



**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

73 Findhorn Street, Dundee, DD4 9PH

Case Reference: FTS/HPC/EV/20/1749

Mr Mike Dailly, Mrs Eleanor Dailly ("the applicants")

Mr Alan Morrell, Ms Clare Gibson ("the respondents")

1. The application dated 17 August 2020 was lodged by the applicants' representatives **Rentlocally Tayside and Fife** with the First-tier Tribunal for Scotland Housing and Property Chamber (the Tribunal).
2. The application was made under Rule 109 of the Procedural Rules being an application for an eviction order under S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act). The following documents were lodged in connection with the application:-
Tenancy Agreement for the tenancy commencing on 31 January 2019 for the property at 73 Findhorn Street, Dundee, DD4 9PH, Notice to Leave dated 26 February 2020 to the respondents and proof of sending same by email to the respondent, S 11 Notice, proof of

service on the local authority, rent statement covering attached to Notices to Leave for the period up to 29 February 2020 with arrears of one month's rent highlighted on 31 January 2020 and the account showing a £0 balance as at 13 January 2020 and a further rent statement for the period up to and including 31 July 2020. The documents referred to above are referred to for their terms and held to be incorporated herein.

3. The Tenancy agreement lodged shows the landlord in terms of the Private Residential Tenancy agreement are the applicants in this case. The respondents are the tenants of the property.
4. Clause 8 states that the first rental payment is due on 31 January 2019 for the period to 28 February 2019 and payments are thereafter due on the 31st day of each month for the month in advance.
5. The Notice to Leave is dated 26 February 2020 and in terms of Part 4 of the Notice to Leave the first day on which proceedings can be raised with the First tier Tribunal Housing and Property Chamber is stated in the Notice to Leave as 27 March 2020. The date of service by email was 26 February 2020.
6. The ground/s of eviction referred to in the Notice to Leave and the application is/are: You are in rent arrears over three consecutive months.
7. In part 3 of the application it is stated: "GROUND 12 YOU ARE CURRENTLY IN AT LEAST ONE MONTH'S ARREARS AND HAVE BEEN IN ARREARS OVER AT LEAST A 3 MONTH PERIOD"

DECISION

8. 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."

9. 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 FTT has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION

Relevant legislation:

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

S 52 of the Act states: Applications for eviction orders and consideration of them

(1) In a case where two or more persons jointly are the landlord under a tenancy, an application for an eviction order may be made by any one of those persons.

(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 that it is reasonable to do so.

(5) 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.

S 54 of the Act states: 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,

(ii) 84 days after it begins if subsection (3) does not apply.

(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 six months, or

(b) the only eviction ground, or grounds, stated in the notice to leave is, or are, one or more of the following—

(i) that the tenant is not occupying the let property as the tenant's home,

- (ii) that the tenant has failed to comply with an obligation under the tenancy,
- (iii) that the tenant has been in rent arrears for three or more consecutive months,
- (iv) that the tenant has a relevant conviction,
- (v) that the tenant has engaged in relevant anti-social behaviour,
- (vi) that the tenant associates in the let property with a person who has a relevant conviction or has engaged in relevant anti-social behaviour.

(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).

S 62 of the Private Housing (Tenancies) (Scotland) Act 2016 states:

62Meaning of notice to leave and stated eviction ground

This section has no associated Explanatory Notes

(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.

(2)In a case where two or more persons jointly are the landlord under a tenancy, references in this Part to the tenant receiving a notice to leave from the landlord are to the tenant receiving one from any of those persons.

(3)References in this Part to the eviction ground, or grounds, stated in a notice to leave are to the ground, or grounds, stated in it in accordance with subsection (1)(c).

(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.

10. I consider that the lodging requirements in terms of Rule 109 b are not met for the following reasons:

11. I consider that the requirement in s 52 (3) of the Act and Rule 109 (b) (ii) of the Procedure Rules is not met in this case. The Tribunal can only entertain an application if it is accompanied by a Notice to Leave. I consider that this requirement means that a valid Notice to Leave has to be submitted with the application.

12. In this case the Notice to Leave to both respondents was dated 26 February 2020. It was emailed to the respondents on that day. There are two reasons why the Notices to Leave are not valid.
13. Firstly the Ground under which the Notice to Leave was served was not met at the time the Notice to Leave was served. Ground 12 (1) of Schedule 3 of the Act requires the following: “12 Rent Arrears (1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.”
14. Sheriff I Fleming in the Upper Tribunal decision [2019] UT 59 Abdul Majid v Adele Gaffney and Andrew Robert Britton of 17 October 2019 stated in para 9” ... *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 months 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 in para 14: “... It is clear that the words “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 a as a basis for overcoming the security of tenure.....” This clearly sets out that the requirement of a valid Notice to Leave is that at the time the Notice to Leave is served the ground on which the notice is based must exist.*
15. In terms of the Notice to Leave however ground 12 clearly requires three months consecutive rent arrears. The rent statement shows that on 26 February 2020 the respondents were not even in arrears for one full month. On 13 January 2020 the rent statement shows a £0 balance. On 31 January 2020 when the payment of £700 was due

