



**DECISION AND STATEMENT OF REASONS OF PETRA HENNIG MCFATRIDGE 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

Case reference FTS/HPC/EV/22/2638

Flat 20 Maybank Court, Balmellie Street, Turriff, AB53 4DE (the property)

Parties

Mr Robert Milne, Mrs Yvonne Milne (Applicant)

Mr Paul James Leslie Smith (Respondent)

Grant Smith Law Practice (Applicant's Representative)

1. The application was made on 3 August 2022 to the First-tier Tribunal (the FTT) under rule 109 and S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) using ground 12 of schedule 3 of the Act.
2. Various documents were provided with the application. These include a Tenancy Agreement commencing 28 February 2022 with a clause stating payment of rent of £425 per calendar month (Clause 8) is due in advance on the 28th day of the month, a blank S 11 notice and a Notice to leave dated 31 May 2022 with an entry in part 4 of 30 June 2022

as the first day when proceedings can be raised. The rent statements included with the Notice to Leave and the application show a rental charge of £450 per month.

3. The FTT wrote to the Applicant's representative on 1 September 2022 and 13 October 2022 requesting further information regarding the Notice to Leave as the document lodged disclosed that the arrears commenced on 28 March 2022 and the Notice to Leave was dated 31 May 2022.
4. The rent statement showed a rental charge of £450 per month although Clause 8 of the tenancy agreement refers to rent payable at the rate of £425 per month. In reply by the Applicants' representative dated 15 September 2022 to the letter of the FTT dated 1 September 2022 asking for clarification, the Applicants' representative stated that the rent should have been shown at a rate of £325 per month without any further explanation as to how that amount related to the tenancy agreement or the arrears calculation.
5. The Applicants' representative has not provided proof of service of the Notice to Leave but stated it was served on 31 May 2022 without identifying the method of service.

DECISION

6. 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."

7. After consideration of the application, the attachments and correspondence from the Applicant, I consider that the application should be rejected in terms of Rule 8 (c) of the Rules of Procedure on the basis as the Tribunal has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION

Relevant Legislation

Rules of Procedure:

Rule 109. Where a landlord makes an application under section 51(1) (for an eviction order) of the 2016 Act, the application must—

(a)state—

(i)the name, address and registration number (if any) of the landlord;

(ii)the name, address and profession of any representative of the landlord;

(iii)the name and address of the tenant **[F72]**(if known)]; and

(iv)the ground or grounds for eviction;

(b) be accompanied by:

- i. evidence showing that the eviction ground or grounds has been met
- ii. a copy of the notice to leave given to the tenant as required under section 52(3) of the 2016 Act
- iii. a copy of the notice given to the local authority as required under section 56 (1) of the 2016 Act

Private Housing (Tenancies) (Scotland) Act 2016

56Restriction on applying without notifying local authority

(1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant unless the landlord has given notice of the landlord's intention to do so to the local authority in whose area the let property is situated.

(2) Notice under subsection (1) is to be given in the manner and form prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003.

(3) In a case where two or more persons jointly are the landlord under a tenancy, references in subsection (1) to the landlord are to any one of those persons.

Ground 12 schedule 3

Rent arrears

12(1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.

[F26(2) The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if—

(a) at the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits, the tenant—

(i) is in arrears of rent by an amount equal to or greater than the amount which would be payable as one month's rent under the tenancy on that day, and

(ii) has been in arrears of rent (by any amount) for a continuous period, up to and including that day, of three or more consecutive months, and

(b) the Tribunal is satisfied that the tenant's being in arrears of rent over that period is not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.]

(3) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—

(a) for three or more consecutive months the tenant has been in arrears of rent, and

(b) the Tribunal is satisfied that it is reasonable on account of that fact to issue an eviction order.

[F27(3A) Sub-paragraph (3B) applies where the First-tier Tribunal is satisfied—

(a) that the eviction ground named by sub-paragraph (1) applies, and

(b) that all or part of the rent in respect of which the tenant is in arrears as mentioned in that eviction ground relates to the period during which paragraph 5 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020 is in force.

(3B) Where this sub-paragraph applies, in considering for the purposes of sub-paragraph (3)(b) whether it is reasonable to issue an eviction order against the tenant, the First-tier Tribunal is to consider the extent to which the landlord has complied with pre-action requirements before applying for the eviction order.]

