



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

Property at 2/2 1 Ashburn Gate, Gourock

Case Ref: FTS/HPC/EV/20/1101

Parties: Debbie Robertson, 36 Dunvegan Avenue Gourock, PA19 1AE (“the Applicant”)

Ms Lynsey Robertson, residing at 2/2 1 Ashburn Gate, Gourock (the Respondent)

1. An application was received from the Applicant via her solicitor. 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 S51 of the Private Housing (Tenancies) (Scotland) Act 2016 (hereinafter referred to as the Act). The Applicant lodged the following documents allowing with her application:
 - Short assured Tenancy document for the Property entered into between the applicant and the respondent dated 12th July 2019
 - Notice to Leave dated 16th March 2020
 - S11 Notice dated 17th April 2020 to Inverclyde council
 - Rent statement to 12th April 2020 showing rent due of £1980
2. The Applicant has applied to recover possession of the Property on the ground that more than 3 months consecutive rent is due in terms of Ground 12 of Schedule 3 to the Act.
3. The Rent arrears statement lodged with the application states the rent first became due and was not paid on 12th January 2020. The rent due previously on 12th December 2019 having been paid.
4. The Applicant referred to a Notice to Leave dated 16th March 2020 which gave details of the eviction ground namely Ground 12 of Schedule 3 of the Act that “In terms of your tenancy rent falls due on 12th day of each month at £495 per month commencing on 12th July 2019. Your rental account has been in arrears

since January 2020. There is a current balance due of £1485. At present there are mandatory grounds of recovery.”

5. 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.”
6. S 62 of the Act sets out the requirement of the notice to leave and stated eviction ground namely
7. “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
8. The Tribunal issued 2 requests for further information. The first dated asked for information about the nature of the tenancy, clarifying it was a private rented tenancy given that the lease purported to be a short assured tenancy; asking for the consent of the joint owner and raising a question about the dates of service of the Notice to Leave. The Applicant responded to those points clarifying the type of lease was an error and confirming that given the date the tenancy was entered into it was a private rented tenancy; providing the consent of the joint owner and responding to the query re dates of service as follows:-

I maintain that the active date on the NTL is correct. I have allowed 48hrs for service in terms of 62(4) with 28 days running from day 2. I have also allowed for the additional day in accordance with 62(5). The notice was served by Sheriff Officer and arguably 28 days runs from the date of service. If so, I have given additional notice. In that event, I will ask the tribunal to exercise discretion under reference to the views expressed by Legal Member Adrian Stalker in Holleran v McAlister FTS/HPC/EV/18/3231.

9. The Tribunal then issued a further request for information on 11th June 2020 as follows:-

“It appears from the Notice to leave and the rent statement lodged that the rent account went into arrears on 12 January 2020. The Notice to leave was served in March 2020. It does not appear that at least three months of arrears were established at the date of service. Having regard to the Upper Tribunal decision in the case of Majid v Gaffney and Britton 2019 UT 59 please clarify the basis upon which the Tribunal can consider the application.”

10. The Applicant’ agent responded advising

“While I recognise that the tribunal may be bound by the approach taken by Sheriff Fleming I am instructed to make you aware of my client’s circumstances and to take issue with the reasoning in the Sheriff’s decision.

This case was accepted as being one of urgency based on the Respondent’s history of involvement in prior applications to the tribunal. She has been subject to two separate applications by her two previous landlords. My email of 17th April 2020 refers. It would appear clear that she is aware of the steps which need to be taken before securing an order for eviction and is taking advantage of the timescales involved to maximise her rent free occupation of the subjects. When our application was submitted the rental balance was £1,485. The balance now stands at £2,970 with no payments made since December 2019. A current statement is attached. I should also add that the tenant is refusing access to the property while asserting that it is in need of repair. The applicant is now in financial hardship and finding difficulty in meeting her mortgage over the subjects.

The application is submitted on Ground 12- due to rent arrears for three or more consecutive months. When the NTL was served the rent due for the months of January, February and March were due and therefore in arrears. The approach taken by Sheriff Fleming in Gaffney interprets the ground as requiring three or more consecutive *calendar* months of rent arrears. With respect, there is nothing in the act or indeed in any of the guidance issued by the government or on the tribunal’s website which justifies this interpretation. If the reasoning in the Gaffney decision is correct a landlord in the applicant’s position would need to wait until 12 April before serving a Notice, by which time 4 months of rent would be in arrears. The Notice would not then be active for a further 31 days when 5 consecutive months of rent would be due. Due to the additional Covid rules the notice would not be active for 10 months.”

3. DECISION

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 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 16th March 2020 and states that proceedings will not be raised until 15th April 2020. From the rent statement lodged with the application and from the submissions of the Applicant it is clear rent became due and owing on 12th January and the Applicant maintains has not been paid since. By the 16th March just over 2 full months’ rent was in arrears, from 12th January to 12th March and 4 days thereafter. Although a third rent payment became due on 12th March the arrears were only just over 2 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. “

9. Whilst the Tribunal appreciates that the Appellant may not like the consequences of the statutory provision, the Tribunal is satisfied that both the Act and the Upper Tier Tribunal decision, which it is bound by, are clear. 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.

10. 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.

Legal Member

3 July 2020