there were arrears of £700 shown. The Notice to Leave was sent on 26 February 2020 before any further rent payment would be due in terms of the Tenancy Agreement. In fact, applying the information in the rent statement lodged, at the time the Notice to Leave to the respondents was sent the arrears had been in place less than one month. The rent statement shows that there rent arrears over three consecutive months had not accumulated at the time the Notice to Leave was sent. Applying the reasoning of the Upper Tribunal as set out above it is clear that at the time the Notice to Leave was served the conditions for ground 12 did not yet exist. The Notice to Leave is thus not valid.

16. Secondly the date entered in part 4 of the Notice to Leave to each respondent is wrongly calculated. The expiry of the period stated in S 54 (2) (b) (i) of the Act will be 28 days after the date of service. In terms of S 62 (5) of the Act it is to be assumed for the purpose of S 62 (4) of the Act that the tenant will receive the notice to leave 48 hours after it is sent. This would then mean a Notice to Leave emailed on 26 February 2020 is assumed to have been received on 28 February 2020. The notice period for the Ground stated in the application in terms of S 54 (2) and (3) of the Act is 28 days. S 62 (4) states the day to be specified in S 62 (1) (b) of the Act, namely the day on which landlord expects to become entitled to make the application, to be the day after the notice period defined in S 54 (2) of the Act will expire. The date stated in S 62 (1) (b) is the date entered in part 4 of the Notice to Leave. In this case the calculation of these dates results in the date to be entered into part 4 of the Notice to Leave in terms of S 62 (1) (b) of the Act being 28 March 2020 and not 27 March 2020. The Notice to Leave thus states the wrong date in part 4. The period calculated is one day short.
17. The legislation sets out explicitly the dates and periods which have to be observed to create a valid Notice to Leave. This is further described in detail in the guidance notes on the Notice to Leave. A tenant, having so been advised, must then be able to rely on the accuracy of the information provided in the Notice to Leave. The date stated on the notice is not the correct date.
18. The Tribunal has considered whether S 73 of the Act may be applicable in this case to assist the applicant. This states: (1) An error in the completion of a document to which this section applies does not make the document invalid unless the error materially affects the effect of the document.
19. In the Tribunal's view, the word "effect" in section 73 (and in the explanatory note)

denotes the effect the notice is intended to have if it is completed without error. It follows from section 62(1)(b), (c) and (d) of the Act that a notice to leave completed without error will give the tenant certain information, namely: 1. 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 FTT, being the day after the notice period expires (section 62(1)(b)). This date is stated in part 4 of the prescribed form, in which the tenant is expressly advised that “An application will not be submitted to the Tribunal for an eviction order before [the date]”, 2. The eviction ground on which the landlord intends to seek an order (section 62(1)(c)), which is indicated by ticking the appropriate box in part 3 of the prescribed form, 3. Details and evidence of the eviction ground (section 62(1)(d) and part 3 of the prescribed form, 4. The tenant’s details (section 62(1)(d) and part 1 of the prescribed form), 5. The name, address and telephone number of the landlord or his agent (section 62(1)(d) and part 2 of the prescribed form). All these parts of the form require to be completed.

20. In the Tribunal’s view, an error in completion “affects the effect” of the notice to leave if, as a result of the error, the notice does not give the tenant that information. In this case, the error clearly “affects the effect” of the notice to leave, because a correct notice would have informed the Respondent of the correct date on or after which an application to the Tribunal could be submitted. That was not done.
21. The notice should, at the very least, correctly inform the tenant of the “why” (the statutory ground) and the “when” of the proceedings that the landlord anticipates raising.
22. To state an earlier date than the date on which, in terms of the Act, the landlord is entitled to raise proceedings is not, in the view of the Tribunal, “an obviously minor error” which could then be dealt with in terms of S 73 of the Act by the Tribunal. It is an error which causes the notice to fail in achieving one of its fundamental purposes.
23. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating “27 March 2020” in part 4 of the notice to leave, rather than “28 March 2020” materially affects the effect of the notice and makes it invalid. It is not a “notice to leave” under section 62. Therefore, the document which accompanied the application to the First-tier Tribunal was not, for the purposes of section 52(3), “a copy of a notice to leave”, and accordingly, given section 52(2)(a), the Tribunal cannot entertain the application.

24. For the reasons stated above the application was not validly made. The Tribunal cannot entertain the application. The application is rejected.

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

Petra Hennig McFatridge
Legal Member
31 August 2020