



Decision with Statement of Reasons of Fiona Watson, Legal Member of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)

Chamber Ref: FTS/HPC/EV/20/0005

Re: Property at Mylnefield Lodge, Invergowrie, DD2 5EH (“the Property”)

Parties:

Sarkar (Dev) Ltd, 10 Carnie Road, Arbroath, DD11 3DY (“the Applicant”)

Ms Tracy Wilson, Mylnefield Lodge, Invergowrie, DD2 5EH (“the Respondent”)

1. On 3 January 2020, an application was received from the applicant. The application was made under Rule 109 of the Rules being an application by a landlord for a Private Residential Tenancy Eviction Order.
2. The following documents were enclosed with the application:
 - (i) Copy Private Residential Tenancy Agreement
 - (ii) Copy Notice to Leave
 - (iii) DM Hall Survey
 - (iv) Email correspondence between the applicant and tenant between 16 August 2019 and 9 September 2019
 - (v) Copy notification to Perth & Kinross Council under s11 of the Homelessness etc. (Scotland) Act 2003
3. A request for further information was sent to the Applicant by letter and email dated 27 January 2020. On 27 January 2020 the Applicant (by email) responded to points raised by the Tribunal.
4. The point raised by the Tribunal in said letter of 27 January 2020 was in relation to the notice period given in Part 4 of the Notice to Leave. The Notice to Leave was dated 10 October 2019. Said Notice to Leave seeks to rely on Grounds 1, 11, 12 and 14 which are contained within Schedule 3 to the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”). Said Notice to Leave was sent to the tenant by email on 10 October 2019. Part 4 of the said notice to leave states as follows:

“An application will not be submitted to the Tribunal for an eviction order before Thursday 7th November 2019. 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).”

5. The Tribunal’s letter to the applicant states *“we note your position that you emailed the Notice to Leave to the tenant on 10 October 2019 advising that an application would not be submitted to the Tribunal before Thursday 7 November 2019. The Private Housing (Tenancies) (Scotland) Act 2016 provides at section 62(4) that the date to be specified in the Notice to Leave as the date on which the landlord expects to become entitled to make an application for an eviction order to the First-tier Tribunal is the day falling after the day on which the notice period will expire.*

Further, section 62(5) of the 2016 Act provides that it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.

Please therefore provide your comments on the date stated as being the date before which an application would not be submitted to the First-tier Tribunal (7 November 2019) and why, in your view, you consider sufficient notice has been given.”

6. In his email reply to the Tribunal, the Applicant submitted:

“The notice to leave was sent by both First Class mail and by email dated 10th October 2019 seeking recovery of the property as at 7th November 2019 albeit to avoid causing concern to the tenant it was explained that no application to the First-tier Tribunal would be made until after 7th Nov 2019 meaning she would not be evicted on the 7th Nov 2019 and we simply wanted to give the defaulting tenant the courtesy of making that known to her....As previously explained and supporting emails were sent the tenant was initially advised to look for another property by email as at 16th Aug 2019 then we waited until 10th Oct 2019 to post/email the Notice to Leave but more importantly we then wanted to avoid evicting the tenant before Christmas so we waited until after Christmas to actually lodge the application seeking an order to recover the property...I am firmly of the belief that the timeline is very clear and fair by informing her on 16 Aug 2019 and waiting until the 10th Oct 2019 before serving the Notice to Leave then going further by not lodging the application until after Christmas and we are now about to enter Feb 2020 and we seem to be no further forward.”

Decision

7. I considered the Application in terms of section 52 of the 2016 Act and Rule 8 of the Rules.

Rule 8 states:-

“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.”

8. After consideration of the application together with the documents and further information provided by the Applicant, I consider 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

9. “Frivolous” in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Midlenhall) 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.

10. The Tribunal finds that the notice to leave lodged with the application is not competent. Section 62 of the 2016 Act sets out the meaning of a notice to leave as follows:

“62 Meaning of notice to leave and stated eviction ground

(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.

(2) In a case where two or more persons jointly are the landlord under a tenancy, references in this Part to the tenant receiving a notice to leave from the landlord are to the tenant receiving one from any of those persons.

(3) References in this Part to the eviction ground, or grounds, stated in a notice to leave are to the ground, or grounds, stated in it in accordance with subsection (1)(c).

(4) The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.

(5) For the purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.

11. Section 54 of the 2016 Act sets out the relevant notice period for a notice to leave:

“54 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)."

12. Section 54(2)(b) of the 2016 Act as set out above, states that the relevant period "begins on the day the tenant receives the notice to leave from the landlord, and (b) expires on the day falling 28 days after it begins if subsection (3) applies" or "84 days after it begins if subsection (3) does not apply." Subsection 3 does not apply in this case. The tenant has occupied the property for more than 6 months, therefore section 54(3)(a) does not apply. The notice to leave in this case seeks to rely on Grounds 1, 11, 12 and 14 as contained within Schedule 5 to the 2016 Act. For section 54(3)(b) to apply, the notice would have to rely on only one (or more) of the grounds which are listed in s54(3)(b). The notice to leave relies on three of those listed grounds, being those listed at section 54(3)(b)(i), (iii) and (v) (being those grounds 11, 12 and 14 as contained in Schedule 5 to the 2016 Act.) However, in addition to those listed grounds, the notice to leave also seeks to rely on ground 1 under Schedule 5 to the 2016 Act. This ground is relied upon where the landlord wishes to sell the property. That ground is not one of those grounds listed in s54(3)(b). Accordingly, the notice to leave does not comply with the requirements of section 54(3) and therefore the relevant period is 84 days in terms of s54(2)(b)(ii). In addition, a

further 48 hours should also have been included in line with the requirements of section 62(5) as stated above. The notice to leave lodged with this application only provided a period of 28 days' notice to the tenant. On that basis, the tribunal finds that the notice to leave does not provide for the correct notice period to the tenant, and therefore does not meet the requirements of a notice to leave in terms of section 62, and in particular, section 62 (4).

13. Accordingly, for the reasons outlined above I consider that the application for an order for repossession should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Rules.

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,

F. Watson

Fiona Watson
Legal Member
4 February 2020