



Decision with Statement of Reasons of Alan Strain, Legal Member of the First-tier Tribunal with delegated powers of the Chamber President of the First-tier Tribunal for Scotland (Housing and Property Chamber)

Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules")

Chamber Ref: FTS/HPC/EV/22/4472

Re: 49 Ballindean Place, Dundee, DD4 8PE ("the Property")

Parties

Mrs Anne Jordan (Applicant)

Miss Amanda Smeaton (Respondent)

Miller Hendry (Applicant's Representative)

Tribunal Member:

Alan Strain (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be dismissed on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules and that it would not be appropriate to accept the application in terms of Rule 8(1)(c).

Background

1. The application was received by the Tribunal under Rule 109 on 22 December 2022. The grounds for possession/eviction were stated to be Ground 11. The following document (in so far as relevant) was enclosed with the application:

- (i) Notice to Leave dated 12 July 2022; and
- (ii) Sheriff Officer Certificate of Service of Notice to Leave dated 13 July 2022.

2. The application was considered by the Tribunal. The Tribunal noted from the Notice to Leave that it was dated 12 July 2022, served on 13 July 2022 and that it stated an application would not be made for an eviction order before 10 August 2022. The Tribunal by letter of 17 January 2023 requested the Applicant's representatives to provide their submissions on the validity of the Notice to Leave as follows:

The Notice to Leave appears not to be valid given the date and manner of service. The information discloses that the service of the Notice to Leave was carried out by Sheriff Officers on 13.7.22. The notice period for ground 11 at the relevant time was 28 days. The date when proceedings can first be raised in part 4 of the Notice to Leave is stated as 10.8.22. The calculation of the date is defined in S 62 (1) (b) of the Private Housing (Tenancy) (Scotland) Act 2016 as the day after the notice period expires. If a notice is served on 13.7.22 the notice period of 28 days expires on 10.8.22. The date after it expires would thus be 11.8.22. Please keep in mind that the provision of paragraph 10 of schedule 1 of the Coronavirus (Scotland) Act 2020, which allowed the Tribunal discretion to deal with wrongly calculated periods in a Notice to Leave has been repealed by the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022 and thus the previous situation of a requirement of precise calculations of such dates is now restored. You may wish to consider the decision of *Holleran v McAllister EV/18/3231*, which is available in the register of published decisions on the Tribunal's website. In light of this please either make written representations stating on what legal basis you think the Notice to Leave could be considered to be valid or, if you agree with the above, please consider whether to withdraw the application and re-raise it with a valid Notice to Leave.

3. The Applicant's representatives responded by email of 31 January 2023 in the following terms:

The Notice to Leave is dated 12 July 2022 and was sent to Sheriff Officers on 12 July 2022 for service upon the Respondent. The Notice to Leave correctly calculated the 28-day notice period which would have expired on 10 August 2022. However, the Sheriff Officers were instructed in error to serve the Notice upon the Respondent on 13 July 2022 rather than 12 July 2022. Service by Sheriff Officers was effected personally on the Respondent on 13 July 2022, and the Certificate of Service was produced along with the Application in Form E amongst the Productions. The Respondent did not remove from the tenancy subjects after the expiry of the Notice period and continues to live there. There is not an issue with the Notice to Leave as it was drafted, but rather that the Notice was served upon the Respondent one day late. This was an error which may have affected the Respondent, and accordingly Section 73 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") is engaged. Section 73 confers a power on the Tribunal to treat a notice as being valid, even if there is an error. We would invite the Tribunal to treat the notice as valid. In our submission the 1-day delay in service of the notice is de minimis. The Respondent has not raised any issue regarding the validity of the notice. The decision of the FTT in *Holleran v McAllister* (Chamber Ref: FTS/HPC/EV/18/3231) can be distinguished from the circumstances in this Application. In *Holleran* the error in the calculation of the correct notice period was 3 days. In this Application it was 1 day as a result of a simple error of delay in service. It is submitted that the difference in effect of an error of 1 day is minor compared to an error of 3 days. Further, all other parts of the Notice to Leave were completed correctly under Section 62(1) of the 2016 Act. The ground on which the Notice is based was identified, and the correct period of 28 days' notice for this ground was highlighted. In *Holleran*, the Tribunal did state that the validity of a Notice cannot be determined on the circumstances that occur after the Notice has been served, however we would highlight the following to the Tribunal:

- The Applicant did not apply to the Tribunal before the date which should have been given on the Notice to Leave.

- The Applicant made the application on 21 December 2022, over 4 months after the Notice has been served upon the Respondent.
- The Respondent was aware of the Applicant's intention to recover possession of the property, having been informed by the Applicant prior to Notice being served.
- The Respondent has made applications to the local authority as well as housing associations to obtain alternative accommodation, even before the Notice was served upon her.

We would also highlight to the Tribunal that an Order granted for the recovery of possession of the property, if granted, cannot be enforced until after 31 March 2023, which is a relevant factor to take into consideration. Further, we would also highlight that under the proposed extension of the Cost of Living (Tenant Protection) (Scotland) Act 2022, then any Order granted by the Tribunal would not be enforceable until after 28 September 2023. It is submitted that the error has not materially affected the Respondent. On the basis of this likely timetable, the Respondent would have in excess of a year to secure new accommodation.

Reasons for Decision

4. The Tribunal considered the application in terms of Rule 8 of the Chamber 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;·
(c) they have good reason to believe that it would not be appropriate to accept the application;

(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."

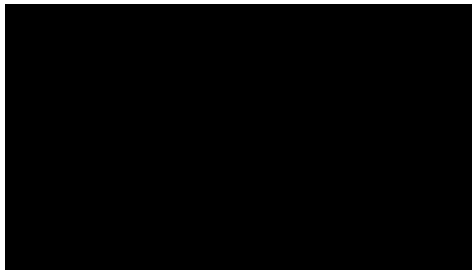
5. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in ***R v North West Suffolk (Mildenhall) Magistrates Court, (1998) Env. L.R. 9***. At page 16, he states: - *"What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic".*

6. The Tribunal considered and followed the earlier Decision of ***Holleran v McAllister EV/18/3231***. The Tribunal finds that, in terms of section 73, the error of stating 10 August 2022 at part 4 of the Notice to Leave, rather than 11 August 2022, does materially affect the effect of the Notice. It is accordingly invalid. It is not a "notice to leave" under section 62. Therefore, the document which accompanied the application to the First-tier Tribunal was not, for the purposes of section 52(3), "a copy of a notice to leave", and accordingly, given section 52(2) (a), the Tribunal cannot entertain the application.

7. Applying the test identified by Lord Justice Bingham in the case of ***R v North West Suffolk (Mildenhall) Magistrates Court*** (cited above) the application is frivolous, misconceived and has no prospect of success. Furthermore, the Tribunal consider that there is good reason why the application should not be accepted. The application is accordingly rejected.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal 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.



Legal Member/Chair

2 February 2023

Date