



**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

29 Louise Street, Dunfermline, KY11 4AT (the property)

Case reference FTS/HPC/EV/22/0464

Parties

Mrs Yvonne Russell (Applicant)

Miss Lisa Smith (Respondent)

Bannatyne Kirkwood France &Co (Applicant's Representative)

1. The application was initially made on 17.2.22 under a different applicant. After extensive correspondence with the First-tier Tribunal (the tribunal) the application was re-submitted in its current format with a date of 20.4.22 under rule 109 and S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) using only ground 12 of schedule 3 of the Act.
2. The documents lodged with the application are referred to for their terms and held to be

incorporated herein.

3. The documents include a Notice to Leave dated 4.8.21 and stating that the date the application could first be made as 11.2.22. The applicant further lodged a rent statement showing rent arrears of £3,230 as of 28.2.22. The statement covers the period of 18.6.19 to 28.2.22. The first date under which a shortfall of rent is shown is 31.5.22, which shows a rent due amount of £440 for the period of 18.5.22 to 17.6.22 and a payment against this of £70. Thereafter the arrears amount shown in the rent statement for the remaining period increases and never reverts to £0.

DECISION

4. 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."

5. 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

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.

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. The tribunal considers that the meaning of this section is that the Notice to Leave has to be a valid Notice to Leave. The same requirement is also stated in rule 109, which is the rule under which the application is made.
2. The Notice to Leave provided is dated 4.8.21 and relies also on the ground “You are in rent arrears over three consecutive months”. The entry in part 3 giving the explanation as to why the ground applies is “There are currently rent arrears of £1820 (monthly rental £440). We are sympathetic that the tenant has been trying to make payments. However, we have only been receiving around half of the rent for over 6 months. Agreements have been made but the tenant has been unable to stick to these agreements. Based on tenants income she does not seem to be able to afford the property.” and a rent statement is referred to as an attachment.
3. Clause 8 sets out that the rent of £440 a calendar month is payable in advance and states that the first payment is to be made on 18.6.19 for the period of 18.6.19 to 17.7.19. The rent statement lodged with the application is somewhat incongruous with the dates stated in the

tenancy agreement as the payment dates are shown as the end of the month dates such as 31.5.21 relating to the payment period of 18.5.21 to 17.6.21. However, the rent statement shows no arrears of rent until the entry of 31.5.21 where a rent amount of £440 is entered for the above period and a payment of £70 shown against this, resulting in a figure of arrears of £370 shown on that 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 4 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, 31.5.21, then the expiry of the three months period would be 31.8.21. However, even if one was to apply the payment dates according to the tenancy agreement rather than the end date of the month entries in the rent statement, the first arrears would arise on 18.5.21 when the rent for the period of 18.5.21 to 17.6.21 would fall due. The £70 payment on 31.5.21 would only cover 5 days rent up to 22.5.22 and by the time of payment on 31.5.21 arrears would thus have been in place since 18.5.21. Applying that date, the expiry of the three months period would be 18.8.21. The documents lodged show that the Notice to Leave is dated 4.8.21 and was received by the tenant on 5.8.21. 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 application is accordingly 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

27 April 2022