



Decision and Statement of reasons of Mrs Jan Todd, Legal Member of the First-tier Tribunal for Scotland (Housing and Property Chamber) 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

Property at 10C Longsdale Terrace

Case Ref: FTS/HPC/EV/20/0659

Parties:

Donald McLennan, Louise MacLeod Fassaig, Benvoullin Road, Oban, PA34 5EF; Fassiag, Benvoullin Road, Oban, PA34 5EF (“the Applicant”)

Ms Annemarie MacCrone, William James Armstrong 10C Longsdale Terrace, Oban (the Respondent)

Background

1. An application was received from the Applicants dated 21st February 2020. The application was made under Rule 109 of the Rules being an application by a private landlord for possession of a rented property let under a private Rented Tenancy in terms of S51 of the Private Housing (Tenancies) (Scotland) Act 2016 (hereinafter referred to as the Act). The Applicant lodged the following documents allowing with her application:
 - Tenancy document for the Property entered into between the applicants and the respondents dated 9th September 2019
 - Notice to Leave dated 20th January 2020
 - S11 Notice dated 21st February to Argyle and Bute Council
 - Landlord’s statement
 - Bank statements
 - E-mails between the Applicant and Respondents between November 2019 and February 2020
 - S11 Notice to Argyle and Bute Council
2. The Applicant applied to recover possession of the Property on firstly Ground 11 that a condition of the tenancy had been breached namely that the Respondents were keeping a pet at the Property and secondly on the

- ground that more than 3 months consecutive rent is due in terms of Ground 12 of Schedule 3 to the Act,.
3. A further information request was sent to the Applicants on 10th March stating "Your application has been referred to a legal member. The legal member has requested that you provide further information as follows:
 - Please provide evidence of service of the Notice to Leave on the Respondent; and
 - Your application states Ground 11 in addition to ground 12. The Notice to Leave only specifies ground 12. Please confirm whether you intend to pursue Ground 11 and on what basis given that the Notice to Leave does not specify this."
 4. The Applicant responded on 14th March advising of why they believed the tenancy conditions had been breached in relation to a dog in the Property and acknowledged that this had not been included in the Notice to Leave because they did not have evidence at that time and at the time of the application they felt they did have evidence.
 5. A further request for information was sent by the Tribunal on 23rd April asking for clarification if they wished to proceed with Ground 12 only as : the Tribunal may not be able to consider a ground for eviction not referred to in the Notice to leave, and also asking again for information regarding the method of service and date of service of the Notice to Leave; evidence of rent arrears including a rent statement and evidence of service of the Section 11 notice
 6. On 27th April the Applicants sent in a rent schedule which showed that the first two months rent due on 9th September and 9th October were paid timeously but that the the rent following due on 9th November, 9th December 2019 and 9th January 2020 were not paid. Neither was the rent due on 9th February however some further payments have been made but the rent outstanding as of 9th April is stated to be £1,640.50.
 7. On 1st May 2020 the Applicants e-mailed again with further information and confirmation that they wished to withdraw Ground 11 the tenants having a dog from their application as they did not wish this to hold up a hearing being set. A legal member of the Tribunal acknowledged this change and asked once again for the previously requested information about the service of the Notice to Leave.
 8. On 23rd April a reply with information regarding the service of the Notice to leave was received from Louise Colhuon of Stevenson Kennedy solicitors although she also indicated she was not acting as a representative for the Applicants.
 9. On 9th July the application was further considered by another legal member of the Tribunal and a further request was made regarding the validity of the ground on which the Applicant was now solely relying namely rent arrears of over 3 months. Namely the legal member asked "

"The application has been further considered by a legal member of the Tribunal. You have indicated that you are not insisting on ground 11, on the basis that it is not referred to in the Notice to Leave. This leaves ground 12 as the only eviction ground. You have submitted a rent statement showing that

the account went into arrears on 9 November 2019, when the respondent failed to pay the rent due on that date. The Notice to leave was served on 20 January 2020. At this date, the respondent had not been in rent arrears for three or more consecutive months. Having regard to the Upper Tribunal decision in the case of Majid v Gaffney and Britton 2019 UT 59, please explain the basis upon which the Tribunal can proceed to consider the application. “

The Applicant replied on 12th July advising “I am responding to your email dated 10/07/20.

We spent several hundred pounds drawing up a legal Private Residential Tenancy Agreement which was signed by ourselves and the tenants. The Agreement clearly stated that the rent MUST be paid on the 9TH of every month. There was no ambiguity about this. The tenants moved into our flat on 09/09/19 - they paid rent on 09/09/19 and then on 09/10/19. That was the last rent we received. NO rent paid on 09/11/19. NO rent paid on 09/12/19. NO rent paid on 09/01/20. I fully understood this to mean THREE CONSECUTIVE MONTHS of non-payment.

