

**Housing and Property Chamber**  
First-tier Tribunal for Scotland



**DECISION AND STATEMENT OF REASONS OF LESLEY JOHNSTON 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

11 Ladeside Gardens, Kilbirnie, KA25 7EA

**Case Reference: FTS/HPC/EV/19/2322**

**MULBERRY HOMES LIMITED ("the applicant")**

**ANTHONY MARTIN LAVELLE ("the respondent")**

1. By application dated 22 July 2019 the Landlord of 11 Ladeside Gardens, Kilbirnie, KA25 7EA ('the Applicant') sought an order for possession against the Tenant of the property in respect of alleged unpaid rent said to be outstanding for a period of seven months. The application was received by the Tribunal administration on 24 July 2019. The application was made under Rule 109 of the Procedural Rules being an application for possession of Private Residential Tenancy in terms of section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016. The following documents were enclosed with the application:-

- (i) Copy tenancy agreement commencing 10 April 2018;

- (ii) Copy Notice to Leave dated 17 June 2019
- (iii) Copy Execution of Service from Sheriff Officers dated 25 June 2019;
- (iv) Copy Safe Deposits Scotland certificate in respect of the tenancy deposit
- (v) Copy Landlord/Home Owner Gas Safety Record
- (vi) Copy section 11 Notice

## DECISION

2. 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."*

3. After consideration of the application, the attachments and correspondence from the applicant, I consider that the application should be rejected on the basis that I have good reason to believe that the application is vexatious within the meaning of Rule 8(1)(a) of the Procedural Rules in respect that the Notice to Leave served on the Respondent was invalid.

### **REASONS FOR DECISION**

4. In terms of Rule 8(1)(a) of the Procedural Rules, the Tribunal may reject an application if it considers that it is frivolous or vexatious. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham 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 to consider in this application in order to determine whether or not this application is frivolous, misconceived, and has no prospect of success.
5. The applicant and respondent entered into tenancy on 10 April 2018. The period of let was from 10 April 2018 to 10 October 2018. The tenancy agreement is entitled "short assured tenancy within the meaning of section 32 of the Housing (Scotland) Act 1988. The terms of the tenancy agreement refer to the 1988 Act. However, no assured tenancy agreement can be created after 1 December 2017 (see Housing (Scotland) Act 1988, section 12). The Applicant has therefore proceeded on the basis that the tenancy falls to be treated as a Private Residential Tenancy Agreement in terms of the Private Housing (Tenancies) (Scotland) Act 2016. A Notice to Leave has been served on that basis, pursuant to section 50(1)(a) of the 2016 Act.

6. The Notice to Leave is dated 17 June 2019. Part 4 of the Notice states that “an application will not be submitted to the Tribunal for an eviction order before 22 July 2019. This is the earliest date that the Tribunal proceedings can start and will be at least the day after the end of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the Let Property).”
7. In this case, the eviction ground relied upon by the Applicant is that the Respondent has been in rent arrears over three consecutive months. The Applicant therefore relies upon giving 28 days’ notice to the Respondent.
8. Section 54 of the 2016 Act states that:

**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—

...

(b) the only eviction ground, or grounds, stated in the notice to leave is...

...

(iii) that the tenant has been in rent arrears for three or more consecutive months,

**9. 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.

10. In this case, the date specified on the notice in terms of section 62(1)(b) was 22 July 2019.

11. The certificate of service from the Sheriff Officers is dated 25 June 2019 and certifies that on that date, Sheriff Officers deposited the Notice to leave by means of a letterbox into the Respondent's place of residence as Sheriff Officers had established that the Respondent continued to reside within the property but were unable to find the Respondent personally.

12. By letter dated 9 August the Tribunal advised the Applicant that "The Notice to Leave was served on 25<sup>th</sup> June 2019. It has an effective date of 22<sup>nd</sup> July 2019 which gives a period of 27 days' notice. The Notice to Leave does not therefore comply with the provisions of section 54(2) of the Private Housing (Tenancies)(Scotland) Act 2016 which requires a period of 28 days' notice to be given to the tenant. Please advise on what basis you consider the Tribunal is able to entertain this application."

13. By letter dated 21 August 2019 the Applicant responded as follows:

"We confirm that it is usual to include the date of service as commencing the 28 day period when the Sheriffs [sic] Officer has served the Notice and issued a Citation which has occurred here."

14. Even if the Applicant is correct that the date of service is to be included as day one of the 28 day period, in terms of section 54(2) the Applicant has not provided 28 days' notice within the meaning of the Act. In terms of section 54(2) the period expires "28 days after it begins (emphasis added)". That being the case, the period would expire on 23 July 2019. In addition, in terms of section 62(4) the date that the Landlord is entitled to make an application for an eviction order to the Tribunal (the date set out in section 4 of the Notice to Leave) is the "day falling after the day on which the notice period defined in section 54(2) will expire". The date the Applicant became entitled was therefore 24 July 2019, not 22 July as stated in the application.

15. Since the Applicant has not provided the requisite period of Notice in terms of section 54(2), and has specified the wrong date in relation to section 62(4) as the date on which the Landlord became entitled to make an application to the Tribunal, the Notice to Leave is invalid and the application for eviction of the respondent is bound to fail.

16. For all these reasons, the Legal Member concludes that the application is frivolous, misconceived and has no prospect of success. The application is rejected in terms of Rule 8(1)(a) of the Procedural Rules 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.

Lesley Johnston

Lesley Johnston  
Legal Member  
4 September 2019