

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988 (“the 1988 Act”) and Rule 65 of The First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 (“the 2017 Rules”)

Chamber Ref: FTS/HPC/EV/18/3180

Re: Property at Flat 3/1, 1010 Maryhill Road, Maryhill, Glasgow, G20 9TG (“the Property”)

Parties:

Mrs Moyra Statham, 27 Park Avenue, Edinburgh, EH15 1JS (“the Applicant”)

Mr Gerald Thom, Flat 3/1, 1010 Maryhill Road, Maryhill, Glasgow, G20 9TG (“the Respondent”)

Brown and Company LLP, Legal Services Agency Ltd, Fleming House, 134 Renfrew Street, Glasgow, G3 6ST (“the Respondent’s Representative”)

Tribunal Member:

Susanne L. M. Tanner Q.C. (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) was not satisfied that the Applicant had served on the Respondent a notice in accordance with Section 19 of the 1988 Act; and accordingly did not entertain proceedings for possession in terms of Section 19(1) of the 1988 Act and did not make an order for possession in terms of Section 18(3) of the 1988 Act.

1. Procedural Background

1.1. The Applicant’s Representative made an application to the tribunal on 23 November 2018 in terms of Section 18 of the Housing (Scotland) Act 1988

("the 1988 Act") and Rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the 2017 Rules").

- 1.2. The Applicant originally sought the Respondent's eviction from the Property in terms of Section 18 of the 1988 Act under Grounds 8, 11 and 12 of Schedule 5 to the 1988 Act. The Application was amended on 11 March 2019 to delete the reference to Ground 8 and proceed in relation to Grounds 11 and 12 (see below).
- 1.3. The Applicant lodged with the Application documents including a copy Section 19 'AT6' notice dated 14 June 2018; with proof of service by Sheriff Officers on 15 June 2018.
- 1.4. On 17 and 19 December 2018 and 4 February 2019 the Applicant provided further information in response to requests by the tribunal.
- 1.5. On 13 February 2019, the Application was accepted for determination by a tribunal. On 27 February 2019, both parties were notified by letter of the date, time and place of Case Management Discussion ("CMD") in relation to the Application on 19 March 2019. The Respondent was invited to make written representations in response to the Application by 14 March 2019. Both parties were advised that they were required to attend the CMD. The parties were advised that the tribunal may do anything at a CMD which it may do at a hearing, including making a decision on the application which may involve making or refusing an eviction order. The parties were also advised that if they do not attend the CMD this will not stop a decision or order being made if the tribunal considers that it has sufficient information before it to do so and the procedure has been fair.
- 1.6. The Respondent did not submit any representations or make any contact with the tribunal.
- 1.7. The tribunal issued Directions to the Applicant dated 5 March 2019, requiring the Applicant to do certain specified things by 13 March 2019.
- 1.8. On 11 March 2019 the Applicant provided further information and stated that she wished to amend the Application to remove the reference to Ground 8. She attached an Amended page of the Application form, deleting the reference to Ground 8.
- 1.9. A Case Management Discussion took place on 19 March 2019 at Glasgow Tribunals Centre. The Respondent instructed a legal representative on the morning of the CMD. Reference is made to the full terms of the CMD Note

dated 19 March 2019, which was produced by the tribunal Chair after the CMD and sent to parties.

1.10. At the CMD, the Respondent's Representative raised a preliminary issue about the AT6, namely that it did not comply with Section 19(2) of the 1988 Act in that it did not specify "the particulars" of the grounds relied upon in that the grounds were copied and pasted into Part 3 of the Notice but no amount of rent arrears was stated on the notice, nor was a rent arrears statement attached to the notice when it was served. Ms Nelson cited the English authority of **Torrige DC v Jones (1986) 18 HLR 107** as being persuasive on the interpretation of a similar statutory requirement for prescribed notices in proceedings for possession in England. A more detailed summary of the submission is contained in the CMD Note.

1.11. The tribunal chair offered the Applicant the opportunity to request an adjournment of the CMD in order that she could take legal advice and to be in a position to provide a response to the legal issue now raised on behalf of the Respondent, following instruction of the respondent's Representative on the morning of the CMD. The Applicant stated that she would wish this opportunity and following some further discussion she stated that she would also consider whether to make a fresh Application for possession and/or an application for payment.

