



**DECISION AND STATEMENT OF REASONS OF JOSEPHINE BONNAR,
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

1/ 2 11 Mains Road, Beith, Ayrshire, KA15 2AR ("the Property")

Case Reference: FTS/HPC/EV/20/1168

Anne Nimmo, Pirnie Lodge Farm, Slamannan, Falkirk, FK1 3DT ("the Applicant")

Charly Anne McDonald, 1/ 2 11 Mains Road, Beith, Ayrshire, KA15 2AR ("the Respondent")

1. By application received on 12 May 2020 the Applicant seeks an eviction order in terms of Rule 109 of the Procedural Rules and section 51(1) of the Private Housing Tenancies (Scotland) Act 2016 ("the 2016 Act"). The Applicant lodged documents in support of the application including a copy tenancy agreement, rent statement and Notice to leave dated 31 March 2020 with a copy track and trace report showing delivery on 6 April 2020. The application form states that an eviction order is sought on the basis of ground 12, rent arrears over three consecutive months. The rent statement lodged with the application indicates that the rent account first went into arrears on 29 January 2020.
2. On 21 May 2020 the Tribunal issued a request for further information to the Applicant. The Applicant was asked to clarify when rent arrears were first incurred by the Respondent as it did not appear that 3 consecutive months of arrears were established at the date of service of the Notice to Leave. The Applicant was also asked to confirm when the notice to Leave was sent to the Respondent, and to provide evidence of this. In the response the Applicant

stated that the Notice had been sent of 31 March 2020, although no evidence was provided. With regard to the rent arrears the Applicant stated that three months rent arrears had been established when the Respondent missed her third payment of rent on 29 March 2020.

DECISION

3. The Legal Member considered the application in terms of Rule 8 of the Chamber 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.”

4. **After consideration of the application and the documents submitted by the Applicant in support of same, the Legal Member considers that the application should be rejected on the basis that it is frivolous within the**

meaning of Rule 8(1)(a) of the Rules.

Reasons for Decision

5. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court*, (1998) Env LR9. He indicated at page 16 of the judgment; "*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 the Legal Member has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success.
6. The Legal Member notes that Notice to leave is dated 31 March 2020. A copy track and trace report has been provided showing delivery did not take place until 6 April 2020, although the Applicant advises that it was sent on 31 March 2020. The rent statement lodged with the application shows that the rent arrears started on 29 January 2020, when the Respondent failed to make the rent payment which was due on that date. The Applicant has confirmed that the rent statement is accurate.
7. Ground 12 of Schedule 3 of the 2016 Act states "(1) it is an eviction ground that the tenant has been in rent arrears for three or more consecutive months." Section 52 (3) of the 2016 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". Section 62 of the 2016 Act states, "(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.
8. In the case of Abdul Majid against Adele Gaffney and Andrew Robert Britton 2019 UT 59, the Upper Tribunal refused permission the Applicant's request for permission to appeal. The Applicants had submitted an application to the Tribunal for an eviction order on the basis of ground 12. The application was rejected by the Tribunal on the ground that the Respondent had not been in rent arrears for three or more consecutive months at the date of service of the

Notice, on 1 July 2019. In refusing the application for permission to appeal the Upper Tribunal stated, at paragraph 9 "...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 arrears for three or more consecutive months." Paragraph (14) ... 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 security of tenure that the 2016 Act."

9. Having regard to the 2016 Act, and the decision of the Upper Tribunal in *Majid v Gaffney*, the Legal Member concludes that the Notice to Leave is invalid. The only eviction ground stated in the Notice to Leave is ground 12 – rent arrears for three or more consecutive months. The Legal Member is not persuaded by the Applicants argument that when the Respondent failed to pay the rent due on 29 March 2020 that ground 12 was established. A third payment may have been missed, but the arrears had not been over three consecutive months. As a result the Respondent had been in arrears of rent for less than three consecutive months when the Notice to Leave was served on her. As the Notice is invalid, the Applicant has failed to submit a Notice to Leave with the application, as required by Section 52(3) of the 2016 Act.

10. The Legal Member determines that, as the Notice to Leave submitted with the application is invalid, the application is frivolous, misconceived and has no prospect of success. The application is rejected 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.

J Bonnar

Josephine Bonnar
Legal Member
15 June 2020