



**DECISION AND STATEMENT OF REASONS OF NEIL KINNEAR, 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 Rules")

in connection with

185E St Michaels Street, Dumfries DG1 2PP

Case Reference: FTS/HPC/EV/20/1574

MRS RITA ATHWAL ("the applicant")

MR ADRIAN ROBINSON ("the respondent")

1. An application dated 17th July 2020 was received from the applicant under Rule 109 of the Rules being an application for an eviction order. The following copy documents were enclosed with the application:-
 - (a) notice to leave;
 - (b) section 11 notice;
 - (c) rent arrears statement;
 - (d) miscellaneous correspondence.

The applicant had previously applied to the Tribunal under application reference

FTS/HPC/CV/20/0481 seeking an order under Rule 111 of the Rules being an application for civil proceedings in relation to a private residential tenancy, which application is ongoing and includes a copy of the private residential tenancy agreement relevant to this application.

DECISION

2. I considered this application in terms of Rule 8 of the 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."

3. After consideration of the application, copy documents and correspondence, I consider that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Rules.

REASONS FOR DECISION

4. '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*". 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.
5. In this application, the applicant purports to rely on ground 8, which is said to be in relation to unpaid rent. This appears to be an error, as Ground 12 is the appropriate ground in seeking an eviction order in relation to unpaid rent in terms of schedule 3 to the *Private Housing (Tenancies) (Scotland) Act 2016*. Ground 8 is the equivalent ground in relation to assured tenancies under the *Housing (Scotland) Act 1988*.
6. The notice to leave, which does purport to rely on ground 12, is dated 26th February 2020, and narrates that the commencement date of the private residential tenancy agreement is 12th December 2019. That commencement date is shown in both the tenancy agreement itself, and is again repeated in the section 11 notice provided. In part 3 of the notice to leave, it is stated "the tenent on the 12/3/2020 will have not paid rent for three months" (sic).
7. The accompanying rent arrears statement shows that the first rental payment on 12/12/2020 (which appears to be an error, and should read 12/12/2019) of £420.00 was paid by the Respondent, but that thereafter he made no payment in respect of rental due on 12/01/2020, 12/02/200 and 12/03/2020.
8. Ground 12 in Schedule 3 of the *Private Housing (Tenancies) (Scotland) Act 2016* provides that "it is an eviction ground that the tenant has been in arrears for three or more consecutive months".

9. It is quite clear that as at the date of the notice to leave dated 26th February 2020, the tenant had not been in arrears for three or more consecutive months, and accordingly the notice is invalid.

10. In *Majid v Gaffney & Anr.* [2019] UT 59, the Upper Tribunal stated at paragraph 14 in relation to the reliance on ground 12 in a notice to leave:
“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...”.

11. That being so, this application seeking an eviction order in relation to a private residential tenancy has no prospect of success, and accordingly it must be rejected upon the basis that it is frivolous.

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.



Neil Kinnear
Legal Member
28th July 2020