



**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

Case reference FTS/HPC/EV/22/4305

Parties

Drum Farm LLP (Applicant)

Ms Ria Thomson (Respondent)

Mrs Philippa Hastings (Applicant's Representative)

West Lodge, 143 Drum Street, Edinburgh, EH17 8RU (House)

PROCEDURAL BACKGROUND:

1. The application 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) was received by the Tribunal on 30.11.22 but was dated 4.7.22. The explanation

provided was that the application had previously been sent in paper form. No proof of posting or specific date was provided.

2. When the application was received by the FTT the ground stated on the application was Ground 8A and the only documents lodged with the application were a cover letter and first page of the Notice to Leave and undated photographs of an envelope being inserted in a letterbox on a door, a S 11 notice and an email to the agent dated 1.6.22 stating some payment records for the Respondent and a sum of arrears of £27,705.
3. On 28.12.22 the FTT wrote to the Applicant's agent in the following terms: 1. Please advise on which ground you base your application. Ground 8A is not a ground stated in schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016. 2. Please provide the Notice to Leave. You have only provided one page as a screenshot to date. 3. Please confirm on which date the Notice to Leave was given to the tenant. The photographs submitted do not show a date. 4. Please provide evidence of service of the S 11 notice on the local authority. 5. Please provide an up to date rent statement in the following format: date, rent due, rent paid, running total of arrears. 6. Please provide evidence that the pre action requirements were complied with. 7. Please provide a copy of the tenancy agreement. 8. Because the application did not reach us until 30.11.2022 the new Cost of Living (Protection for Tenants) (Scotland) Act 2022 now applies to the application. Please consider the attached letter and advise of your position.
4. There was no reply.
5. The FTT wrote again on 2.2.23 "We refer to our letter of 28th December requesting further information before your application can be considered fully. We note we have not received any response. We enclose a further copy of that letter and would note that if the Notice to leave you are seeking to rely on was served on or around 3rd June 2022 it may be that the notice is no longer valid as any application must be made and accepted using a Notice to leave that is in force, and it expires after 6 months. Please now advise if you wish to proceed with this application in which case please address the points raised in our previous letter and comment on the validity of the Notice to leave in respect of this application and S.55 of the 2016 Act. Alternatively if you wish to withdraw this application reserve the Notice to Leave and reapply after it expires, please advise in writing."
6. Following a telephone call the request was again re-sent on 1.3.23.
7. On 3.3.23 the FTT received from the Applicant's agent the following reply: "Please find attached the additional information you requested. 1. We base our application on ground 12 from Schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016 2. Notice to leave attached 3. Notice to leave was delivered on the 3rd June 2022. The same date as the letter is dated. I have dated video footage of it being hand delivered if this is required. 4. I will forward on the S11 notice shortly. 5. Rent statement attached. 6. Can you please clarify what evidence you require of pre action requirements. We have emails and texts to the tenant trying to make

contact. Is this what you are looking for? 7. Tenancy agreement attached.” The following documents were attached: Tenancy agreement, rent statement .

