



**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 0/1 14 Garturk Street, Glasgow G42 8JE

Case Ref: FTS/HPC/EV/21/0057

**Parties: Virhia Consutling Ltd 52 Albert Road Glasgow
 (“the Applicant”)**

**G4 Properties Glasgow Ltd 52 Albert Road Glasgow
 (Representative)**

**Ms Dora Luncan Flat 0/1 14 Garturk Street, Glasgow G42 8JE, (the
 Respondent)**

1. An application was received from the Applicant via their representative dated 7th January 2021. 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:
 - Notice to Leave dated 2nd July 2020
 - S11 Notice dated 7th January 2021
 - Rent statement to December 2020 showing rent outstanding from 12th April 2020
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 April 2020. The rent due previously on 12th March 2020 having been paid.
4. The Applicant referred to a Notice to Leave dated 2nd July 2020 which gave details of the eviction ground namely Ground 12 of Schedule 3 of

- the Act and provided reasons that included “no rental payments since 12th April 2020 resulting in arrears of £1650 and continuing to rise”
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 3 requests for further information. The first dated 21st January 2021 asked for:-
“Before a decision can be made, we need you to provide us with the following:

*Please provide evidence of service of the Notice to Leave on the tenant and the section 11 Notice on the local authority.
Please reply to this office with the necessary information by 4 February 2021. If we do not hear from you within this time, the President may decide to reject the application.*

9. The Applicant responded via their agent on 28th January enclosing evidence of the delivery of the Notice to Leave and a copy of the e-mail to the local authority enclosing the s11 notice.
10. The Tribunal then issued a further request for information on 5th February 2021 as follows:-
“Thank you for your response of 28th January. Your application has been considered and a further issue has been identified.

It appears that from the Notice to leave and the rent statement lodged that the first arrears accrued from 12 April 2020. The Notice to leave was served in 2nd July 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 as in that decision the Upper Tier Tribunal upheld that at least 3 months arrears had to be owing at the date of service and at the 2nd July only 2 months arrears are potentially due and owing?

Please reply to this office with the necessary information by 19 February 2021. If we do not hear from you within this time, the President may decide to reject the application”

11. The Applicant' agent responded advising :_

“Good Afternoon,

I have attached our office copy of the notice which was also sent to the tenant with a screenshot of the rent book.

As you correctly stated the tenant stopped paying rent on the 12th April 2020, I have listed below the months rent was not received, please note that the rent is due in advance and not in arrears

12th April 2020 to 11th May 2020 £550, 12th May to 11th June 2020 £550, 12th June to 11th July 2020 £550

Notice was served on the 2nd July and this was well after the rent due date of the 12th June 2020.

According to our records notice was served after 3 months of rent was outstanding, if you do not agree with this, can you please explain why this is not agreeable.

Please respond ASAP, so we can look into this and it does not effect our rights to proceed and have the application rejected.”

12. The Tribunal wrote again on 21st February explaining and requesting a further response:-

Before a decision can be made, we need you to provide us with the following:

1. The Tribunal notes that rent is due in advance. The arrears of rent commenced 12 April 2020. In terms of the case of Majid v Gaffney and Britton 2019 UT 59 when Ground 12 is relied upon (as is the case here) the rent must have been outstanding for 3 or more consecutive months. It is not the amount of rent it is the specified period of time that is of significance. The rent must have been in arrears for a period of at least 3 months as at the date of service of the Notice to Leave which failing the Notice to Leave is invalid. In this case the rent arrears would have been in arrears for a period of 3 months by 12 July 2020. The Notice to leave was served on 2 July 2020. Please either withdraw your application if you accept that the Notice to leave is invalid or provide your submissions setting out (with reference to authority) on what basis the application can proceed.

Please reply to this office with the necessary information by 8 March 2021. If we do not hear from you within this time, the President may decide to reject the application”

13. There was no response so a further reminder was sent on 18th March as follows:-
“I refer to your recent application which has been referred to the Chamber President for consideration.
Before a decision can be made, we need you to provide us with the following:
We refer to the tribunal’s request for further information dated 22 February 2021, to which a response was required by 8 March 2021. You were asked either to withdraw your Application, if you accept that the Notice to Leave relied upon is invalid; or to provide a written submissions, setting out with reference to legal authority, on what basis you submit that the Application can proceed.
You may wish to seek legal advice prior to responding.
Please reply to this office with the necessary information by 25 March 2021. If we do not hear from you within this time, the President may decide to reject the application.”
14. There has been no further response.

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.

15. 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.

16. 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.

17. The Legal Member notes that the Notice to Leave was sent on 2nd July 2020 and states that proceedings will not be raised until 6th January 2021. 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 April 2020 and the from the rent statement lodged with the application has remained in arrears since then as only a few payments were made in September and October 2020 and nothing has been paid since. By the 2nd July 2020 over 2 full months’ rent was in arrears, from 12th April to 12th June plus 20 days thereafter. Although a third rent payment became due on 12th July the arrears were only 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.

18. 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.

11. In addition the Applicant has not responded to two further requests for information, so the application is also rejected for the failure to respond.

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

6th April 2021
Date