10. The Applicant was given a further opportunity by a Legal Member to explain why they thought the application was valid given the ruling in Majid v Gaffney and Britton referred to in the previous letter from the Tribunal and the Applicant has responded on 17th August saying “I do not know what else to say as we had thought we were complying with the rules and had acted on legal advice when serving the Notice to Leave.”

Decision and Reasons

11. The Applicant has provided all the information they can and the facts regarding the amount of rent that was due and owing at the date of the service of the Notice to Leave on 20th January 2020 is not in doubt, namely no rent was paid on 9th November, 9th December or 9th January.
12. The Applicant is relying on a Notice to Leave dated 20th January 2020 which gives details of the eviction ground they are relying on as Ground 12 of Schedule 3 of the Act. The reasons stated in the Notice to Leave for the grounds being met are “Non payment of rent. As at today’s date the amount of £1,725 is outstanding. This amount stems from non-payment of rent which was due in equal amounts of £575 on 9th November 2019, 9th December 2019 and 9th January 2020. ”
13. S 52(3) of the Act 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.”
14. S 62 of the Act sets out the requirement of the notice to leave and stated eviction ground namely
15. “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 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
 - d. Fulfills any other requirements prescribed by Scottish Ministers in regulations
16. The Tribunal issued several requests for further information as set out above. The Applicant has withdrawn her request to apply under Ground 11 and it is noted Ground 11 was not mentioned in the Notice to Leave served on the Respondents so I have not considered this further. This decision is based on the Applicant's remaining claim relying on Ground 12, 3 months arrears of rent outstanding.
17. I considered the application in terms of Rule 8 of the Rules and that Rule provides:-

“Rejection of the Application

8. (1) The Chamber President or another member of the First Tier Tribunal under 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 is resolved*
- c) they have good reason to believe that it would not be appropriate to accept the application*
- d) they consider the application is being made for a purpose other than a purpose specified in the application or*
- e) the applicant has made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First Tier Tribunal under 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 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 reasons for the decision.

18. After consideration of the application, the attachments and the correspondence from the Applicant I consider that the Application should be rejected on the basis that it is frivolous in terms of Rule 8(1) (a) of the Rules.

19. Reasons for the Decision

“Frivolous” in the context of legal proceedings is defined by Lord Justice Binham 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” it is that definition which I have applied as the test in this application and, on consideration of this test I have determined that this application is frivolous, misconceived and has no prospect of success.

20. The Legal Member notes that the Notice to Leave was sent on 20th January 2020 and states that proceedings will not be raised until 20th February 2020. From the rent statement lodged after a request from a legal member and from the submissions of the Applicant it is clear rent became due and owing on 9th November and was not paid on 9th December or on 9th January 2020. Just over 2 full months’ rent was in arrears, namely from 9th November to 9th January and 11 days thereafter. Although a third rent payment became due on 9th January the arrears were only over 2 months 11 days at the time the Notice to Leave was served. This does not meet the requirements of the Act namely the **ground of eviction must be satisfied** at the date of service of the Notice to Leave.
21. This is clearly set out by the Upper Tribunal in the case of *Majid v Gaffney*. The facts in that case were that the Applicant had submitted an application for eviction under Ground 12. The application was rejected by the First Tier Tribunal on the ground that the Respondent had not been in rent arrears for three or more months at the date of service of the Notice to Leave. The Upper tier Tribunal refused the application for permission to appeal and stated
- “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.

At page 5 of the decision Sheriff Fleming goes on to state

“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 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. “

22. Whilst the Tribunal appreciates that the Applicant has tried in good faith to meet the requirements of the Act, the Tribunal is satisfied that both the Act and the Upper Tier Tribunal decision, which it is bound by, are clear. The arrears must be for three months and over before Ground 12 is met and any Notice of Leave reliant on arrears of less than that is not valid. The Arrears in this application at the date of the Notice to leave were not 3 months or over in arrears, it would not have reached 3 months arrears until 9th February although rent was due and owing on 9th January. The applicant appears to acknowledge this in her response of 18th August when she acknowledges that *“The case cited in your email, (Majid v Gaffney), states that rent arrears and owing rent are different things”*. Accordingly, for this reason, this application must be rejected upon the basis that I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1)(a) and (c) of the Procedural Rules. The mandatory requirements of the Act are not met, the action is futile and is therefore rejected as being frivolous.

What you should do now:-

If you accept the decision there is no need to reply.

If you disagree with the decision then an applicant aggrieved by the decision of the Chamber President, or another member of the First Tier Tribunal acting under delegated powers of the Chamber President, 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 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.

Jan Todd

Legal Member

Date 1st September 2020