



**DECISION AND STATEMENT OF REASONS OF JOSEPHINE BONNAR,
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 Rules")**

in connection with

6 Scotsmill Gardens, Blackburn, AB21 0GA ("the property")

Case Reference: FTS/HPC/EV/20/0263

**Neil George Dewhurst, Paula Dewhurst 5 – 9 Bon Accord Crescent, Aberdeen,
AB11 6DN ("the Applicant")**

**Alexis Chole Noelle Smith, Willhaid Liyai Ayiego, 6 Scotsmill Gardens,
Blackburn, AB21 0GA ("the Respondent")**

1. By application dated 24 January 2020 Applicant seeks an order in terms of Rule 109 of the Rules, being an eviction order in terms of Section 50 Private Housing Tenancies (Scotland) Act 2016 ("the 2016 Act"). The Applicant lodged a copy private residential tenancy agreement, copy notice to leave and notice in terms of Section 11 of the Homelessness etc (Scotland) Act 2003 in support of the application. The ground for eviction stated in both the application and the Notice to leave is that the Applicant intends to sell the let property.
2. On 4 February 2020 a request for further information was issued to the Applicant. The Tribunal noted that the Notice to leave did not appear to give the required period of notice to the Respondent and therefore was not valid. By letter dated 11 February 2020 the Applicant's agent advised the Tribunal that it was accepted that the notice period was a day short and that an error had been made in relation to same. However, the agent referred the Tribunal

to Section 52(4) of the 2016 Act which allows the tribunal to consider applications made in breach of Section 54, if the Tribunal considered it reasonable to do so. In addition the agent asked the Tribunal to take into account the fact that the application was not lodged until 2 months after the date stated in the Notice to leave and that the Applicant requires to sell the property in order to purchase a new home in America, where he now lives.

DECISION

3. The Legal Member 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;

(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.”

4. **After consideration of the application and the documents submitted by the Applicant in support of same, the Legal Member considers that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Rules.**

Reasons for Decision

5. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court*, (1998) Env LR9. He indicated at page 16 of the judgment; *“What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic”*. It is that definition which the Legal Member has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success.
6. The Notice to Leave which accompanies the application is dated 22 October 2019. It was emailed to the Respondent on 24 October 2019. The Notice states that “An application will not be submitted to the Tribunal for an eviction order before 23 November 2019. This is the earliest date that Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the let property)”. The relevant sections of the 2016 Act are as follows:-

52 Applications for eviction orders and consideration of them

...

(2) The Tribunal is not to entertain an application for an eviction order if it is made in breach of—

(a) subsection (3), or

(b) any of sections 54 to 56 (but see subsection (4)).

(3) 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.

(4) Despite subsection (2)(b) the Tribunal may entertain an application made in breach of Section 54 if the tribunal considers it reasonable to do so.

...

54 Restriction on applying during the notice period

(1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.

(2) The relevant period in relation to a notice to leave—

(a) begins on the day the tenant receives the notice to leave from the landlord, and

(b) expires on the day falling—

(i) 28 days after it begins if subsection (3) applies,

...

(3) This subsection applies if—

(a) On the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than 6 months, or

...

(4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3).

62 Meaning of notice to leave and stated eviction ground

(1) References in this Part to a notice to leave are to a notice which—

(a) is in writing,

(b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal,

(c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and

(d) fulfils any other requirements prescribed by the Scottish Ministers in regulations.

...

(4) The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.

(5) For the purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.

7. For the purposes of section 62(1)(d), the relevant regulations are the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017, schedule 5 of which sets out the prescribed form for a notice to leave. Part 4 of that form is set out as follows:

Part 4 THE END OF THE NOTICE PERIOD

An application will not be submitted to the Tribunal for an eviction order before (insert date). This is the earliest date that the Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the Let Property).

8. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, states:

26 Service of documents

(1) This section applies where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person (whether the expression “serve”, “give”, “send” or any other expression is used).

(2) The document may be served on the person—

...

(c) where subsection 3 applies, by being sent to the person using electronic communication.

...

(6) Where a document is served as mentioned in subsection (2)(c) it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.

...

9. The Legal Member notes that the Notice to leave was sent by email to the Respondent on the 24 October 2019. This constitutes service under section 26(2)(c) of the 2010 Act. Accordingly, under section 26(c), the notice to leave “is to be taken to have been received 48 hours after it is sent unless the contrary is shown.” This is confirmed, in respect of a notice to leave, by section 62(5) of the 2016 Act, which states: “it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent”. Therefore the notice submitted with the application can be taken to have been served on 26 October 2019. This means that the Notice was received by the Respondent less than six months from the date upon which they became entitled to occupy the property. The notice period therefore expired on 23 November 2019.
10. In terms of section 62(4) of the 2016 Act the Notice must state a date being “the day falling after the day on which the notice period defined in section

54(2) will expire.” In this case, that date was 24 November 2019. Therefore, in order to comply with section 62(4), the date which ought to have been specified in the notice was 24 November 2019. As the date stipulated in the Notice submitted with the application is 23 November 2019, the notice is not a valid notice to leave in terms of section 62 of the 2016 Act.

11. The Legal Member proceeded to consider the argument put forward by the Applicant in his letter of 11 February 2020, namely that Section 52(4) could apply. The Legal Member considered the decision of the Upper Tribunal in the case of Jagdish Singh Panpher v Christina McDonald UTS/AP/18/0012. In that case, the Appellant argued that the tribunal had discretion to allow an application for eviction to proceed despite a defective Notice to leave being submitted in support of same. The Upper tribunal rejected this argument stating that “Unfortunately, no such discretion exists. The tribunal can only operate within the terms of Private Housing Tenancies Scotland Act 2016 and subordinate legislation”.(Paragraph 1). The Upper Tribunal considered the effect of section 52(4) of the 2016 Act. The Upper Tribunal concluded “the fact that subsection (4) confers a discretion on the Tribunal to waive an application made in breach of section 54 (restriction on applying during the notice period) which raises the clearest implication possible that no such discretion exists for a breach of subsection (3).”
12. The Legal Member concludes, having regard to the Upper Tribunal’s remarks, that the Tribunal has no discretion to entertain the Applicant’s application if the Applicant is in breach of Section 52(2)(a) and (3) of the 2016 Act. Section 52(3) requires a notice to leave to be lodged with the application. A notice to leave is defined in Section 62. Section 62(b) requires that notice to “specify the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order”. As the date specified in the notice to leave submitted with the application is incorrect, the notice is invalid and the Tribunal cannot entertain the application.
13. The Legal member therefore concludes that the application is frivolous, misconceived and has no prospect of success. The application is rejected on that basis.

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.

Josephine Bonnar
Legal Member
21 February 2020