8. This then disclosed that the Notice to Leave states in part 4 the date of the notice as 3.6.22 and the date proceedings could be raised at the earliest “1st July 2022”.
9. The FTT thereafter raised the following issues in correspondence of 28.3.23 to the Applicant’s agent.” With regard to the Notice to leave you have advised it was hand delivered and we can see the photograph you have provide dshowing this. However in terms of the Act a notice to leave to be valid should give 28 days, (plus2 for service if made by e-mail or post if necessary) and specify the day after the day on which the notice period defined in S54(2) of the Act will expire. If it was served by hand on 3rd June the 28 days would expire on 1st July and the date to be specified would appear to be 2nd July and the date actually specified is the 1st July. If this is correct please advise how the Notice to Leave can be valid if it specifies the wrong day? 2. In addition more than 6 months has elapsed now since the expiry of the Notice to leave as advised in our last letter and this means the Notice to Leave would not be able to be relied upon in terms of S55 of the 2016 Act. Again please give us legal submissions why you believe your application based on this Notice to leave which is now over 6 months old could be valid? 3. With regard to the request regarding the S11 notice we require to see how it was served on the local authority we do have a copy of the Notice itself. 4. We would also confirm that correspondence between the applicant and the tenant regarding the rent arrears would be useful to receive if you are maintaining this application. Whether or not they are sufficient to meet the requirements of the pre action legislation would be up to the Tribunal to determine if the matter is accepted and proceeds to a case management discussion.”
10. The Applicant’s agent requested this to be re-sent in a telephone call and the request was re-sent on 12.4.23.
11. On 18.4.23 the following reply was received: “With regards to the additional information requested. 1. The date of the notice being the 3rd June and being hand delivered on the 3rd June. By my calculation 28days from that date is the 1st June, as the notice states. 2. The original tribunal application was sent by post and appears to have gone missing. This was all explained in the re sent email with the full original application attached. 3. The S11 was sent by post as with the above. Sent from the Pathhead, Midlothian post box. As you say you have a copy. I don’t know how I can otherwise evidence the sending of it. 4. I am sending all email correspondence between the applicant and the tenant in a separate email to you. Please let me know if for any reason you do not receive it. “
12. On 5.5.23 and again on 22.6.23 the FTT wrote with the following request for representations: “You indicate your belief that an appropriate period of notice has been given to the tenant . Can you consider the terms of the Private Housing (Tenancies) (Scotland) Act 2016 (and particularly sections 54(2), 62(4) and 62(5) of that Act) and confirm whether the Notice To Leave (NTL) meets the requirements of those sections with particular regard to (a) the appropriate period of notice and (b) the date to be specified in the NTL as 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, and whether it should be regarded as valid. Can you please consider the terms of section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 and confirm why you believe that your method of service upon this tenant (which seems to consist of putting the notice through a letterbox) is valid and effective. You may wish to obtain independent legal advice on the matters contained in this letter. Please reply to this office with the necessary information by 19 May 2023. If we do not hear from you within this time, the President may decide to reject the application.

13. The latest letter stated as the date for a reply 6 July 2023.
14. No representations have been received by 6.7.23 addressing these issues.
15. The case documents and all correspondence in the case are referred to for their terms and held to be incorporated herein.

DECISION

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."

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 Tribunal has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION:

Applicable Legislation:

S 62 of the Private Housing (Tenancies) (Scotland) Act 2016 states:

62 Meaning of notice to leave and stated eviction ground

This section has no associated Explanatory Notes

(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. ...

S 54 of the said Act states:

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,

(ii)84 days after it begins if subsection (3) does not apply.

(3)This subsection applies if—

(a)on the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than six months, or

(b)the only eviction ground, or grounds, stated in the notice to leave is, or are, one or more of the following—

(i)that the tenant is not occupying the let property as the tenant's home,

(ii)that the tenant has failed to comply with an obligation under the tenancy,

(iii)that the tenant has been in rent arrears for three or more consecutive months,

(iv)that the tenant has a relevant conviction,

(v)that the tenant has engaged in relevant anti-social behaviour,

(vi)that the tenant associates in the let property with a person who has a relevant conviction or has engaged in relevant anti-social 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).

S 52 of the Act states:

52 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.

S 55 Restriction on applying 6 months after the notice period expires

(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 more than six months after the day on which the relevant period in relation to that notice expired.

(2)In subsection (1), "the relevant period" has the meaning given in section 54(2).

(3)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).

S 73 of the Act states:

73 Minor errors in documents

(1) 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.

(2) This section applies to—

...

(d) a notice to leave (as defined by section 62(1)).

Findings and Reasons:

16. The application is based on a Notice to Leave which shows that the notice period of 28 days expired, accepting the date of service as 3.6.22, on 1.7.22. In terms of S 55 of the Act 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 more than six months after the day on which the relevant period in relation to that notice expired. The relevant period expired on 1.7.22, the 6 months period stated in S 55 of the Act thus expired on 1.1.23. In terms of rule 5 (3) of the Rules of Procedure the FTT may "request further documents and the application is to be held to be made on the date that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement". Regardless of the issue of the validity of the Notice to Leave as set out below, whilst the application reached the FTT on 30.11.23, it did not at that point meet the lodging requirements as the Notice to Leave

had not been produced in full and thus it was not possible to check the date on the Notice to Leave. The Notice to Leave as a full document had been requested on 28.12.22 and was not produced until 3.3.23, which is a date clearly outwith the 6 months period. It would not be appropriate to accept the application as in terms of S 55 of the Act the notice could at that stage no longer form the basis of a valid application.

