



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 8(1)(a) of the First-tier Tribunal for Scotland (Housing and Property Chamber) Rules of Procedure 2017 (“the Rules”)

Chamber Ref: FTS/HPC/EV/25/3359

Re: Property at 10 Dippol Crescent, Cumnock, KA18 2BZ (“the Property”)

Parties:

Kate Magoma (“the Applicant”)

Tribunal Member: Ruth O’Hare, Legal Member with delegated powers from the Chamber President

Decision

The Legal Member of the First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that this application received on 5 August 2025 is frivolous and should therefore be rejected under Rule 8(1)(a) of the Rules.

Background

- 1 This is an application for an eviction order under Rule 109 of the Rules and section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”). The application was received by the Tribunal on 5 August 2025.
- 2 In accordance with Rule 5(2) of the Rules, a Legal Member with delegated powers from the Chamber President reviewed the application to ascertain whether it met the required manner of lodgement for an application under Rule 109. On 21 August 2025 the Tribunal wrote to the Applicant’s representative, Mr Frank Benson, requesting a rent statement, the notice to leave with proof of delivery to the tenant, and the notice under section 11 of the Homelessness etc (Scotland) Act 2003 (“section 11 notice”) with proof of delivery to the local authority.
- 3 On 28 August 2025 the Applicant’s representative provided the section 11 notice, notice to leave and a rent statement.

- 4 On 23 September 2025 the Tribunal wrote again to the Applicant's representative in the following terms:-

"Your email of 28 August is acknowledged and has been considered.

Your eviction application indicates that you seek an eviction based on ground 12 as contained in the relevant schedule to the Private Housing (Tenancies) (Scotland) Act 2016. In order for a notice to be valid on that ground, the tenant must have been in arrears for three consecutive months at that date it is served. It is the length of time that arrears have existed which is crucial not the amount of arrears involved. The notice to leave (NTL) based on ground 12 appears to be dated 2 July 2025. In order for that notice to be valid on that ground, the tenant must have been in arrears for three consecutive months at that date, i.e. since on or before 2 April 2025.

The rent statement you have provided seems to suggest that that your tenant entered into arrears on or after 21 April 2025. If so, your tenant would not have been in arrears for three consecutive months until 21 July 2025 at the earliest. Is this correct? If so, any notice served upon him prior to that date will be invalid.

We would refer you to the Upper Tribunal decisions in the cases of Rafique v Morgan (2022) UT 07 and Majid v Gaffney (2019) UT 59. These Upper Tribunal decisions considered whether it is competent for a notice to leave to be served before a tenant has been in arrears for that required period of three consecutive months. The decisions confirmed that a notice to leave cannot be served until a tenant has been in arrears consecutively for a period of three months. The amount of the arrears has no bearing on it. The crucial element here is the period of time during which of the arrears have existed consecutively. This tribunal is bound to follow decisions which interpret relevant legal provisions issued by the Upper Tribunal, unless you can persuade a tribunal that the Upper Tribunal cases are wrongly decided.

Your payment application will be placed on hold pending your response to the above queries.

Upon receipt of the above information, a final decision can then be taken on whether the eviction application is valid and whether it should be accepted and referred to the tribunal for full determination. Please respond to this letter within the next two weeks.

You may wish to obtain independent legal advice on the matters contained in this letter."

- 5 On 23 September 2025 the Tribunal received a response from the Applicant's representative stating that he now understood the notice should have been delivered on 21 July 2025 however he wished to ask the Tribunal to consider the fact that the tenants were now in five months arrears and refusing to pay rent. The Applicant was facing financial hardship as a result.

Reasons for decision

- 6 Rule 8(1)(a) of the Rules allows an application to be rejected by the Chamber President if “***they consider the application is vexatious or frivolous***”.
- 7 “Frivolous” in the context of legal proceedings is defined by Lord Justice Bingham in R v North West Suffolk (Mildenhall) Magistrates Council (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 In terms of section 52(3) of the 2016 Act, an application for an eviction order in relation to a private residential tenancy must be accompanied by a valid notice to leave. The requirements of Rule 109 of the Rules mirror the statute in this respect. The Applicant has provided a notice to leave dated 2 July 2025 which includes ground 12 of schedule 3 of the 2016 Act. Ground 12 requires the tenant to have been in arrears of rent for three or more consecutive months when the notice to leave is served.
- 9 In terms of the tenancy agreement between the parties, the rent falls due to be paid in advance on the 21st of each month. The rent statement produced by the Applicant shows that the tenant first fell into arrears on 21 April 2025. The notice to leave was delivered to the tenant on 2 July 2025.
- 10 The calculation of rent arrears for the purpose of a notice to leave that includes ground 12 has been addressed by the Upper Tribunal (“UT”). In Majid v Gaffney ([2019] UT 59) the UT considered an appeal against a decision by the Tribunal to reject an application in circumstances almost identical to the present application. The landlord had sent a notice to leave to the tenant on 1 July 2019 citing rent arrears. Sheriff Fleming in that case outlined the requirements for a notice to leave relying upon ground 12, stating “*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*”. Sheriff Fleming went on to say “*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 service. That being the case, the notice itself is invalid*” and “*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*”. He concluded that an invalid notice to leave could not be founded on in an application to the Tribunal under the 2016 Act. His opinion was later confirmed by Sheriff Kelly in the case of Rafique v Morgan ([2022] UT 07).
- 11 In this case, the rent account first fell into arrears on 21 April 2025. The expiry of the three month period would therefore be 21 July 2025. The tenant had not been in rent arrears for three or more consecutive months when the notice to leave was delivered on 2 July 2025. The notice to leave is therefore invalid and the application cannot comply with the requirements of section 52(3) of the 2016 Act.

- 12 Whilst the Applicant's representative has outlined the hardship the Applicant is facing as a result of the rent arrears, he has presented no legal argument to counter the decisions of the UT which are binding on the Tribunal. The Tribunal has some sympathy with the Applicant's position however the application has no prospects of success in its current form.
- 13 Accordingly, the Legal Member has concluded that the application is futile and must therefore be rejected under rule 8(1)(c).

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.

Ruth O'Hare

Legal Member/Chair

24 October 2025

Date