1.12. The CMD was adjourned to 16 April 2019 at 1400 in Glasgow Tribunals Centre. The purpose of the adjournment was to allow the Applicant to take legal advice, if she wished, in relation to the legal argument made on behalf of the Respondent that the AT6 does not meet the requirements of Section 19(2) of the Housing (Scotland) Act 1988; and thereafter, should the tribunal proceed to consider the matter, to allow parties to make submissions in relation to the reasonableness or otherwise of an order for possession being granted in the event that Grounds 11 or 12 are met.

1.13. **Tribunal Directions – 19 March 2019**

1.13.1. The tribunal issued Directions dated 19 March 2019, requiring the Applicant to do certain specified things by close of business on 3 April 2019, to allow time for her to seek legal advice and or representation in relation to the orders.

1.14. Applicant's Response to Directions of 19 March 2019

1.14.1. On 1 April 2019, the Applicant submitted written representations stated to be in response to the Directions, which comprised a four paragraph introduction headed "*Counter Claim Argument*", a summary of an email thread between the parties and a summary of the dates the Respondent was advised how much the arrears were on his account. The Applicant submitted that the lack of information in the AT6 itself (which is admitted) can be cured by the provision of information about arrears to the Applicant at an earlier date.

1.14.2. On 3 April 2019 the tribunal sent a letter to the Applicant noting that the written submissions appeared to be a response to the arguments advanced on behalf of the Respondent at the CMD rather than a "counterclaim"; and that the submissions did not contain any legal arguments about the validity or otherwise of the AT6 nor cite any legal authorities in support of their position that the tribunal could look to surrounding facts and circumstances when considering whether the requirements of Section 19(2) of the 1988 Act had been met. The tribunal extended the period for compliance with the Direction until 9 April 2019, to allow the Applicant to submit any legal argument she wished to advance in relation to the Respondent's legal argument.

1.14.3. On 9 April 2019 the Applicant submitted written representations including an excerpt from an opinion paper by Jonathan Mitchell QC for Shelter, "*Eviction and Rent Arrears*" (1995) with a hyper link to the full paper and a copy of the English Court of Appeal authority **Dudley v MBC 1990 WL 755121**. Within the written submissions the Applicant stated that she had taken advice from Scottish Association of Landlords. She stated that **Torridge** was not binding, only persuasive. She referred to the final paragraph of page 6 of **Dudley** in support of an argument that error in the particulars does not invalidate the notice.

1.15. CMD: 16 April 2019 at 1400h at Glasgow Tribunals Centre

1.15.1. The Applicant attended and was supported by Ms Wendy Gallacher, One Stop Properties, lettings agency.

1.15.2. The Respondent attended and was represented by Ms Kirsty Nelson, Brown and Company.

1.15.3. Applicant's Submissions

1.15.4. The tribunal chair asked the Applicant whether there were any oral submissions she wished to make in relation to the preliminary issue, beyond those contained in her written submissions. The Applicant submitted that the failure to include the amount of rent arrears or to attach a rent statement was a *bona fide* mistake and that the tribunal should find the authority of **Dudley** persuasive and find that the omission of the amount of rent arrears from the notice did not mean that the notice did not comply with the requirements, when one took into account the correspondence with the Respondent about rent arrears.

1.15.5. The tribunal chair noted that the Court of Appeal in **Dudley** was considering a different situation to the present one, in that an amount had been stated by the landlord but that amount was incorrect (in that it included utilities as well as rent), whereas in the present case, no amount was stated in the notice, which simply repeated the wording of the grounds relied upon. The tribunal chair referred to the judgement of Gibson LJ, last paragraph of page 6 and the first paragraph on page 7, which states that: *"... the requirement is that the landlord gives particulars of the ground specified by him on which the court will be asked to make an order for possession. The question is whether, at the date of the notice, the landlord has in good faith stated the ground and given the particulars of that ground. The requirement of particulars is satisfied, in my judgement, if the landlord has stated in summary form the facts which he then intends to prove in support of the stated ground for possession."*

1.15.6. The tribunal chair also referred to page 7 of the judgment, third paragraph in which the Court of Appeal considered the earlier decision of the court in **Torrige** and repeated with approval the fact that *"[t]he landlord had failed to state what was claimed as being in arrears and had therefore failed to comply with the requirements in Section 83(2)(c)."* Further the court distinguished the facts in **Dudley** from those in **Torrige** in that in **Torrige**, there were no particulars of the rent alleged to have been unpaid so there was no need to consider the objective accuracy of any statement in the notice as there was in **Dudley**.