17. Furthermore, in terms of S 52 (3) of the Act and rule 109 (b) (ii) of the Rules of Procedure an application must be accompanied by a copy of the Notice to Leave. I consider that this means that a valid Notice to Leave must be submitted with the application. The first question in this case is whether or not the Notice to Leave was a valid Notice to Leave and thus fulfills the requirement of S 52 (3) of the Act and of rule 109 (b) (ii).
18. The issue in this case is the notice period. The expiry of the period stated in S 54 (2) (b) (ii) of the Act will be 28 days after the date of service as the tenant had been entitled to occupy the property for more than 6 months and the ground ultimately states as relevant is ground 12. The date of 1.7.22 as the date on which proceedings first can be raised on the basis of a notice to leave issued on 3.6.22 stated in part 4 of the Notice to Leave is thus incorrect. The date to be entered into the Notice to Leave, if accepting the notice was hand delivered to the Respondent on 3.6.22, should have been 2.7.22, this being 28 days notice period and, as stated in S 62 (4) of the Act, stating the date after the expiry as the date when proceedings could first be raised.
19. The legislation sets out explicitly the dates and periods which have to be observed to create a valid Notice to Leave. A tenant, having so been advised, must then be able to rely on the accuracy of the information provided in the Notice to Leave. The date stated on the notice is not the correct date. The calculation overlooks the provision of S 62 (4) of the Act, which states: "*(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.*"
20. The Tribunal has considered whether S 73 of the Act may be applicable in this case to assist the applicant. This states: (1) 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.

21. In the Tribunal's view, the word "effect" in section 73 (and in the explanatory note) denotes the effect the notice is intended to have if it is completed without error. It follows from section 62(1)(b), (c) and (d) that a notice to leave completed without error will give the tenant certain information, namely: 1. 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 Tribunal, being the day after the notice period expires (section 62(1)(b)). This date is stated in part 4 of the prescribed form, in which the tenant is expressly advised that "An application will not be submitted to the Tribunal for an eviction order before [the date]", 2. The eviction ground on which the landlord intends to seek an order (section 62(1)(c)), which is indicated by ticking the appropriate box in part 3 of the prescribed form, 3. Details and evidence of the eviction ground (section 62(1)(d) and part 3 of the prescribed form, 4. The tenant's details (section 62(1)(d) and part 1 of the prescribed form), 5. The name, address and telephone number of the landlord or his agent (section 62(1)(d) and part 2 of the prescribed form). All these parts of the form require to be completed.
22. In the Tribunal's view, an error in completion "affects the effect" of the notice to leave if, as a result of the error, the notice does not give the tenant that information. In this case, the error clearly "affects the effect" of the notice to leave, because a correct notice would have informed the Respondent of the correct date on or after which an application to the Tribunal could be submitted. That was not done.
23. The notice should, at the very least, correctly inform the tenant of the "why" (the statutory ground) and the "when" of the proceedings that the landlord anticipates raising.
24. To state an earlier date than the date on which, in terms of the Act, the landlord is entitled to raise proceedings is not, in the view of the Tribunal, "an obviously minor error" which could then be dealt with in terms of S 73 of the Act by the Tribunal. It is an error which causes the notice to fail in achieving one of its fundamental purposes.
25. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating "1st July 2022" in part 4 of the notice to leave materially affects the effect of the notice and makes it invalid. It is not a "notice to leave" under section 62. Therefore, the document which accompanied the application to the First-tier Tribunal was not, for the purposes of section 52(3), "a copy of a notice to leave", and accordingly, given

section 52(2)(a), the Tribunal cannot entertain the application.

26. The Tribunal considered whether S 52 (4) of the Act could be of assistance to the Applicant. All S 52(4) allows is to consider an application made in breach of S 54 if it considers it is reasonable to do so. However, stating the wrong date in the Notice to Leave is not a breach of S 54 but a breach of S 62 (1) (b), which prescribes the information to be included in the Notice to Leave. Had the Notice to Leave stated the correct date but had the application been made before that date, then the Tribunal could have considered whether it would have been appropriate to consider the application made e.g. due to time pressure because of antisocial behavior. S 54 relates, as the title states, to “Restriction on applying during the notice period” and it is only a non compliance with that which the Tribunal has discretionary power to consider. The breach in this case is not of S 54 but of S 62 and the Tribunal has no discretionary power to entertain this application as the date stated in the Notice to Leave had been wrongly stated in terms of that provision. As stated above, the only other power potentially applicable, that in S 73, does not apply in this case. It would thus not be appropriate to accept an application which does not comply with the requirement of S 52 and rule 109.
27. For the above reasons the Tribunal considered that it would not be appropriate to accept the application.

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.

P H McFatridge

Petra Hennig McFatridge

Legal Member

2 August 2023