



**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

17 Clark Street, Bannockburn, Stirling FK7 0JW

Case Reference: FTS/HPC/EV/20/1018

Ruth and William McColl, Nether Cambushinnie Farm, Braco, FK15 9JU ("the applicant")

Lauren Jarvis-Akpan 17 Clark Street, Bannockburn, Stirling FK7 0JW ("the respondent")

1. On 31 March 2020 Mr Steven Strachan of Capital Letters Property Management on behalf of the applicant lodged an application with the First tier Tribunal Housing and Property Chamber (the Tribunal). The application was made under Rule 109 of the Procedural Rules being an application for an eviction order under S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act). The following documents were lodged in connection with the application:- Authorisation letter, Tenancy Agreement, Notice to Leave, Notice to Local Authority, rent statement. The documents referred to above are referred to for their terms and held to be incorporated herein.
2. The Landlord in terms of the Private Residential Tenancy agreement is the applicant in this case. The respondent is the tenant of the property.

3. The application was lodged and dated 31 March 2020. The Notice to Leave is dated 24 February 2020 and in terms of Part 4 of the Notice to Leave the first day on which proceedings can be raised with the First tier Tribunal Housing and Property Chamber is stated in the Notice to Leave as 28 May 2020.
4. The ground of eviction referred to in the Notice to Leave and the application is Ground 11 of Schedule 3 of the Act. The ground of eviction stated in the application is Ground 8.

DECISION

5. 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."

6. 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 FTT has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION

Relevant legislation:

Rule 109 (b) of the Procedural Rules states an application for an eviction order under S 51 of the Act has to 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

S 52 of the Act states: 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.

S 54 of the Act states: Restriction on applying during the notice period

(1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.

(2) The relevant period in relation to a notice to leave—

(a) begins on the day the tenant receives the notice to leave from the landlord, and

(b) expires on the day falling—

(i) 28 days after it begins if subsection (3) applies,

(ii) 84 days after it begins if subsection (3) does not apply.

(3) This subsection applies if—

(a) on the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than six months, or

(b) the only eviction ground, or grounds, stated in the notice to leave is, or are, one or more of the following—

(i) that the tenant is not occupying the let property as the tenant's home,

(ii) that the tenant has failed to comply with an obligation under the tenancy,

(iii) that the tenant has been in rent arrears for three or more consecutive months,

(iv) that the tenant has a relevant conviction,

(v) that the tenant has engaged in relevant anti-social behaviour,

(vi) that the tenant associates in the let property with a person who has a relevant conviction or has engaged in relevant anti-social behaviour.

(4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3).

7. I consider that the requirement in s 52 (3) of the Act and Rule 109 (b) (ii) of the Procedure Rules is not met in this case. The Tribunal can only entertain an application if it is accompanied by a Notice to Leave. I consider that this requirement means that a valid Notice to Leave has to be submitted with the application.
8. In this case the Notice to Leave was dated 24 February 2020. The Notice to Leave states that it relies on Ground 11 of Schedule 3 of the Act. The entry in part 2 is :“you have breached a term(s) of your tenancy agreement”. The entry in part 3 reads: “In terms of clause 8 of the tenancy agreement, rent of £595.00 due on or before 29th day of each month. The tenant has not paid the rent due in advance of 29th January 2020 and 29th February 2020 and is in rent arrears of £1190.00 as of 2nd March 2020. The tenant is therefore in rent arrears for two consecutive months. A rent statement is attached.” The entry in part 4 states: An application will not be submitted to the Tribunal for an eviction order before 28th May 2020. This is the earliest date that Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the Let Property). The Notice to Leave was allegedly accompanied by a rent statement. This was not submitted in evidence.
9. The application was lodged with the Tribunal by email on 31 March 2020 and is dated 30/03/2020. The entry in part states in part 5 Possession/Eviction Grounds states:

“Ground 8 – At least 3 months rent is in arrears both on the date on which the notice of proceedings was served and at the date of the hearing. The tenant is currently due rent for 29th January, 29th February and 29th March 2020 and a total sum of £1785.00”. A rent statement was submitted in evidence dated 30 March 2020 showing arrears of rent for the period of rent due in advance for the respective following months for 29 January, 29 February and 29 March 2020.