1.15.7. The tribunal chair asked the Applicant for any submissions she wished to make, having read the paragraph she cited in support of her position in the context of the facts of that case and considered the paragraph to which the tribunal chair had drawn her attention.

1.15.8. The Applicant submitted that it is English law and it is not binding on the tribunal but she wanted it to be persuasive. She submitted that her understanding and reasoning was different from that of the tribunal chair. She submitted that possession is sought under grounds 11 and 12 and the tenant was well aware that he was in arrears. She accepted that it was a mistake by the lettings agency that the amount had not been put on the notice. However, she submitted that it is well documented in other correspondence that the tenant was in arrears and the mistake should not invalidate the notice.

1.15.9. The tribunal chair asked the Applicant whether she intended to refer to any authorities in support of her submission that the tribunal can look outwith the terms of the notice itself in order to determine whether the particulars of the ground are specified in the notice. The Applicant said that she did not. She stated that advice was taken from SAL and that she had been advised that if she documented the fact that the tenant had been kept up to date with his arrears, that should be sufficient.

1.15.10. The Applicant also referred to the excerpt from Jonathan Mitchell's opinion for Shelter, which was cited in her written submission, submitting that it supported her argument in that he states that "*[i]n a rent arrears context, accordingly, the actual extent of rent arrears must be stated, although if there is a bona fide error in this, that will not invalidate the notice*". The tribunal chair referred to the full text version of the article via the hyperlink, noting that the full text version includes footnotes, and reads: "*In a rent arrears context, accordingly, the actual extent of rent arrears must be stated [3. **Torridge**], although if there is a bona fide error in this, that will not invalidate the notice [4. **Dudley**]*". The tribunal chair stated that the paragraph simply appeared to re-state the principles already discussed with reference to the cases of **Torridge** and **Dudley**. Mr Mitchell repeated the proposition that in a rent arrears context the actual amount of rent arrears must be stated. The reference to a "*bona fide error*" appeared to relate to an error in the amount stated, not an error in omitting to state any amount for rent arrears, when one considered the judgment in **Dudley**, which was cited. The Applicant appeared to accept that position but repeated her submission that although the amount of rent arrears was omitted from the notice the tenant had been made aware of the rent arrears in correspondence.

1.15.11. The Applicant stated that she had no further submissions she wished to make in relation to the preliminary point.

1.15.12. The tribunal Chair asked the Applicant whether a payment Application had been made to the tribunal, as discussed at the previous CMD. The Applicant stated that she has made an application and received an email to say that the tribunal has received it. She has not yet been advised that it has been accepted for determination and no CMD has been fixed.

1.15.13. Submissions on behalf of the Respondent

1.15.14. Ms Nelson stated that the tribunal chair had already raised the issues she was intending to raise. She submitted that **Dudley** appears to be the case about the objective accuracy of a notice, whereas these proceedings are concerned with the sufficiency of the notice, which is a different point.

1.15.15. She submitted that it is irrelevant whether the tenant on a factual basis knew how much the arrears were as a result of correspondence. She referred again to the paragraph on page 6 of the judgment in **Dudley** and observed that the Court required the landlord to state in summary form the facts he then intends to prove. Ms Nelson submitted that the tribunal should find this approach persuasive in terms of the interpretation of Section 19 of 1988 Act, in relation to what Parliament meant by "particulars". Ms Nelson submitted that the case of **Dudley** draws a distinction with **Torridge**, in which no rent arrears were stated on the notice, which did not meet the statutory requirements. On that basis Ms Nelson submitted that the AT6 in the present case does not have the particulars required by Section 19. She further submitted that Parliament cannot have meant by the insertion of the word "particulars" in addition to the word "ground", that the landlord should simply re-state the ground.

1.15.16. Ms Nelson moved the tribunal to dismiss the action and refuse the order for possession.

1.15.17. She submitted that if the tribunal is not minded to do that, she was in a position to state a defence of reasonableness for which she submitted that a full hearing should be fixed.

