various documents were provided with the application. These include a Tenancy Agreement commencing 9.7.2020 showing as the rent payable 625 per calendar month (clause 8) due in advance on the 1st day of the month, a S 11 notice with proof of service and a notice to leave dated 9.7.24 with an entry in part 4 of 2.3.24 as the first day when

proceedings can be raised. The Applicant's representative sent further correspondence with one of the joint tenants, which makes it clear that the joint tenant is not making payment as the other joint tenant is not making payment of their share. A rent statement and bank records submitted show that the monthly rent had been increased to £875.50 and that the last payment made for the May rent was a payment of £437.50 received from one of the Respondents on 13.5.24.

3. In the course of correspondence with the FTT the Applicant had submitted a rent statement and clarified that the ground for the application was rent arrears under ground 12.
4. The file documents are referred to for their terms and held to be incorporated herein.

DECISION

5. 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."

6. 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

2016 Act:

Ground 12 schedule 3

Rent arrears

12(1)It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months. ..

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

(a)for three or more consecutive months the tenant has been in arrears of rent, and

(b)the Tribunal is satisfied that it is reasonable on account of that fact to issue an eviction order. ..

7. The application is 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, which is the rule under which the application is made.
8. The Notice to Leave provided is dated 9.7.24 and relies on the ground “You are in rent arrears over three consecutive months”. In terms of the tenancy agreement as updated it is accepted for the purpose of this decision that the rent had been increased to £875.50 per month as payments of this amount are shown in the rent statement as having been received regularly from 1.1.24 onwards. In terms of the tenancy agreement the rent is payable in advance on or before the 1st day of each month. The rent statement lodged with the application shows a £434.50 outstanding balance as of 13.5.24. Accepting the rent amount as above, the payment of £437.50 for the month of May 2024 covers 15 days rent for that month. Thus the arrears for the month of May commence on 16.5.24. The arrears on 9.7.24, the day the Notice to Leave was served on the Respondents, this does not amount to three consecutive months of arrears. The matter has been fully and comprehensively dealt with by the Upper Tribunal in at least two decisions, which are binding on the FTT.
9. 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.

10. Taking the first date when a deficit is shown on the rent statement, which would be 16.5.24, then the expiry of the three months period would be 16.8.24. The documents lodged show that the Notice to Leave is dated 9.7.24. At that time the tenants had not been in arrears of rent for a period of three or more consecutive months. This is exactly the same situation which was addressed in the UT decision Majid v Gaffney. 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.
11. 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 tenant is in arrears of rent for three or more consecutive months. On 9.7.24, the date of the notice, the tenants had not been in arrears of rent for that required period. **The Notice to Leave is invalid because at the time the Notice to Leave was served ground 12 did not apply. It would not be appropriate to accept an application in those circumstances as it does not meet the lodging requirements. The application is accordingly rejected.**
12. For the avoidance of doubt, the Applicant should note that this decision does not prevent the Applicant from making a fresh application to the FTT in future.

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

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Legal Member

22 October 2024