

Housing and Property Chamber
First-tier Tribunal for Scotland



**DECISION AND STATEMENT OF REASONS (CORRECTED) OF DAVID BARTOS, LEGAL MEMBER OF THE
FIRST-TIER TRIBUNAL WITH DELEGATED POWERS OF THE CHAMBER PRESIDENT**

Under Rules 8 and 36 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of
Procedure 2017 ("the Procedural Rules")

In connection with

20 Badenheath Terrace, Mollinsburn, Glasgow G67 4HL

Case Reference: FTS/HPC/EV/19/3925

The Parties:-

LAURA STANNERS, 20 Kirk Place, Condorrat, Cumbernauld, G67 4EE ("the Applicant")

represented by Dan McManus, 17 Kirk Place, Cumbernauld G67 4EE

LOUISE MacDONALD, 20 Badenheath Terrace, Mollinsburn, Glasgow G67 4HL ("the Respondent")

BACKGROUND

1. On 10 December 2019 the Applicant lodged an application for eviction of the Respondent from the property 20 Badenheath Terrace, Mollinsburn ('the property'). The application was made in terms of section 51 of the Private Housing (Tenancies) (Scotland) Act 2016. The application was based on ground 12 (rent arrears) and ground 11 (breach of tenancy). In her e-mail to the Tribunal dated 10 December 2019 she enclosed a copy of a purported notice to leave and a Post Office certificate of posting that stated that the notice to leave had been dispatched to the Respondent on 29 October 2019.

DECISION

2. For the reasons given below this application is rejected.

REASONS FOR DECISION

3. I considered the application in terms of Rule 8 of the Procedural Rules. That Rule provides:-

'Rejection of Applications

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; . . .*

(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 reason for the decision."

4. For the purposes of this rule the word 'frivolous' does not have its ordinary day-to-day meaning. What 'frivolous' means for the purposes of rules of legal procedure was defined by Lord Justice Bingham in the case *R v. North West Suffolk (Mildenhall) Magistrates Court* (1998) Env.L.R. 9 when he stated at page 16:- *'What the expression means in this context is, in my view that the court considers the application to be futile, misconceived, hopeless or academic.'*
5. The application was made under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016. Section 51 requires the Tribunal to be satisfied that one of the eviction grounds in schedule 3 to the Act applies.
6. The eviction grounds founded on in the application are grounds 11 and 12. Ground 11 provides that it is an eviction ground that the tenant has failed to comply with an obligation

under the tenancy other than that to pay rent. Ground 12 states:

'(1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months'.

Section 52(2) of the Act states:

'The Tribunal is not to entertain an application for an eviction order if it is made in breach of . . . subsection (3)'.

Section 52(3) 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.'

Section 62(1) states:

'References. . . to a notice to leave are to a notice which . . . (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).'

In addition part 3 of the notice to leave requires a landlord to state how they believe that the grounds have arisen.

7. Under the tenancy agreement between the parties the Respondent was due to pay the Applicant rent of £495 payable on the twenty-eighth day of each month. In her notice to leave the Applicant founded on non-payment of rent on 28 August, 28 September and 28 October 2019. The notice to leave was dispatched on 29 October 2019 by recorded delivery post at 12.05 hrs and had been signed on that date. As at 29 October 2019 the tenant had not been in rent arrears for three consecutive months. In particular less than three months had passed since the August instalment had become due. Ground 12 had not been satisfied as 29 October.
8. The notice to leave required to give reasons for ground 11 as well as for ground 12. The notice made no reference to any non-rent obligation in the tenancy agreement that the Applicant alleged had been broken. Whilst the notice mentioned the Respondent's lack of co-operation in rectifying what was alleged to be a typographical error in the numbering of the property's address in the tenancy agreement, it did not indicate any obligation under the agreement that obliged the Respondent to rectify such an error. It follows that Ground 11 had not been satisfied as at 29 October 2019.

9. It follows that the notice to leave was given to the Respondent prematurely. It required the Respondent to leave the property when the Respondent was still entitled to remain there. In these circumstances the notice to leave cannot be valid. This has been affirmed in the recent Upper Tribunal case *Majid v. Gaffney* [2019] U.T. 59 available on www.scotcourts.gov.uk.
10. In these circumstances I take the view that by making an application to the Tribunal based on an invalid notice to leave the Applicant has breached section 52(3) of the Act. This has the result that the Tribunal cannot entertain the application at all. In those circumstances the current application is misconceived and doomed to fail.
11. Accordingly for these reasons, this application must be rejected upon the basis that the application is 'frivolous' in its legal meaning for the purposes of rule 8(1)(a) of the Procedural Rules. In addition under rule 8(1)(c) and on the same basis I have good reason to believe that it would not be appropriate to accept this application and send it to a case management discussion for further consideration. The application must therefore be rejected.
12. I note in passing that this rejection is made on the basis that the tenancy was valid as asserted by the Applicant. However it is not self-evident that the tenancy was or is valid. The tenancy agreement bore to be an 'Assured Shorthold Tenancy Agreement' within the provisions of the Housing Act 1988 which applies only in England and Wales. Furthermore it provided for a term of one year. At the time that it was signed fixed terms such as this had been excluded by the 2016 Act. It is therefore arguable that both parties were under error as to an essential element of the tenancy agreement, namely that it was entered into on the basis that it would be for a fixed term of one year. An error as to an essential element of an agreement would leave it invalid.

What you should do now

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 when the decision was sent to them. Information about the appeal procedure can be forwarded to you on request.

David Bartos

David Bartos

Legal Member acting under delegated powers

13 December 2019