



**DECISION AND STATEMENT OF REASONS OF JOSEPHINE BONNAR,
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

39 Broad Street, Peterhead, AB42 1JB ("the Property")

Case Reference: FTS/HPC/EV/20/0812

Goldwells Property Ltd 37 Broad Street, Peterhead, AB24 1JB ("the Applicant")

**Anthony Bains, Jodie Leanne Hope, 39 Broad Street, Peterhead, AB24 1JB ("the
Respondent")**

1. By application received on 9 March 2020 the Applicant seeks an eviction order in terms of Rule 109 of the Rules and Section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act"). The Applicant lodged a copy private residential tenancy agreement and copy Notices to Leave together with Sheriff Officer Certificates of service in support of the application. The eviction ground stated in the Notice to Leave is ground 14, antisocial behaviour. The Notices are dated 30 January 2020. They were served by Sheriff Officer on 31 January 2020. Part 4 of the Notices state "An application will not be submitted to the Tribunal for an eviction order before 28 February 2020. 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)".
2. On 27 April 2020 a request for further information was sent to the Applicant.

The Applicant was asked to clarify the basis upon which the Tribunal could consider the application as the Notice to Leave appeared to be invalid, the reason being that the date specified as the earliest date that an application could be made is incorrect. On 6 May 2020 the Applicant provided a lengthy response to the request for further information. In summary the Applicant stated that (1) It is accepted that the date appears to be incorrect and should be 29 February 2020. This is a drafting oversight by the solicitor who prepared the Notice but does not render the notice invalid, (2) Section 52 of the 2016 Act does not require the Notice to Leave submitted to be free from mistakes and a drafting error does not prevent the Tribunal from considering the application, (3) The application was not submitted until 6 March 2020. As a result section 54 of the 2016 Act was not breached and the landlord did not seek to rely on an incorrect notice period specified in the Notice, (4) Section 62 of the 2016 Act identifies the components of the Notice to leave but does not state that the Notice is invalid if one of the components is absent (5) the Tribunal requires to take account of the overriding objective and should be fair and flexible and (6) The error in the Notice to Leave does not fall within one of the grounds for rejection of an application in Rule 8 of the procedure rules.

DECISION

3. The Legal Member 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;

(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.”

- 4. After consideration of the application and the documents submitted by the Applicant in support of same, the Legal Member considers 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

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 LR9. He indicated at page 16 of the judgment; *"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 the Legal Member has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success.
6. The Legal Member is satisfied that the Notice to leave which accompanies the application is invalid. The Notice was served by Sheriff Officer on 31 January 2020. The date which is specified in the Notice as the earliest date upon which an application to the Tribunal can be made is 28 February. It should be 29 February 2020. This is conceded by the Applicant. The relevant sections of the 2016 Act are as follows:-

52 Applications for eviction orders and consideration of them

...

(2) The Tribunal is not to entertain an application for an eviction order if it is made in breach of—

(a) subsection (3), or

(b) any of sections 54 to 56 (but see subsection (4)).

(3) 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.

54 Restriction on applying during the notice period

(1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.

(2) The relevant period in relation to a notice to leave—

(a) begins on the day the tenant receives the notice to leave from the landlord, and

(b) expires on the day falling—

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

...

(3) This subsection applies if—

...

(b) the only eviction ground, or grounds, stated in the notice to leave is, or are...

(v) that the tenant has engaged in relevant antisocial behaviour,

...

(4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3).

62 Meaning of notice to leave and stated eviction ground

(1) 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 order 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), and

(d) fulfils any other requirements prescribed by the Scottish Ministers in regulations.

...

(4) 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.

7. For the purposes of section 62(1)(d), the relevant regulations are the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017, schedule 5 of which sets out the prescribed form for a notice to leave. Part 4 of that form is set out as follows:

Part 4 THE END OF THE NOTICE PERIOD

An application will not be submitted to the Tribunal for an eviction order before (insert date). This is the earliest date that the 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).

