



**DECISION AND STATEMENT OF REASONS OF PETRA HENNIG MCFATRIDGE 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 Procedural Rules")

in connection with

27 Kirk Street, Strathaven ML10 6LB

Case Reference: **FTS/HPC/EV/20/1524**

**Sandra Nelson("the applicant")**

**Mark Andrew Murphy ("the respondent")**

1. The application under Rule 109 of the Procedural Rules was made to the First-tier Tribunal for Scotland Housing and Property Chamber (the Tribunal) on 14 July 2020.
2. The application was made under Rule 109 of the Procedural Rules being an application for an eviction order under S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act).
3. After several requests for documentation and further information from the Tribunal to the applicant, the application was ultimately lodged with the following documents: Private Residential Tenancy Agreement between the parties for the property commencing 6.11.2020, Notice to Leave dated 25.2.2020 with a date for raising the application stated in part 4 as 27.3.2020,

a rent statement attached to same showing first arrears arising on 6.12.2019 and rent arrears for the period to 5.3.2020, S 11 notice and email serving same, rent statement for the period of 6.11.2019 to 6.9.2020 and authorization of Purple Bricks by the applicant. The documents referred to above are referred to for their terms and held to be incorporated herein.

4. Clause 8 of the tenancy agreement states that the first rental payment is due on 6 November 2019 and payments are thereafter due on the 6th day of each month for the month in advance. The rent is £475 per calendar month.
5. The Notice to Leave is dated 25.2. 2020 and in terms of Part 4 of the Notice to Leave the first day on which proceedings can be raised with the First tier Tribunal Housing and Property Chamber is stated in the Notice to Leave as 27.3.2020.
6. The ground/s of eviction referred to in the Notice to Leave and the application is/are: You are in rent arrears over three consecutive months.
7. In part 3 of the application it is stated:  
**You are in rent arrears over three consecutive months for the rental period of**  
06.02.2020 to 05.03.2020  
06.01.2020 to 05.02.2020  
06.12.2019 to 05.01.2020

**We attach the following evidence to support the eviction action:**

**Statement of account**

8. The statement of account shows that there is a £0 balance on 6.11.2019 and the arrears are listed for the payments due on 6.12.2019, 6.1.2020 and 6.2.2020. The latter covers the period of 6.2.2020 to 5.3.2020.
9. On several occasions and in particular on 16.9.2020 the Tribunal asked the applicant to provide the tenancy agreement, Notice to Leave and proof of service, S 11 notice and

proof of service, rent statement and proof that the tenant was aware the payment was being sought.

10. On 29.9.2020 some of this information was finally provided by Purple Bricks. The Tribunal was only able to consider the documentation once authorisation of Purple Bricks was provided by the applicant on 5.10.2020.
11. The Notice to Leave details were provided by Purple Bricks with the comment that the Notice to Leave was sent by first class mail.
12. The application is made on Grounds 11 and 12.
13. The documents lodged and the case correspondence are referred to for their terms and held to be incorporated herein.

## **DECISION**

14. I considered the application in terms of Rule 8 of the 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."*

15. After consideration of the application, the attachments and correspondence from the Applicant, I consider that the application should be rejected in terms of Rule 8 (c) of the Rules of Procedure on the basis as the FTT has good reason to believe that it would not be appropriate to accept the application.

## **REASONS FOR DECISION**

Relevant legislation:

**Rule 109.** Where a landlord makes an application under section 51(1) (for an eviction order) of the 2016 Act, the application must—

(a) state—

(i) the name, address and registration number (if any) of the landlord;

(ii) the name, address and profession of any representative of the landlord;

(iii) the name and address of the tenant [\[F72](#)(if known)]; and

(iv) the ground or grounds for eviction;

(b) be accompanied by:

- i. evidence showing that the eviction ground or grounds has been met
- ii. a copy of the notice to leave given to the tenant as required under section 52(3) of the 2016 Act
- iii. a copy of the notice given to the local authority as required under section 56 (1) of the 2016 Act

S 52 of the Act states: Applications for eviction orders and consideration of them

(1) In a case where two or more persons jointly are the landlord under a tenancy, an application for an eviction order may be made by any one of those persons.

(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.

(4) Despite subsection (2)(b), the Tribunal may entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable to do so.

(5) The Tribunal may not consider whether an eviction ground applies unless it is a ground which—

(a) is stated in the notice to leave accompanying the landlord's application in accordance with subsection (3), or

(b) has been included with the Tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought.

16. I consider that the lodging requirements in terms of Rule 109 b are not met for the following reasons:

17. I consider that the requirement in s 52 (3) of the Act and Rule 109 (b) (ii) of the Procedure Rules is not met in this case. The Tribunal can only entertain an application if it is accompanied by a Notice to Leave. I consider that this requirement means that a valid Notice to Leave has to be submitted with the application.

18. In this case the Notice to Leave to the respondent was dated 25.2. 2020.

19. The applicant failed to provide evidence that the Notice to Leave was validly served. The only evidence provided for service of the Notice to Leave is the statement in the email from Purple Bricks dated 29.9.2020 " A copy of the Notice to Leave with evidence of how and when it was served. Attached – sent to tenant 1st class post ". In terms of S 26(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, service of a document can be carried out by personal delivery, sending the document to the proper address by registered post or a postal service which provides for the delivery of the document to be recorded or by electronic communications.

20. First class post without recorded delivery is not a valid way of service.

21. The tenancy agreement in clause 4 further states that : "The Landlord and Tenant agree that all communications which may or must be made under the Act and in relation to this Agreement, including notices to be served by one party on the other will be made in writing using: The email addresses set out in clauses [2 or 3] and 1]. "

22. Service was not carried out in accordance with that provision.
23. Thus the Notice to Leave was not validly served.
24. Furthermore, even if one considered the service by post sufficient, the Ground under which the Notice to Leave was sent was not met at the time the Notice to Leave was sent.
25. Ground 12 (1) of Schedule 3 of the Act requires the following: “12 Rent Arrears (1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.”
26. Sheriff I Fleming in the Upper Tribunal decision [2019] UT 59 Abdul Majid v Adele Gaffney and Andrew Robert Britton of 17 October 2019 stated in para 9” ... *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 months 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. “ and in para 14: “... It is clear that the words “expects” relates to the date on which the application will be made. That is entirely distinct from the eviction ground. 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 a as a basis for overcoming the security of tenure.....” This clearly sets out that the requirement of a valid Notice to Leave is that at the time the Notice to Leave is served the ground on which the notice is based must exist.*
27. In terms of the Notice to Leave however ground 12 clearly requires three months consecutive rent arrears. The rent statement shows that the arrears started on 6.12.2019. Rent payments were thereafter due on 6.1.2020 and 6.2, 2020. However, by

the date of the Notice to Leave on 25.2.2020 the respondent could not have been in arrears of 3 consecutive months. The arrears first arose on 6.12.2019 and thus the total period between 6.12. 2019 and 25.2. 2020 was less than 3 full months. Applying the reasoning of the Upper Tribunal as set out above it is clear that at the time the Notice to Leave was signed and allegedly sent the conditions for ground 12 did not yet exist. The Notice to Leave is thus not valid.

28. It would not be appropriate for the Tribunal to entertain an application that is not based on a valid Notice to Leave in terms of S 52 (3) of the Act and Rule 109 of the Procedural Rules.
29. For the reasons stated above the application was not validly made. The Tribunal cannot entertain the application. The application is rejected.

### **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.**

Petra Hennig McFatridge  
Legal Member  
14 October 2020