



**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

1. The application dated 31.5.23 was made to the First-tier Tribunal, Housing and Property Chamber (FTT) under Rule 103 of the Procedural Rules under regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011.
2. The Applicant stated in the attached documents, which are referred to for their terms and held to be incorporated herein, that she was applying for an order for return of her deposit and further sums retained by the landlord. The Applicant, after several enquiries from the Tribunal, lodged 2 documents headed Lodger Agreement. She also lodged bank statements to show payments made, correspondence between landlord and Applicant, and an advert for the room.
3. The Lodger Agreement states that the agreement entered into is for a fully furnished room in a property occupied also by the landlord.
4. The FTT wrote to the Applicant on 28 February 2022 in the following terms: "...2. Please advise whether your landlord lived in the same property as you. The Tenancy Deposit Schemes (Scotland) Regulations 2011 do not apply if your landlord was resident in the property. ..."
5. The Applicant's agent stated on 10 .8.23: Thank you for your response. We apologise for the delay in sending the information requested. We confirm that our client, Ms Duan, was living with a resident landlord during the tenancy. We have previously been advised by the Sheriff Court that the HPC would have jurisdiction in such matters. For certainty, we would be grateful if you could confirm in writing that this is not the case, after which we will advise our client to

withdraw her application and submit it again to the sheriff court.

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

REASONS FOR DECISION

8. In terms of regulation 3 (3) of The Tenancy Deposit Schemes (Scotland) Regulations 2011
*“(3) A “relevant tenancy” for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—
(a) in respect of which the landlord is a relevant person; and
(b) by virtue of which a house is occupied by an unconnected person,
unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.*
9. In terms of section 83 (6) of the Antisocial Behaviour etc. (Scotland) Act 2004 a tenancy is described as an excluded tenancy amongst other examples:
(6) For the purposes of subsection (1)(b), the use of a house as a dwelling shall be disregarded if—.... (e) the house is the only or main residence of the relevant person;
10. The application is rejected because the agreement lodged with the application clearly disclosed that the Respondent resided at the property as the main householder at the time the Applicant lived at the property and the application information shows that the Respondent continues to reside there as the property address is stated as the proper address for the Respondent on the application.
11. An application under Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 can only be made with regard to a qualifying tenancy as described in Regulation 3(3). A situation where the property in question is also the residence of the person who otherwise would be considered the relevant person to register as a landlord is specifically excluded as a relevant tenancy in terms of section 83 (6) (e) of the Antisocial Behaviour etc. (Scotland) Act 2004 and thus the documentation lodged with the application and the description of the Respondent in the application indicate that the arrangement in question is not a qualifying tenancy in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011.
12. It would not be appropriate for the FTT to accept an application to which the Regulations do not apply because it would not have jurisdiction to deal with an application under Rule 103 and Regulation 9 of the said Tenancy Deposit Schemes (Scotland) Regulations 2011 if the underlying agreement does not constitute a qualifying tenancy in terms of

Regulation 3 (3).

13. If the Applicant, which was not made clear in the application or subsequently, did not wish to make the application under rule 103 as stated on the application, but wished to raise civil proceedings recovering funds paid over to and retained by the landlord, the Tribunal would also not have jurisdiction in the matter.
14. The lodger agreement was entered into in 2019. The only tenancy type private landlords and tenants could enter into after 1.12.2017 and for which jurisdiction transferred to the Housing and Property Chamber was a Private Residential Tenancy in terms of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act). S 71 of the Act sets out the transfer of jurisdiction to the First-tier Tribunal. It states:
(1) In relation to civil proceedings arising from a private residential tenancy—
(a) the First-tier Tribunal has whatever competence and jurisdiction a sheriff would have but for paragraph (b),
(b) a sheriff does not have competence or jurisdiction.
(2) For the purposes of subsection (1), civil proceedings are any proceedings other than—
(a) the prosecution of a criminal offence,
(b) any proceedings related to such a prosecution
15. Schedule 1 of the Act sets out types of tenancies which cannot be Private Residential Tenancies. This applies to tenancies where there is a resident landlord as set out below:
Resident landlord
7 A tenancy cannot be a private residential tenancy if paragraph 8 or 9 applies to it.
8 This paragraph applies to a tenancy if—
(a) the let property would not be regarded as a separate dwelling were it not for the terms of the tenancy entitling the tenant to use property in common with another person (“shared accommodation”), and
(b) from the time the tenancy was granted, the person (or one of the persons) in common with whom the tenant has a right to use the shared accommodation is a person who—
(i) has the interest of the landlord under the tenancy, and
(ii) has a right to use the shared accommodation in the course of occupying that person's home.

9 (1) This paragraph applies to a tenancy if sub-paragraphs (2) and (3) apply to it.

(2) This sub-paragraph applies to a tenancy if, from the time it was granted, a dwelling within the same building as the let property has been occupied as the only or principal home of a person who, at the time of occupying it, has the interest of the landlord under the tenancy.

(3) This sub-paragraph applies to a tenancy if, at the time it was granted, there was an ordinary means of access—

(a) through the let property to the dwelling occupied by the person who is, or is to be, the landlord, or

(b) through the dwelling occupied by the person who is, or is to be, the landlord to the let property (whether or not that access was available to the tenant as of right).

(4) For the purpose of this paragraph, in determining whether a dwelling is occupied as the only or principal home of the person having the interest of the landlord, no account is to be taken of—

(a) any period beginning with the date on which the interest of the landlord is transferred (other than on death) and ending—

(i) 28 days later, or

(ii) 6 months later if, within 28 days of the period beginning, the person to whom the interest is transferred notifies the tenant of the person's intention to occupy a dwelling within the same building as the let property,

(b) any period of up to 24 months beginning with the date of the person's death and ending with the person's interest in the tenancy being vested in another person (otherwise than as the person's executor).

10 If, at any time, the landlord holds the landlord's interest as a trustee under a trust, a reference in paragraph 8 or 9 to a landlord or the person having the interest of the landlord includes a person who is a beneficiary under the trust.

11 In a case where two or more persons jointly are the landlord under a tenancy, references to the landlord in paragraphs 8 to 10 are to any one of those persons.

16. Given the description of the Lodger Agreement, the landlord was at the relevant time residing in the same property. The tenancy can thus not be a Private Residential Tenancy. If the Lodger Agreement is not a Private Residential Tenancy then the dispute over payment of funds cannot constitute “civil proceedings arising from a private residential

tenancy” and thus the Tribunal does not have jurisdiction in terms of S 71 of the Act.

17. It would not be appropriate for the FTT to accept an application for which it does not have jurisdiction.

18. For the above reasons 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.

Legal Member
16 August 2023