



**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/23/1541

**Parties**

**Mr Stephen Broadley (Applicant)**

**Ms Elizabeth Keenan (Respondent)**

**Mrs Marilyn Kent (Applicant's Representative)**

**158 Croftside Avenue, Glasgow, G44 5ND (House)**

1. The application was made on 11.5.23 to the First-tier Tribunal (the FTT) under rule 109 and S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) using ground 12A of schedule 3 of the Act.
2. After requests for further information various documents were provided with the application. These include a Tenancy Agreement commencing 15.5.19 with two joint tenants, Elizabeth Keenan and Morgan Keenan with clause 8 stating payment of rent of

£595 per calendar month is due in advance on the 15<sup>th</sup> day of the month, a S 11 notice and a Notice to leave to Elizabeth Keenan dated 3.4.23 with an entry in part 4 of 4.5.23 as the first day when proceedings can be raised as well as a rent statement showing that as of the date of the Notice to Leave on 3.4.23 the arrears of rent were £2,514.23. The Applicant further provided a rent increase notice raising the monthly rent to £625, an up to date rent statement and correspondence which is stated to fulfill the pre-action requirements.

3. The FTT wrote to the Applicant on 13.6.23 raising in particular the following two matters:  
“1. You have only made the application against one joint tenant in a Private Residential Tenancy. S 78 (3) of the Private Housing (Tenancy) (Scotland) Act 2016 (the Act) states “ in a case where two or more persons jointly are the tenant under a tenancy, references in this Act to the tenant are to all of those persons unless stated otherwise.” The Tribunal can only grant an application against “the tenant” in terms of S 51 of the Act. Please consider to add the second tenant, in which case you will have to provide their current address and contact details. Should you be unable to do so you can apply for Service by Advertisement (the form can be found on the Tribunal’s website) and you would have to submit this together with a negative trace report from a tracing agent or Sheriff Officers. .... 4. Please make representations as to how the Notice to Leave based solely on ground 12A would be valid. Ground 12A states:“(2)The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if— (a)the tenant has accrued rent arrears under the tenancy in respect of one or more periods, (b)the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months’ rent under the tenancy when notice to leave is given to the tenant on this ground in accordance with section 52(3),”. However, it would seem that at the time when the Notice to Leave was emailed the total amount of arrears did not amount to 6x the amount of rent due (6x£625 = £3,750 but the arrears at the stage of the Notice to Leave are shown as £2,514.23). “
4. The Applicant’s representative replied on 21.6.23: “ Miss Elizabeth Keenan has informed us via text message(attached) that Miss Morgan Keenan has moved out of the above property around hence why we have not put her on the application. I have re-attached the tenancy agreement and rent statement in your format. The tenant has been in rent arrears since May 2022 which means ground 12A would be valid. The Notice to Leave was served on the 3rd April 2023 which takes it over 6 months of rent arrears. These arrears have been built up by non payment of rent of £625.00 for May, June, July, August, September 2022 and the tenant is also not paying the extra £96.51 for the last 8 months. She did receive a payment from DWP for £2,475.00 to use for her rent arrears in October 2022 which they can confirm and the amount would have cleared the arrears. But Ms Keenan did not use the payment for all her rent arrears as she had other debts owed to her brother. .... This is over 6 months when the NTL was served on the 3rd April 2023. The rent statement shows the payments of £528.49.”

5. The file documents are referred to for their terms and held to be incorporated herein.

## DECISION

6. 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."*

7. 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

### Relevant Legislation

### Rules of Procedure:

**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

### Ground 12A schedule 3

#### *Substantial Rent arrears*

12A(1) It is an eviction ground that the tenant has substantial rent arrears.

(2) The First-tier Tribunal may find that the ground named by [sub-paragraph \(1\)](#) applies if—

(a) the tenant has accrued rent arrears under the tenancy in respect of one or more periods,

**(b) the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months' rent under the tenancy when notice to leave is given to the tenant on this ground in accordance with section 52(3), and**

(c) the Tribunal is satisfied that it is reasonable to issue an eviction order.

(3) In deciding under [sub-paragraph \(2\)](#) whether it is reasonable to issue an eviction order, the Tribunal is to consider—

(a) whether the tenant being in arrears of rent over the period or periods in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit,

(b)the extent to which the landlord has complied with the pre-action protocol prescribed by the Scottish Ministers under paragraph 12(4)(b) (and continued in force by virtue of section 49 of the Coronavirus (Recovery and Reform) (Scotland) Act 2022).

