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

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**DECISION AND STATEMENT OF REASONS OF ANDREW UPTON, 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

29 Jeanette Avenue, Hamilton, ML3 7RS ("the Property")

**Case Reference: FTS/HPC/EV/19/3950**

**Mr Mohammed Hanif ("the applicant")**

**Miss Jo-Marie Pirie ("the respondent")**

1. On 9 December 2019, an application was received from the applicant. The application was made under Rule 109 of the Procedural Rules being an application for a Private Residential Tenancy Eviction Order. The following documents were enclosed with the application:-

- Copy Private Residential Tenancy Agreement
- Copy Notice to Leave dated 4 November 2019
- Copy Section 11 Notice to South Lanarkshire Council
- Copy proof of posting for Notice to Leave and Section 11 Notice

## DECISION

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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 it appears to be frivolous within the meaning of Rule

8(1)(a) of the Procedural Rules, and I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1)(c) of the Procedural Rules.

## REASONS FOR DECISION

4. '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. In terms of section 1(1) of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act"):-

### **"1 Meaning of private residential tenancy**

(1) A tenancy is a private residential tenancy where—

- (a) the tenancy is one under which a property is let to an individual ("the tenant") as a separate dwelling,
- (b) the tenant occupies the property (or any part of it) as the tenant's only or principal home, and
- (c) the tenancy is not one which schedule 1 states cannot be a private residential tenancy."

In terms of section 44 of the 2016 Act:-

### **"44 No termination by parties except in accordance with this Part**

A tenancy which is a private residential tenancy may not be brought to an end by the landlord, the tenant, nor by any agreement between them, except in accordance with this Part."

In terms of sections 51 and 52 of the 2016 Act:-

### **"51 First-tier Tribunal's power to issue an eviction order**

- (1) The First-tier Tribunal is to issue an eviction order against the tenant under a private residential tenancy if, on an application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies.
- (2) The provisions of schedule 3 stating the circumstances in which the Tribunal may or must find that an eviction ground applies are exhaustive of the circumstances in which the Tribunal is entitled to find that the ground in question applies.
- (3) The Tribunal must state in an eviction order the eviction ground, or grounds, on the basis of which it is issuing the order.
- (4) An eviction order brings a tenancy which is a private residential tenancy to an end on the day specified by the Tribunal in the order.

### **52 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."

6. The tenancy in this application meets the criteria in section 1(1) of the 2016

Act, and is therefore a Private Residential Tenancy ("PRT"). As such, in terms of section 44, it may only be brought to an end under Part 5 of the 2016 Act. The application here is made under section 52 of the 2016 Act, and seeks an eviction order. It is accompanied by a Notice to Leave which was served upon the tenant, thus satisfying the requirement of section 52(3).

7. However, in terms of section 51, the Tribunal may only grant an order if one of the exhaustive grounds for eviction specified in Schedule 3 to the 2016 Act applies. Reading sections 51 and 52 together, it seems clear to me that, for the Tribunal to grant the eviction order, it must be satisfied that the Notice to Leave specifies a ground for recovery which is, both at the time of service of the Notice as well as at the date of application to the Tribunal, available to the applicant. Any alternative interpretation of the statute could give rise to the possibility that a landlord could serve a notice specifying a ground not yet available (and, thus, rendering the Notice to Leave invalid) in the expectation that it will become available prior to making an application. It cannot be the case that a Notice to Leave which is, at the date of service, fundamentally invalid can nonetheless be founded upon as a basis for overcoming the security of tenure that the 2016 Act confers on all tenants under a PRT.
8. This issue was recently considered by the Upper Tribunal in *Majid v Gaffney and another*, [2019] UT 59. There, at paragraph 14, Sheriff Fleming states unequivocally:-

*"In terms of section 62(1)(b) reference is made to a date on which the landlord 'expects to become entitled to make an application for an eviction order to the First-Tier Tribunal'. It is clear that the word '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 as a basis for overcoming the security of tenure that the 2016 Act."*

9. That brings me to the Notice to Leave in this case. It is based upon Ground 12, which is that the respondent has been in rent arrears for three or more consecutive months. As I outlined above, the Notice to Leave is dated 4 November 2019, and I require to consider whether Ground 12 is properly satisfied as at that date, in order to determine whether the Notice to Leave is Valid.
10. Part 3 of the Notice to Leave provides the detail as to how the respondent is said to satisfy Ground 12. The applicant provides as follows:- "Rent is due to be paid on the 3<sup>rd</sup> of each calendar month in advance per clause 7 of the Lease. Rent for the months of September, October and November are now overdue". From this, I take that the respondent first entered arrears on 3 September 2019.
11. Ground 12 can be either a mandatory or discretionary ground for eviction, depending on the relative value of the rent arrears. However, as a starting point, the tenant must have been in rent arrears for three or more consecutive months. That is to say, the tenant must have been in arrears for three or more consecutive calendar months. Thus, if the respondent in this case was first in arrears of rent on 3 September 2019 (as the Notice to Leave specifies), then the expiry of three months would be 3 December 2019. That the respondent had, by 4 November 2019, been owing three rent payments is nothing to the point; she had to be in arrears for a specified period of time, and at 4 November 2019 she had not been.
12. Accordingly, I find that the Notice to Leave issued to the respondent by the applicant is invalid. For that reason, the application cannot, in my view, be successful. It therefore meets the test of frivolity in Rule 8(1)(a), and I reject it. Even if it did not, it is my view that it would not be appropriate to accept the

application for the reasons set out above, and I would separately reject the application in terms of Rule 8(1)(c).

### **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.

Andrew Upton  
Legal Member  
18 December 2019