1.15.18. The Tribunal chair drew parties' attention to the English case of **Marath v MacGillivray (1996) 28 HLR 484**, in which the Court of Appeal considered the principles in **Torridge** and **Dudley** and applied them to a case in which the landlord was seeking possession on the basis of three months' rent arrears. The tribunal clerk provided copies to parties and gave

them the opportunity to read it and address the tribunal on any matters arising, if they so wished.

1.15.19. The Applicant stated that again this is English law and had no further submissions to make on the case.

1.15.20. Ms Nelson stated that the Court of Appeal was simply re-stating the principles and applying them and that the case does not add anything new or different to the principles already discussed.

1.15.21. The tribunal chair thanked parties for their submissions and said that she was intending to make a decision on the Application today in terms of Rule 17(4) of the 2017 Rules.

2. Reasons for Decision

2.1.1. Section 19(2) of the 1988 Act provides that the “[t]he First-tier Tribunal] shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground and particulars of it are specified in the notice under this section; ...”

2.1.2. The phrase “and particulars of it” was inserted by the Housing Act 1988 (c.50), s. 140(1), Sch. 17 Pt. I para. 85(a).

2.1.3. Section 19(2) draws a distinction between specification in the notice of the “ground” relied upon and “the particulars of” that ground and makes clear that both are required.

2.1.4. No Scottish authorities were cited to the tribunal on the interpretation of the words “the particulars of”.

2.1.5. The English Court of Appeal authorities of **Torrige** (cited by the Respondent's Representative), **Dudley** (cited by the Applicant's Representative) and **Marath** (drawn to parties attention by the tribunal), all *supra*, are not binding but are persuasive on the tribunal in relation to the interpretation of a similar statutory requirement in relation to notices for proceedings for possession in England and Wales.

2.1.6. **Torrige** is persuasive authority for the proposition that in a rent arrears case, the particulars that require to be given in the notice are the amount of rent arrears. Simply stating that there are rent arrears was not sufficient as it was simply a recitation of the ground relied upon.

- 2.1.7. The case of **Dudley** is also persuasive but can be distinguished on the facts from the present case, in that in **Dudley** the landlord had specified an amount of rent arrears in the notice but the amount was incorrect. That was the context in which the court was considering the questions of “bona fide error” and “objective accuracy”. The Court of Appeal in **Dudley** cited with approval the proposition in **Torrige** that in a rent arrears case the amount of rent arrears should be specified in the notice, otherwise it will be invalid.
- 2.1.8. The Court of Appeal in **Marath** cited with approval the principles in **Torrige** and **Dudley** and applied them to the facts of that case, which involved rent arrears in excess of three months’ rent. The Court held that the notice should either specify how much rent is due or make clear how the tenant can ascertain how much rent is due.
- 2.1.9. In the present Application, it is accepted by the Applicant that the notice simply repeated the wording of grounds 11 and 12 and no amount of rent arrears was specified (stating that this was an error on the part of the Applicant’s letting agent). It is also accepted by the Applicant that no rent statement was attached to the notice. However, the Applicant seeks to rely on correspondence with the Respondent prior to service of the notice to support the fact that the Respondent was “well aware” of the level of rent arrears and that that can cure any deficiency in the prescribed terms of the notice. The tribunal cannot accept the submission advanced on behalf of the Applicant. To comply with Section 19(2) of the 1988 Act, the notice itself requires to specify both the ground(s) relied upon and the particulars of that ground or those grounds. In the present case that was not done.
- 2.1.10. For those reasons, the tribunal was not satisfied that the requirements of Section 19(2) of the 1988 Act had been met and therefore did not entertain the proceedings for an order for possession or proceed to consider whether the requirements of Grounds 11 and 12 had been met.
- 2.1.11. The tribunal chair informed parties that they have the right to seek permission to appeal on a point of law and that information would be included with the written decision.
- 2.1.12. The Applicant stated that she would not be appealing the decision and that she intended to serve a fresh AT6 notice and make another application for eviction. The tribunal chair indicated that if the Applicant makes another application on the basis of service of a new AT6 she may wish to request that the tribunal conjoin that application with the payment

application that has recently been made so that any hearing can be fixed in relation to both applications.

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.

Susanne L. M. Tanner

16 April 2019

Susanne L. M. Tanner Q.C.
Legal Member/Chair