



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”)

In connection with
4 Knowe Road, Chryston, Glasgow, G69 9BQ (House)

Case reference FTS/HPC/EV/22/0682

Parties

Mr Steven Taylor, Mrs Donna Taylor (Applicant)

Mr Marc Sutherland (Respondent)

CODA Estates (Applicant’s Representative)

Background

1. An application was received from the first named Applicant via his representative dated 7th March 2022. 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 S.51 of the Private Housing (Tenancies) (Scotland) Act 2016 (hereinafter referred to as the Act). The Applicant lodged the following documents allowing with his application:
 - Tenancy document for the Property
 - Notice to Leave dated 17th August 2021
 - S11 Notice and e-mail to the local authority
 - Mandate to the representative
 - Rent statement
2. The Applicant applied to recover possession of the Property on Ground 12 the ground that more than 3 months consecutive rent is due in terms of Ground 12 of Schedule 3 to the Act,
3. A further information request was sent to the Applicants on 30th March 2022 requesting
“I refer to your recent application which has been referred to the Chamber President for consideration. Before a decision can be made, we need you to provide us with the following: 1. Please confirm if the joint owner should

be added as joint Applicant or provide written authority from her for the application to proceed in the sole name of the Applicant. 2. Please confirm how and when the Notice to leave was given to the Respondent, and provide evidence of this. 3. The Notice to leave appears to be invalid as the Respondent does not appear to have been in rent arrears over 3 consecutive months at the date of service of the Notice. According to the rent statement the consecutive arrears started on 12 June 2021 as the only sum outstanding for May is a charge for late payment, not rent. Please confirm why you think that the Tribunal can consider the application. You may wish to consider the Upper Tribunal decision in the case of Majid v Gaffney 2019 UT 59. 4. The Form F needs to specify the sum being sought. Please provide an amended form which provides this. " Please reply to this office with the necessary information by 13 April 2022. If we do not hear from you within this time, the President may decide to reject the application."

4. The Applicant's representative responded on 4th April advising That they wished a joint owner to be added, namely Ms Donna Taylor and giving her details and advised the Notice to leave was "emailed to tenant on 17-08-2022, copy of email attached. Notice was also posted to tenant not recorded delivery. Tenant was also given a copy of the notice when he was in the office 14/12/2021".

With regard to the question as to how 3 months' rent was due and owing when the notice to leave was sent the Applicant responded "– tenant owed rent for 12/06/2021 - 11/07/2021 £495.00, 12/07/2021 - 11/08/2021 £495.00 and 12/08/2021 - 11/09/2021 £495.00. Therefore I believe when notice was issued the tenant owed 3 months' rent. Referring to tenant's statement – rent paid late for period 12/03/2021 - 11/04/2021 (2 transactions £250 paid on 19/03/2021 + £245 paid 26/03/2021) rent paid late 16/04/2021 for period 12/04/2021 - 11/05/2021 rent paid late 04/06/2021 for period 12/05/2021 - 11/06/2021 Furthermore, the payment we received on 04/06/2021 was the last payment we received until 14/012/2021

5. A further request for information was sent by the Tribunal on 22nd April 2022 asking for clarification and saying:-
"Before a decision can be made, we need you to provide us with the following: 1. You have now added the joint owner as a further applicant. Please thus also provide authorisation by the joint owner to the agent for both applications. 2. For EV/22/0682: please note that the UT in the decision Majid v Gaffney 2019 UT 59 appears to specifically address the situation described in your email: In the decision Sheriff Fleming writes in paragraphs 8 and 9:" [8] The tenancy in this application is a private residential tenancy. It can only be brought to an end under Part 5 of the Private Housing (Tenancies) Scotland Act 2016 hereafter " the 2016 Act"). In this case the applicant sought to bring the tenancy to an end by means of an application for an eviction order. The original application for the eviction order by the appellant was necessarily accompanied by a Notice to Leave which was dated 1st July 2019 and which had been served on the tenant. It stated " You are in rent arrears of £1525 from rent due 30/4/19, 31/5/19 and 30/6/19. Despite repeated reminders and promises of payment, your account remains in arrears." [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 30th April 2019 then the Supported by the Scottish Courts and Tribunals Service www.scotcourtsribunals.gov.uk expiry of the three month period would be 30th July 2019. As at 1st 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.” Please also note that the quoted UT decision was recently further confirmed in the decision UTS/AP/21/0037 by Sheriff Kelly. 3. Please make representations as to how you consider the situation is different in the current application. Please reply to this office with the necessary information by 6 May 2022. If we do not hear from you within this time, the President may decide to reject the application.

Decision and Reasons

6. The Applicant did not respond. A further reminder was sent on 31st May 2022 by e-mail to the Applicant’s representative but there has been no response.
7. The Applicant has provided information regarding the amount of rent that was due and owing at the date of the service of the Notice to Leave, namely no rent was paid on 12th June, 2021, 12th July 2021 and 12th August 2021.
8. The Applicant is relying on a Notice to Leave dated 17th August 2021 which gives details of the eviction ground they are relying on as Ground 12 of Schedule 3 of the Act. The reasons stated in the Notice to Leave for the grounds being met are “You have been in arrears for more than 3 months”
9. S 52(3) of the Act states “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.”
10. S 62 of the Act sets out the requirement of the notice to leave and stated eviction ground namely
11. “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

12. The Tribunal issued several requests for further information as set out above. The Applicant has not responded to the last two requests for information.
13. 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 it is frivolous in terms of Rule 5 (4) and 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 Legal Member notes that the Notice to Leave was sent on 17th August 2021 and states that proceedings will not be raised until 20th February 2022. From the rent statement lodged and from the submissions of the Applicant it is clear rent became due on 12th June 2021 and was then in arrears by one month by 12th July 2021. Rent was not paid on 12th July or 12th August, and so by 17th August 2021 when the Notice to Leave was sent over 2 full months’ rent was in arrears. Although

a third rent payment became due on 12th August the arrears were only around 2 1/4 months at the time the Notice to Leave was served. This does not meet the requirements of the Act namely the ground of eviction **must be satisfied at the date of service of the Notice to Leave.**

8. This is clearly set out by the Upper Tribunal in the case of Majiid v Gaffney. The facts in that case were that the Applicant had submitted an application for eviction under Ground 12. The application was rejected by the First Tier Tribunal on the ground that the Respondent had not been in rent arrears for three or more months at the date of service of the Notice to Leave. The Upper tier Tribunal refused the application for permission to appeal and stated

“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 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.

At page 5 of the decision Sheriff Fleming goes on to state

“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 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. “

13. Whilst the Tribunal appreciates that the Applicant may not like the consequences of the statutory provision, the Tribunal is satisfied that both the Act and the Upper Tier Tribunal decision, which has now been reaffirmed in a further decision by the Upper Tier Tribunal namely *UTS/AP/21/0037* is correct. The First Tier Tribunal is bound by these decision which are clear and leave no discretion. The arrears must be for three months and over before Ground 12 is met and any Notice of Leave reliant on arrears of less than that is not valid. The Arrears in this application at the date of the Notice to leave were not 3 months or over in arrears. Accordingly, for this reason, this application must be rejected upon the basis that I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1)(a) and (c) of the Procedural Rules. The mandatory requirements of the Act are not 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.

Jan Todd

20th June 2022

Legal Member