



DECISION AND STATEMENT OF REASONS OF NICOLA IRVINE, 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

169 High Street, Dalkeith, EH22 1BB ("the Property")

Case Reference: FTS/HPC/EV/22/3846

Robert P. Slight & Sons Ltd, Unit B 1 Wallyford Industrial Estate, Wallyford, EH21 8QJ ("the Applicant")

Mr John Friel, 169 High Street, Dalkeith, EH22 1BB ("the Respondent")

1. The Applicant seeks an eviction order in terms of Rule 109 of the Rules and Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act"). The Applicant lodged a copy of the tenancy agreement, Notice to Leave, Section 11 Notice and a letter from estate agents regarding the proposed sale of the property. The application was considered by a Legal Member with delegated powers of the Chamber President. The Notice to Leave was dated 1 July 2022 but was not served on the Respondent until 6 July 2022. A letter was issued to the Applicant's representative on 16 November 2022 explaining that the Notice to Leave appeared to be invalid and requesting an explanation as to why the Tribunal should entertain the application. The Applicant's representative responded by email on 16 November. The Applicant's position was that at part 4, the Notice to Leave contained the date 28 September 2022 and should have contained the date 29 September 2022. It was submitted that the Notice was not invalid on the basis that this was a minor error. Reliance

was placed on Section 73 of the 2016 Act. It was submitted that there was no prejudice to the Respondent on the basis that the application was not submitted to the Tribunal until 18 October 2022.

DECISION

2. 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.

3. **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

4. '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.
5. Consideration has been given to the following statutory provisions contained in the 2016 Act:

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...

...

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

...

(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.

(5) For the purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.

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)).

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).

Signed:

(Landlord(s) or Agent):

Dated:

6. In this case, the date entered in the form after the words “eviction order before” was 28 September 2022. The date of signature was 1 July 2022. Evidence has been produced demonstrating that the Notice was served on the Respondent by sheriff officers on 6 July 2022. The relevant notice period is 84 days on the basis that the Applicant wishes to recover possession based on ground 1. Therefore the notice period began on 6 July and expired on 28 September 2022. In terms of section 62(1)(b), the date which ought to have been specified in the Notice was 29 September 2022. The Notice to Leave does not fulfil the requirements of section 62.
7. It was accepted by the Applicant’s representative that the date which should have been entered in part 4 was 29 September 2022.
8. In terms of section 73(1) and (2)(d), an error in the completion of a Notice to Leave does not make it “invalid” unless the error “materially affects the effect” of the Notice. The Legal Member’s view, is that where an error in the completion of a Notice to Leave does materially affect the effect of the notice, then that error makes the document “invalid”; i.e. it is not a “Notice to Leave” for the purposes of the Act.
9. In this case, the error clearly “affects the effect” of the Notice to Leave, because a correct notice would have informed him of the date (29 September) on or after which an application to the Tribunal could be submitted. The information expressly required in terms of Section 62 (1)(b) is fundamental to the Notice to Leave. To state an earlier date on which the Applicant is entitled to raise proceedings is not an obviously minor error. The error invalidates the Notice because it fails to meet one of the fundamental purposes.
10. The Legal Member therefore determines 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.

Nicola Irvine

Legal Member/Chair

1 December 2022