



**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

0/1 6 Harrow Place, Glasgow ("the Property")

Case Reference: FTS/HPC/EV/20/1397

Tonero Ltd, 1 Oliver Close, Edinburgh ("the Applicant")

**Carolann Gallacher, Gary McMullan 0/1 6 Harrow Place, Glasgow ("the
Respondents")**

1. By application received on 23 June 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, Notice to leave and rent statement. The application form states that an eviction order is sought on the basis of ground 12, rent arrears over three consecutive months.
2. On 3 July 2020 the Tribunal issued a request for further information to the Applicant. The Applicant was asked to confirm when and the Notice to leave was posted to the Respondent. The Applicant was also asked to clarify the rent statement as it appeared that the Respondent had not been in arrears of rent for the requisite period when the Notice was given. In the response the Applicant confirmed that the Notice had been posted on 3 March 2020, and provided a copy post office receipt. With regard to the rent statement the

Applicant stated, “As the tenant’s rent due date is the final day of each month and is payable for the month in advance, if payments are not received by that date then the tenant is considered to be a month behind. At the time notice was served, the tenant had entered their third month of arrears as of the 29th February 2020, so notice was served accordingly on 3rd 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 3 March 2020. Evidence has been provided which appears to establish that it was posted to the Respondent on the same date. A rent statement has been lodged which shows that the rent arrears started on 30 December 2020, when the Respondent failed to make the rent payment which was due on that date. No further payments have been made by the Respondent and three payments had been missed when the Notice to Leave was issued.
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 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. At the date of service of the Notice, on 3 March 2020, the Respondent had only been in arrears of rent for two months and three days. The Respondent may have missed three instalments, but the eviction ground had not been established by that date, as the Respondent had not been in arrears for three or more consecutive months.
10. The Legal Member determines that, as the ground for eviction had not been established at the date of service of the Notice to Leave, the Notice is invalid, As a result 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.

Josephine Bonnar
Legal Member
27 August 2020