



Decision and Statement of reasons of Mrs Jan Todd, Legal Member of the First-tier Tribunal for Scotland (Housing and Property Chamber) 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 Rules”)

In connection with

Property at 6A Ernest Street, Arbroath, DD11 1UB

Case Ref: FTS/HPC/EV/21/2527

Parties: Ms Lorraine Lee Pine Ridge, Inverurie, Aberdeenshire (Applicant)

Rent Locally Tayside & Fife (Applicant’s Representative)

Ms Dawn Swankie 6A Ernest Street, Arbroath, DD11 1UB (Respondent)

Background

1. An application was received from the Applicants representative dated 18th October 2021. The application was made under Rule 109 of the Rules being an application by a private landlord for possession of a rented property let under a private Rented Tenancy in terms of S.51 of the Private Housing (Tenancies) (Scotland) Act 2016 (hereinafter referred to as the Act). The Applicant lodged the following documents allowing with her application:
 - Tenancy document for the Property entered into between the applicants and the respondents dated 5th February 2020
 - Notice to Leave dated 31st March 2021
 - S11 Notice and e-mail to the local authority
 - Mandate to the representative
 - Rent statement
 - End of lease arrangements
2. The Applicant applied to recover possession of the Property on Ground 12 the ground that more than 3 months consecutive rent is due in terms of Ground 12 of Schedule 3 to the Act,.
3. A further information request was sent to the Applicants on 11th November requesting

"I refer to your recent application which has been referred to the Chamber President for consideration. Before a decision can be made, we need you to provide us with the following:

- 1. We note that you have indicated the notice to leave was sent by e-mail on 31st March 2021, could you please provide a copy of the e-mail sending the notice to leave?*
- 2. The ground you are relying on is rent has been in arrears for 3 months at the date of the notice, Ground 12. It appears that from the Notice to leave and the rent statement lodged that the first arrears accrued from 5th February 2021 the date by which one month was in arrears after the rent became due on 5th January. The Notice to leave was served in 31st March 2021. It does not appear that at least three months of arrears were established at the date of service. Having regard to the Upper Tribunal decision in the case of *Majid v Gaffney and Britton 2019 UT 59* please clarify the basis upon which the Tribunal can consider the application as in that decision the Upper Tier Tribunal upheld that at least 3 months arrears had to be owing at the date of service and at the 31st March 2021 only 2 $\frac{3}{4}$ months arrears are potentially due and owing? Please reply to this office with the necessary information by 25 November 2021. If we do not hear from you within this time, the President may decide to reject the application."*
- 4. The Applicant's representative responded on 11th November writing "With regards to your 2 request 1. Copy of email sent attached 2. From our ledger we saw that the tenant was 3 month's rent payment in arrears (£1170). Following a meeting between the tenant and the Property Manager, we then served an NTL on that basis. Since then the arrears has continued to increase, currently at £1940 as per attached ledger."*
- 5. A further request for information was sent by the Tribunal on asking for clarification on 26th November saying:-
"Thank you for your response to our letter of 11th November and providing the copy e-mail attaching the notice to leave. With regard to our second request however you do not appear to have addressed the point that the rent was not in arrears of 3 months or over at the point the notice to leave was served. Please consider your position, take any legal advice that you may wish to and provide legal submissions as to why you believe that rent which became due and owing on 5th January and was therefore one month in arrears on 5th February and was not paid thereafter, amounts to three months in arrears by 31st March when the notice to leave was served? Please reply to this office with the necessary information by 10 December 2021. If we do not hear from you within this time, the President may decide to reject the application."*
- 6. On 29th November the Applicant's representative responded advising:-
"We understand that due to system issues and staff Covid, we produced the NTL a few days early. We would wish the HPC to consider this in their decision. As the matter stands, the tenant has increased arrears to a current level of £1940"*