(4) In deciding under sub-paragraph (3) whether it is reasonable to issue an eviction order, the Tribunal is to consider whether the tenant's being in arrears of rent over the period in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.

(5) For the purposes of this paragraph—

(a) references to a relevant benefit are to—

(i) a rent allowance or rent rebate under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971),

(ii) a payment on account awarded under regulation 91 of those Regulations,

(iii) universal credit, where the payment in question included (or ought to have included) an amount under section 11 of the Welfare Reform Act 2012 in respect of rent,

(iv) sums payable by virtue of section 73 of the Education (Scotland) Act 1980,

(b) references to delay or failure in the payment of a relevant benefit do not include any delay or failure so far as it is referable to an act or omission of the tenant.

[F28(6) In sub-paragraph (3B), “pre-action requirements” means such requirements as the Scottish Ministers may specify in regulations.

(7) Regulations under sub-paragraph (6) may in particular make provision about—

(a) information to be provided by a landlord to a tenant including information about the terms of the tenancy, rent arrears and any other outstanding financial obligation under the tenancy,

(b) steps to be taken by a landlord with a view to seeking to agree arrangements with a tenant for payment of future rent, rent arrears and any other outstanding financial obligation under the tenancy,

(c) such other matters as the Scottish Ministers consider appropriate.]

1. The application is made on ground 12 of schedule 3 of the Act and would require, in terms of S 52 (3) of the Act, to be accompanied by a Notice to Leave and in terms of S 56 by a Notice to the Local Authority. The FTT considers that the meaning of this section is that the Notice to Leave has to be a valid Notice to Leave and the S 11 Notice has to be completed and not a blank uncompleted form. The same requirements are also stated in rule 109, which is the rule under which the application is made.
2. The Notice to Leave provided is dated 31 May 2022 and relies on the ground “You are in rent arrears over three consecutive months”. The entry in part 3 gives the lack of payment of rent on 28.3.2022, 28.4.2022 and 28.5.2022 as the basis for the notice as stated in the attached rent statement. The attached rent statement shows a monthly rental charge of £450.
3. In terms of the tenancy agreement the rent of £425 per month is payable in advance on or before the 28th day of each month. The rent statement lodged with the application shows no arrears of rent until the entry of 28 March 2022, when no payment was made on the due date. The arrears increase from then onwards.

4. The tribunal considers that the Notice to Leave is invalid. In the decision [2019] UT 59 Majid v Gaffney Sheriff Fleming sets out the requirements of a valid Notice to Leave in cases of rent arrears and states in para 9 “[9] *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.*” and goes on to say: “[13] *The basis for the decision of the First-tier Tribunal is that the Notice to Leave specified a ground for eviction which was not satisfied as at the date of the service. That being the case the notice itself is invalid. [14] The appellant appears to be conflating two separate statutory provisions. 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. There is no arguable ground of law. Permission to appeal is refused.*” The issue was further recently confirmed in the decision of Sheriff Kelly in [2022] UT07 Rafique v Morgan.
5. Having regard to these decisions, the clear requirement for a valid Notice to Leave in arrears cases is that as at the date the Notice to Leave is served on the tenant the tenant is in arrears of rent for three or more consecutive months.
6. Taking the first date when a deficit is shown on the rent statement, 28 March 2022, then the expiry of the three months period would be 28 June 2022. The documents lodged show that the Notice to Leave is dated 31 May 2022. At that time the tenant had not been in arrears of rent for a period of three or more consecutive months. This is exactly the same situation which was addressed in the UT decision Majid v Gaffney. The Notice to Leave was issued incorrectly and thus invalid. It would not be appropriate to accept an application based on a Notice to Leave which is invalid.
7. The S 11 notice was not completed. It does not meet the requirements of rule 109. It would not be appropriate to accept an application based on a blank S 11 notice.
8. The application is accordingly rejected.
9. As an aside, the application also requires to provide evidence that the ground applies. In this case it is not clear how the rent statements provided or the amended explanation in the email of 15 September 2022 correspond to the rental charge stated in the Tenancy Agreement. This

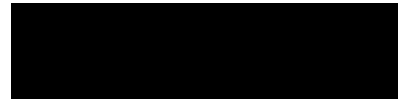
alone would not have resulted in a rejection of the application but further calls into doubt the information provided in the application.

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.



Petra Hennig McFatridge

Legal Member

18 November 2022