8. In terms of Section 54 the relevant notice period in this case is 28 days. The Notice period expired on 28 February 2020. The date which should be specified is 29 February 2020. The Applicant concedes this but argues that Section 52 does not require the Notice to be free from mistakes. The Legal Member is not persuaded by this argument. It is Section 62 which provides a definition of the Notice to leave for the purposes of the Act. In terms of Section 62 the Notice must be in writing, in the prescribed form and state a date. That date is the day falling after the day on which the notice period defined in Section 54(2) will expire. In this case that date was 29 February 2020. Therefore, in order to comply with Section 62, the date which ought to have been specified in the notice was 29 February 2020.
9. As the date specified is incorrect, the Notice to leave submitted with the application is not a notice to leave under Section 62. The Applicant argues that Section 62 does not state that the Notice is invalid if any of the 4 requirements (or components) are absent. The Legal Member is not persuaded by this argument. The opening words of Section 62 state that a notice to leave is a notice which fulfills the four requirements (a) to (d). If the notice does not fulfil any of those requirements, it is not a notice to leave under the Act.
10. The Legal Member concludes that, if the Notice to Leave is not a “notice to leave” in terms of the Act, then the Applicant has failed to comply with Section 52(3) and the Tribunal cannot “entertain” the application.

11. The Applicant argues that the error in the notice is a minor drafting error. Section 73(1) and (2)(d) of the 2016 makes provision for minor errors in Notices to Leave. Subsection (1) states. "An error in the completion of a document to which this section applies does not make the document invalid unless the error materially affects the effect of the document." It follows that where the error does materially affect the effect, then that error makes the document invalid. It also follows that the test "materially affect the effect" is the only basis upon which the Tribunal can conclude that a Notice to leave is valid where there has been an error in its completion. The explanatory note to Section 73 states "105 Section 73 provides that any errors in specified documents do not invalidate the document if they are sufficiently minor that they do not materially alter the effect of the document. Of necessity, there are a number of documents which the Act requires the use of at certain times. This section ensures that a common sense approach can be taken to meeting these requirements, and a party is not penalised for an obviously minor error. The protection applies equally to landlords and tenants".
12. The Legal Member is satisfied that the word "effect" in Section 73 denotes the effect the notice is intended to have, if it is completed without any mistakes. In terms of Section 62, a Notice to Leave will give the tenant certain information. This includes the day on which the landlord under the tenancy in question expects to become entitled to make an application to the Tribunal for an eviction order, being the day after the notice period expires. This is part of the form that requires to be completed by the landlord.
13. The Legal Member is also satisfied that an error "affects the effect" of the notice if, as a result of the error, the notice does not give the tenant that information. In this case, the error clearly does affect the effect of the notice because a correct notice would have informed the tenant that the 29 February was the earliest date on which an application could be made. This was not the case.
14. The Applicant argues that the effect of the notice was not materially affected by the error because the Respondent suffered no prejudice. The reason given is that the Applicant did not lodge the application until 6 March 2020. The Legal Member is not persuaded by this argument. Firstly, the validity of a notice cannot be determined by circumstances which occur after it was served. If that were the case, it might not be possible for the Tribunal to judge whether a notice was valid and whether an application ought to be entertained, without firstly determining what happened after service. Secondly, Section 73 provides the only route for an otherwise defective notice to be valid. That test involves assessing whether the notice provides certain required information. Therefore a notice cannot be cured by events which occur after the tenant has received it. The Legal Member is satisfied that the information required expressly by the 2016 Act (referred to by the Applicant as the components) are fundamental to

the Notice to leave. The Notice should, at the very least, correctly inform the tenant of when the application can be made. To state an earlier date than the date which the statute stipulates is not “an obviously minor error”, it is an error which causes the notice to fail to achieve one of its fundamental purposes.

15. The Legal Member concludes that, in terms of section 73, the error in the notice does materially affect the effect of the notice. It is accordingly invalid. It is not a notice to leave in terms of Section 62 of the Act and is therefore not a notice to leave in terms of Section 52(3). Accordingly, the Tribunal cannot entertain the application

16. The last part of the Applicant’s submission is that the Tribunal must have regard to the overriding objective when assessing the application and that a defective notice is not a basis for rejection of an application in terms of Rule 8. The Legal Member is satisfied that, in reaching the decision, consideration has been given to the overriding objective. The requirement to be flexible is in the context of the conduct of proceedings, not in the application of the relevant law to the application. With regard to Rule 8 the Legal Member is satisfied that, for the reasons previously stated, that the application is frivolous, misconceived and has no prospect of success. The application is rejected on that basis.

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.

J. Bonnar

Josephine Bonnar
Legal Member
27 May 2020