

**DECISION AND STATEMENT OF REASONS OF PETRA HENNIG MCFATRIDE, 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

34 Earnock Avenue, Motherwell ML1 3EX

Case Reference: FTS/HPC/EV/19/0773

GRAHAM CALDER, 84 KIRKLAND STREET, MOTHERWELL, ML1 3JW ("the Applicant")

THOMAS MCMAHON, FLAT 2/1, 18 MUSLIN STREET, GLASGOW G40 4AP ("the Respondents")

1. On 8 MARCH 2019 an application was received from the applicant. The application was made on the face of it as an application under Rule 66 of the Rules on FORM F, however it is clear from the cover email of the application that the applicant is actually making an application for payment of loss of rent and damage under a Guarantor's Agreement.
2. The Application included as evidence a copy tenancy agreement for the property, a rent statement and a copy of a document headed Guarantor's Agreement dated 19 July 2017, which does not state the name of the tenant, the property it relates to or the amount of rent payable.
3. There is no document showing the amount claimed for or how this is calculated other than the rent statement.

DECISION

4. 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.”

5. After consideration of the application the Legal Member considers that the application should be rejected on the basis that I have good reason to believe that it would not be appropriate to accept the application in terms of Rule 8(1)(c) of the Procedural Rules.

Reasons for Decision

First of all the application in its current form does not disclose the amount the applicant is seeking and was made on Form F under Rule 66, which would be an application for order for possession upon termination of a short assured tenancy. This is clearly not the case. The applicant is seeking payment of an undefined amount arising out of the Guarantor's Agreement lodged with the application. In terms of Rule 5 of the Rules of Procedure the Tribunal could request further documentation and clarification of the claim. However, in this case I find that the application cannot proceed due to a lack of jurisdiction and thus I consider that it should be rejected at this stage.

The Tribunal's jurisdiction for payment of money could only arise out of S 16 of the Housing (Scotland) Act 2014. **16 Regulated and assured tenancies etc.:**

(1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal—(a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)), (b) a Part VII contract (within the meaning of section 63 of that Act), (c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).

In this case the applicant wishes the Tribunal to order payment of rent arrears and damage to the property not from the Tenants of the property but from the Guarantor. I do not consider that the circumstances of this case truly arise out of an Assured Tenancy Agreement as required by S 16 of the Housing (Scotland) Act 2014.

In *Sauchiehall Street Properties One Ltd v EMI Group Ltd*. Hous. L.R.24 the landlord of commercial premises in Glasgow sought payment from the guarantor. The defenders pled that the court had no jurisdiction as the action did not have as its object the tenancy of immoveable property. In accepting that argument, Sheriff Reid stated [47]

“Firstly, the parties are not landlord and tenant. Instead, the parties are creditor and debtor under a guarantee. Secondly, the aim or subject matter of the agreement in question (being the contract upon which the action is founded) is not a tenancy of immovable property at all. It is a guarantee. Thirdly, the object of the proceedings is not to enforce (or to seek substitutional redress for the alleged breach of) an obligation owed to a landlord by a tenant under a lease but, rather, to enforce an obligation owed to a landlord by a third party debtor under a guarantee. In other words, the object of the proceedings is “only indirectly related” ... to a tenancy of immovable property, in that the guarantee relates to the obligations of a tenant under a lease.”

Whilst this case may well involve a guarantee of obligations under an assured tenancy, although

the property the guarantee refers to is not stated in the Guarantor's Agreement lodged and thus in any event further documentation would have to have been produced by the applicant to show that the Guarantor's Agreement relates to a specific property and tenancy agreement, in any event I consider that the facts of the case are analogous to *Sauchiehall Street Properties One Ltd.* as the basis of the application is that the respondent is the debtor under a guarantee. The aim or subject matter of the agreement is a guarantee, not a tenancy.

The object is to enforce an obligation owed to the applicant by the respondent not under the tenancy agreement but under a separate guarantee. Therefor I consider that the matter is not a matter arising from an assured tenancy as required for S 16 of the Housing (Scotland) Act 2014 to apply.

It follows that the Tribunal does not have jurisdiction to determine the action directed against the respondent and it is for that reason that I believe that it would not be appropriate to accept the application and I reject the application in terms of Rule 8 (1)(c) of the Procedural Rules.

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
18 March 2019

