



**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/PR/24/2329

Parties

Miss Jaqueline Kerr (Applicant)

Ms Rebecca Hardie (Respondent)

2 Melbourne Place, Newtown, St Boswells, Roxburghshire, TD6 0PA (the property)

1. The application dated 19.05.2024 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 that she was applying for an order repayment of a £1,250 she paid at the start of a 3 year commercial lease commencing 28.02.2023 for a barber shop. The

Applicant lodged a document headed Lease with the application, which states in clause 8 that the permitted use of the property is to be used as a barber's shop (class 1 (retail) of the Scottish Use Class Order). The applicant does not claim to have used the property as a dwelling house.

3. The FTT wrote to the Applicant on 23.05.24 in the following terms: *"Your application is in respect of a deposit paid in connection with a commercial lease. The Tribunal does not have jurisdiction in connection with commercial leases. Please withdraw your application and raise proceedings in the Sheriff Court or explain on what basis you consider the Tribunal has jurisdiction to deal with your application."*
4. On 23.05.24 the applicant replied: *"The reason I have put an application in with yourselves is because the sheriff court rejected my claim and advised that I would have to apply with yourselves so I am just a bit confused as to where to go from here. Any advise would be appreciated."*
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 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."*

The Tenancy Deposit Schemes (Scotland) Regulations 2011 make provision about tenancy deposit schemes for the purposes of S 120-122 of the Housing (Scotland) Act 2006. S 120 (2) of the 2006 Act defines the scope as follows: "*(2) A tenancy deposit scheme is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation."*

1. 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 commercial lease is not a relevant tenancy in terms of section 83 (1) (b) of the Antisocial Behaviour etc. (Scotland) Act 2004. S 83 (6) states: "*(6) For the purposes of subsection (1)(b), the use of a house as a dwelling shall be disregarded if—
...*" and thus it is clear that the provision relates to properties used as a dwelling house

and not for commercial purposes. The documentation lodged with the application and the description of the Respondent in the application confirm that the arrangement in question is not a qualifying tenancy in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 because it is for the use of the property for business purposes as a barber's shop. The contract is a commercial lease and not a lease relating to living accommodation.

2. In addition, the application actually does not seek a penalty under the Deposit Scheme Regulations but seeks repayment of the deposit. Therefore the Tribunal further considered whether the application may be potentially valid under a different rule. The repayment of a deposit would usually fall within the scope of civil disputes and thus relate to rules 70 or 111 of the Rules of Procedure. As the lease was first entered into in 2023 it could not be a tenancy under the Housing (Scotland) Act 1988. The only possible rule that could apply in this case would be rule 111, which relates to applications under S 71 (1) of the Private Housing (Tenancies) (Scotland) Act 2016. S 71 defines the jurisdiction of the First-tier Tribunal applying as follows: *First-tier Tribunal's jurisdiction*
(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.
3. It is clear that in this case the Tribunal cannot have jurisdiction under S 71 as the lease does not relate to civil proceedings arising out of a residential tenancy because the tenancy was a commercial lease and not a residential tenancy.
4. It would not be appropriate for the FTT to accept an application 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) and under rule 111 as the underlying agreement is not a residential tenancy.
5. The application thus has to be rejected.
6. The Tribunal notes that the applicant is asking the Tribunal to advise her of a way forward. However, as a judicial body the Tribunal cannot provide legal advice.

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

Legal Member

28 May 2024