



**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 Flat 4 289 Castlemilk Road Kings Park Glasgow G44 4LE

Case Ref: FTS/HPC/EV/20/2114

Parties: Mr Adeniyi Shonubi (Applicant)

Unicorn Homes (Applicant’s Representative)

Mr Christopher Gordon Hassen (Respondent)

Flat 4, 289 Castlemilk Road, Kings Park, Glasgow, G44 4LE

1. An application was received from the Applicant via his letting agent representative, dated 2nd October 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 his application:
 - Tenancy document for the Property entered into between the applicant and the respondent dated 17th January 2020
 - Notice to Leave dated 23rd March 2020
 - Copy e-mails with South Lanarkshire Council
2. The Applicant has applied to recover possession of the Property on the ground that more than 3 months consecutive rent is due in terms of Ground 12 of Schedule 3 to the Act.
3. The statement in the application states the first month’s rent and deposit was paid and no further sums have been paid.
4. The Applicant referred to a Notice to Leave dated 23rd March 2020 which gave details of the eviction ground namely Ground 12 of Schedule 3 of the Act and gave further details which appear to say although the writing is not wholly clear

that “Only the deposit and first month’s rent due and paid as at today’s date. Rent due on 17th February and 17th March unpaid. Notice now given as it is likely rent due on 17th April will not be honoured. Have however given 28 days from 17th April 2020 due rent day”

5. 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.”
6. S 62 of the Act sets out the requirement of the notice to leave and stated eviction ground namely
7. “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. Fulfils any other requirements prescribed by Scottish Ministers in regulations
8. On 19th October the Tribunal issued a request for further information as follows:

1. The Notice to Leave you have submitted appears to be invalid as the date specified is incorrect. In addition, it would appear that the ground was not established at the date of service as the first missed payment was 17 February 2020. Please confirm the basis upon which the Tribunal can consider the application.

2. Please provide a copy of the section 11 Notice sent to the Local Authority, together with evidence that it was sent.

3. Please provide a rent statement for the relevant period showing rent due, rent paid and running total outstanding.

4. Please provide a mandate from the Applicant authorising you to act on his behalf.”

9. The Applicant’ agent responded on 21st October enclosing a copy of an e-mail to South Lanarkshire Council with a Section 11 notice, (albeit with no date of raising of these proceedings and no type of tenancy ticked); an e-mail with a mandate from the applicant authorising the agent; a rent statement and the following response to the request as to validity of the Notice to Leave:-

“Thank you for the response and would confirm the following as requested –

Notice to Leave dated 23 March 2020 as this was the date that the notice was hand delivered to the tenant. We were in the midst of our office going into an

imminent lockdown. Although our office was closing the office was still running remotely. We were of the understanding that although the tenant was not at that time in three months arrears we do not have to wait for the three months arrears to have accumulated before we gave notice as long as we state that no action can be taken until 28 days after the three months is up. At that time, the tenant owed rent for 17th February 2020 and 17th March 2020.

10. The Rent statement showed that the sum of £625 has been paid in cash on 17th January for the first month's rent but no further sums have been received.

3. DECISION

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.

5. 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.

6. 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.

7. The Legal Member notes that the Notice to Leave was sent on 23rd March 2020 and states that proceedings will not be raised until 18th May 2020. From the rent statement lodged and from the submissions of the Applicant it is clear rent became due and owing on 17th February and the Applicant maintains has not been paid since. By the date of the Notice to Leave just over 2 full months’ rent was due but only one month was fully in arrears i.e. the month starting 17th February. The second month would not be fully in arrears until 17th April and the third month on 17th May. The Applicant’s agent acknowledges that three months’ rent was not fully in arrears at the time the Notice to Leave is sent but argues that it is competent for them to service the Notice to Leave before the rent is 3 months in arrears if they give an extra 28 days in the date specified in the Notice to Leave as the date the tenant would have to leave by. They offer no explanation or legal basis for this belief. 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.

8. This is clearly set out by the Upper Tribunal in the case of *Majjid 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. “

9. Whilst the Tribunal appreciates that the Applicant may not like the consequences of the statutory provision, 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.

10. 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.

J Todd

4th November 2020

Legal Member

Date