(4)For the purpose of this paragraph—

(a)references to a relevant benefit are to—

(i)a rent allowance or rent rebate under the Housing Benefit Regulations 2006 ([S.I. 2006/213](#)),

(ii)a payment on account awarded under regulation 93 of those Regulations,

(iii)universal credit, where the payment in question included (or ought to have included) an amount under section 11 of the Welfare Reform Act 2012 in respect of rent,

(iv)sums payable by virtue of section 73 of the Education (Scotland) Act 1980,

(b)references to delay or failure in the payment of a relevant benefit do not include any delay or failure so far as it is referable to an act or omission of the tenant.

1. The application is made on ground 12A of schedule 3 of the Act and would require, in terms of S 52 (3) of the Act, to be accompanied by a Notice to Leave and in terms of S 56 by a Notice to the Local Authority. The FTT considers that the meaning of this section is that the Notice to Leave has to be a valid Notice to Leave. The same requirements are also stated in rule 109, which is the rule under which the application is made.
2. The Notice to Leave provided is dated 3.4.23 and was served by email on that date on the Respondent only. It states as the only eviction ground on the notice ground 12A. In terms of the tenancy agreement the rent of £625 per month is payable in advance on or before the 15th day of each month. The rent statement lodged with the application shows an amount of arrears as at the date of service of the Notice to Leave of £2,514.23. The requirement of ground 12A is not that the tenant has been in arrears of rent for a period of at least 6 months but that the tenant is in arrears of rent which cumulatively equates to, or exceeds, an amount that is the equivalent of 6 months rent under the tenancy when the notice to leave is given. The amount of rent under the tenancy agreement is £625 per month. The amount equating to 6 times the amount of rent is thus £3,750. The amount of £2,514.23 outstanding as at 3.4.23 is not equivalent to or exceeding £3,750 and thus ground 12 A was not met on the date the notice was served on the Respondent.
3. Although in the context of ground 12, which relates to 3 months consecutive rent arrears, the matter of how to establish the level and duration of arrears of rent for the required period or sum on the relevant day of the Notice to Leave being given to the tenant has been fully and comprehensively dealt with by the Upper Tribunal in at least two decisions, which are binding on the FTT. What is relevant to this case in this context is that the UT held that the ground must be met on the day when the Notice to Leave is given to the tenant.
4. In the decision [2019] UT 59 Majid v Gaffney Sheriff Fleming sets out the requirements of a valid Notice to Leave in cases of rent arrears and states in para 9 “[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 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.” and goes on to say: “[13] The basis for the decision of the First-tier Tribunal is that the Notice to Leave specified a ground for eviction which was not satisfied as at the date of the service. That being the case the notice itself is invalid. [14] The appellant appears to be conflating two separate statutory provisions. In terms of section 62(1)(b) reference is made to a date on which the landlord “expects to become entitled to make an application for an eviction order to the First-Tier Tribunal”. It is clear that the word “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 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.**” The issue was further recently confirmed in the decision of Sheriff Kelly in [2022] UT07 Rafique v Morgan.

5. Having regard to these decisions, the clear requirement for a valid Notice to Leave in arrears cases is that as at the date the Notice to Leave is served on the tenant the requirement for the ground must be met. In cases of an eviction under ground 12A thus the question is whether on the date the Notice to Leave was given to the tenant **the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months’ rent under the tenancy.** The UT also defined that there is a requirement of a tenant being in arrears of rent, not simply owing rent.
6. As the amount of arrears on the date the notice was served was less than 6 times the monthly rent the ground of 12A was not met at that time. The FTT is bound by the clear decisions of the Upper Tribunal on this matter that the requirement is that the ground is met on the day the Notice to Leave is given to the tenant. The Notice to Leave was issued incorrectly and is thus invalid. It would not be appropriate to accept an application based on a Notice to Leave which is invalid.
7. Furthermore, the Notice to Leave was only issued to the Respondent and not to the joint tenant. The application is also made only against the Respondent and not the joint tenant stated on the tenancy agreement. No evidence has been produced that the tenancy with two joint tenants had been terminated correctly and replaced with a tenancy solely in the name of the Respondent. S 78 (3) of the Private Housing (Tenancy) (Scotland) Act 2016 (the Act) states “ in a case where two or more persons jointly are the tenant under a tenancy, references in this Act to the tenant are to all of those persons unless stated otherwise.” The Tribunal can only grant an application against “the tenant” in terms of S 51 of the Act. In the absence of such evidence it would not be appropriate to accept an application directed

against only one joint tenant as the Tribunal would not be able to grant an order against “the tenant” if the application is not directed against the joint tenants, who are “the tenant” in terms of S 78 (3) of the Act .

8. The application is accordingly rejected.
9. For the avoidance of doubt it should be stressed that this decision does not prevent the Applicant from making a fresh application once all requirements as set out in the rules of procedure and the Act are met.

### **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**



Petra Hennig McFatridge  
Legal Member  
20 July 2023