



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”)

Case Ref: FTS/HPC/EV/3536

Re: Property at 19 Hazel Dene, Methil, KY8 2JL

**Parties: Mr Brian Delorey, Wellside House, Kennoway Road, Windygates, KY8 5BX
 (“the Applicant”)**

**Mr Christopher Bell, 19 Hazel Dene, Methil, KY8 2JL
 (“the Respondent”)**

1. On 1st November 2019 an application was received from the Applicant .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 S51 of the Private Housing (Tenancies) (Scotland) Act 2016 (hereinafter referred to as the Act)
2. The following documents were received in support of the application:-
 - a. Tenancy agreement dated 19th and 26th June 2019
 - b. Notice to leave dated 1st October 2019
 - c. Notice to leave dated 1st November 2019
 - d. S11 Notice to Fife Council
 - e. Various Letters demanding payment of rent
 - f. Copy bank statements

3. DECISION

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 I have good reason to believe that it would not be appropriate to accept the application as 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 Applicant has applied to recover possession of the Property on the eviction ground that the tenant has been in rent arrears for three or more consecutive months in terms of Ground 12 of Schedule 3 to the Act.
- 8. The Applicant referred to Notices to Leave dated 1st October and 1st November
- 9. S 62 of the Act sets out the requirement of the notice to leave and stated eviction ground namely
 - "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*

10. S62(4) states:- *“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”*

11. Section 54(2) sets out the required notice period which states *“ The relevant period in relation to the notice to leave*

a. *Begins on the day the tenant receives the notice to leave from the landlord and*

b. *Expires on the day following*

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

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

12. Section 54(3) states *“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*

13. The lease entered into between the parties commenced on 27th June 2019 and therefor at the date either of the Notices to Leave were served the tenant had not been entitled to occupy the property for more than six months and the only eviction ground stated in the notice to leave is that set out in S54(3)(b)(iii) therefore the required notice period is a clear 28 days from the date the tenant receives the notice from the landlord, the relevant period of notice expiring one day after 28 days after it begins.

14. The Applicant has served two Notices to Leave on the Tenant. The first notice is dated 1st October 2019 and states *“that an Application will not be submitted to the Tribunal for an eviction order before 1st 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.)*

15. The Notice to Leave refers to the eviction ground being *“Rent arrears over two consecutive months.”* This is Ground 12 in the Act, however the rent due and as at 1st October is only £860 being two months' rent for sums due on 31st August and 30th September. The eviction ground is that the tenant must have been in arrears for three or more consecutive months. As at 1st October the tenant was not in arrears for three or more consecutive months. How arrears should be calculated has been the subject of an appeal to the Upper Tribunal and a decision was issued by Sheriff Fleming in the case of Abdul Majid against Adele Gaffney and Andrew Robert Britton

UPS/AP/0037 that confirms that rent should not only be due but outstanding for three months. As at 1st October the tenant had been in arrears for only one full month with the second month's rent only becoming due on 30th September.

16. This Notice to Leave specifies a ground for eviction which was not satisfied at the date of service. That being the case the Notice itself is invalid.

17. With regard to the Notice to Leave dated 1st November 2019 the Applicant has not given the required notice to the Tenant in terms of the Act. The Respondent is the tenant and the notice to leave is deemed to have been received 48 hours after it was sent, namely 48 hours after 1st November 2019 when the Applicant sent the Notice to Leave by e-mail to the Tenant, which means the tenant is deemed to have received it on 3rd November. The notice period therefore expires 28 days later. The day to be specified in the notice to leave in terms of S64 (2) is one day after the notice will expire. The day that should be specified is therefore 2nd December 2019. The date actually specified is 1st November. This gives no notice whatsoever to the tenant. The action is therefore incompetent because the relevant clear period of 28 days after the notice has been received by the Tenant has not been specified; the Respondent has not therefore been given adequate or fair notice of these proceedings.

16. The Applicant advised that he was advised he could use the Notice Period given in the Notice to Leave dated 1st October as applying to the second Notice to Leave. The Requirements of the Act are quite specific for Notices to Leave as set out above. The first Notice to Leave is invalid for the reasons explained. Notwithstanding that, any Notice to Leave has to be looked at on its own merits and the second Notice to Leave fails to give the requisite notice as required by the Act. It is therefore also invalid.

17. In addition even if adequate notice had been given in the Notice to Leave dated 1st November at that date the tenant had not been in arrears for 3 or more months as rent was outstanding from 30th August, 30th September and just became due on 31st October so rent had only been outstanding for 2 months and a day.

Adequate notice in terms of the Act having not been given and the eviction ground specified, not being met, the action is futile and is therefore rejected as being frivolous.

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.

J Todd

Legal Member

Date

5/2/19