Decision and Reasons

7. The Applicant has provided all the information they can and the facts regarding the amount of rent that was due and owing at the date of the service of the Notice to Leave is not in doubt, namely no rent was paid on 5th January, 2021, 5th February 2021 and 5th March 2021 with only £200 being paid on 25th March 2021.
8. The Applicant is relying on a Notice to Leave dated 31st March 2021 which gives details of the eviction ground they are relying on as Ground 12 of Schedule 3 of the Act. The reasons stated in the Notice to Leave for the grounds being met are "You have been in arrears for more than 3 months as per the attached ledger"
9. S 52(3) of the 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."
10. S 62 of the Act sets out the requirement of the notice to leave and stated eviction ground namely
11. "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 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
 - d. Fulfils any other requirements prescribed by Scottish Ministers in regulations
12. The Tribunal issued several requests for further information as set out above. The Applicant has stated that they applied a few days early due to staff shortages and Covid and have asked the Tribunal to take this into account. This decision is based on the Applicant's claim relying on Ground 12, 3 months arrears of rent outstanding.
13. I considered the application in terms of Rule 8 of the Rules and that Rule provides:-

"Rejection of the Application

- 8. (1) The Chamber President or another member of the First Tier Tribunal under 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 is resolved*
 - c) they have good reason to believe that it would not be appropriate to accept the application*
 - d) they consider the application is being made for a purpose other than a purpose specified in the application or*
 - e) the applicant has made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First Tier Tribunal under 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 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 reasons for the decision.

5. After consideration of the application, the attachments and the correspondence from the Applicant I consider that the Application should be rejected on the basis that it is frivolous in terms of Rule 8(1) (a) of the Rules.

6. Reasons for the Decision

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

7. The Legal Member notes that the Notice to Leave was sent on 31st March 2021 and states that proceedings will not be raised until 3rd October 2021. From the rent statement lodged and from the submissions of the Applicant it is clear rent became due and owing on 5th January 2021 and was not paid on 5th February or on 5th March with £200 being paid on 25th March. Over 2 full months’ rent was in arrears from 5th January to 31st March 2021. Although a third rent payment became due on 5th March the arrears were only over 2 3/4 months at the time the Notice to Leave was served. This does not meet the requirements of the Act namely the ground of eviction **must be satisfied at the date of service of the Notice to Leave.**

8. This is clearly set out by the Upper Tribunal in the case of *Majjid v Gaffney*. The facts in that case were that the Applicant had submitted an application for eviction under Ground 12. The application was rejected by the First Tier Tribunal on the ground that the Respondent had not been in rent arrears for three or more months at the date of service of the Notice to Leave. The Upper tier Tribunal refused the application for permission to appeal and stated

“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.

At page 5 of the decision Sheriff Fleming goes on to state

“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 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. “

13. Whilst the Tribunal appreciates that the Applicant may not like the consequences of the statutory provision, the Tribunal is satisfied that both the Act and the Upper Tier Tribunal decision, which it is bound by, are clear and leave no discretion. The arrears must be for three months and over before Ground 12 is met and any Notice of Leave reliant on arrears of less than that is not valid. The Arrears in this application at the date of the Notice to leave were not 3 months or over in arrears, it would not have reached 3 months arrears until 5th April although rent was due and owing on 5th January. The applicant’s representative appears to acknowledge this in his response of November when he acknowledges that *“due to system issues and staff Covid, we produced the NTL a few days early”*. Accordingly, for this reason, this application must be rejected upon the basis that I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1)(a) and (c) of the Procedural Rules. The mandatory requirements of the Act are not met, the action is futile and is therefore rejected as being frivolous.

It is noted that the Tribunal does have a discretion in terms of S 52(4) to entertain an application which is made for an eviction order where it is made in breach of section 54 namely where it is made before the expiry of the relevant period in the Notice to Leave if the Tribunal considers it reasonable to do so. This allows the Tribunal to consider applications based on a Notice to Leave where the ground is met at the date the Notice to Leave is served, but the relevant date (in this case the 6 months plus time for serving and the extra day required) has not yet expired. This was not however the circumstances in this application as the relevant period had expired but the ground itself had not been met.

What you should do now:-

If you accept the decision there is no need to reply.

If you disagree with the decision then an applicant aggrieved by the decision of the Chamber President, or another member of the First Tier Tribunal acting under delegated powers of the Chamber President, 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 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.



8th

December

2021

Legal Member