10. The Notice to Leave cannot be valid for the following reasons: The notice was raised in terms of ground 11 of Schedule 3 of the Act. Ground 11 (3) states :” The reference in subparagraph (2) to a term of the tenancy does not include the term under which the tenant is required to pay rent.” It is clear that the ground stated in the Notice to Leave cannot be ground 11 as the only circumstances narrated are rent arrears. The ground stated in the Notice to Leave was not evidenced as is necessary in part 3 of the Notice to Leave.
11. Even if one was prepared to consider that the explanation in part 3 may be sufficient to evidence that there had been a typographical error in part 2 in ticking the box regarding breach of tenancy conditions and that the issuer had ticked the wrong box and meant to issue the notice on the basis of the next ground which states “you are in rent arrears over three consecutive months” the Notice to Leave would also be invalid. Ground 12 (1) of Schedule 3 of the Act requires the following: “12 Rent Arrears (1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.” Sheriff I Fleming in the Upper Tribunal decision [2019] UT 59 Abdul Majid v Adele Gaffney and Andrew Robert Britton of 17 October 2019 stated in para 14: “... *It is clear that the words “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.....*” This clearly sets out that the requirement of a valid Notice to Leave is that at

the time the Notice to Leave is served the ground on which the notice is based must exist. In terms of the Notice to Leave however ground 12 clearly requires three months consecutive rent arrears. The Notice to Leave was signed and dated 24 February 2020. The statement in part 3 of the Notice to Leave reads: "In terms of clause 8 of the tenancy agreement, rent of £595.00 due on or before 29th day of each month. The tenant has not paid the rent due in advance of 29th January 2020 and 29th February 2020 and is in rent arrears of £1190.00 as of 2nd March 2020. The tenant is therefore in rent arrears for two consecutive months." Because the Notice to Leave was dated 24th February 2020 it could not include the rent due on 29th February 2020 as that date had not happened. The only rent arrears due could be the ones arising from 29th January 2020 and it is clear that as at the date of the Notice to Leave the rent arrears were not present for three consecutive months. Even if the Notice to Leave might have been sent on the date mentioned in part 3 of the Notice to Leave at "and is in rent arrears of £1190.00 as of 2nd March 2020. The tenant is therefore in rent arrears for two consecutive months" the arrears referred to in the Notice to Leave would only have been for two consecutive months. The Notice to Leave is thus also invalid if based on Ground 12 of Schedule 3 of the Act because at the date the Notice to Leave was issued the tenant had not been in rent arrears for three or more consecutive months.

12. I also find that the Tribunal cannot consider the application because of the requirement stated in s 52 (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." The applicant's representative completed part 5 of the application with the text " Ground 8 – At least 3 months rent is in arrears both on the date on which the notice of proceedings was served and at the date of the hearing." The application refers to Ground 8. Ground 8 in Schedule 3 of the Act reads: "8 Not an employee. 8(1) It is an eviction ground that the tenancy was entered into to provide an employee with a home and the tenant is not a qualifying employee." This clearly cannot be the ground on which the application and the Notice to Leave were issued as these only refer to rent arrears. It is also neither the test of the ground which was ticked in the list of grounds on the Notice of Rejection nor the test of Ground 12 of Schedule 3 of the Act as stated above, which

may have been the intended ground for the Notice to Leave. It is an approximate quote of ground 8 of Schedule 5 of the Housing (Scotland) Act 1988, which does not apply to Private Residential Tenancies. It is therefore not clear that the Tribunal can in this case consider any ground for eviction in terms of schedule 3 of the Act as the grounds stated by reference to numbers do not match the definitions and the grounds indicated are not consistent between the Notice to Leave and the application. There was no application to the Tribunal to grant permission to include a further ground of eviction.

13. Finally, the Notice to Leave stated as the date on which an application to the Tribunal could be first made the date of 28 May 2020. The application was in fact made on 31 March 2020. In terms of the Notice to Leave lodged the application would thus also have been made prematurely and would certainly not have given the tenant the required fair notice that an application to the Tribunal would be raised on 31 March 2020.
14. For the reasons stated above the application was not validly made. The Tribunal cannot entertain the application. The application is rejected.

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
28 April 2020