



Decision with Statement of Reasons of H Forbes, Legal Member of the First-tier Tribunal with delegated powers of the Chamber President of the First-tier Tribunal for Scotland (Housing and Property Chamber)

Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules")

Chamber Ref: FTS/HPC/CV/22/0626

Re: 29 Kersland Street, Glasgow, G12 8BW ("the Property")

Parties:

Michael Lim ("the Applicant")

McMillan & Company Residential Ltd. ("the Respondent")

Tribunal Member:

Ms H Forbes (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be dismissed on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules and that it would not be appropriate to accept the application in terms of Rule 8(1)(c).

Background

1. An application was received by the Tribunal under Rule 111 on 2nd March 2022. The Applicant indicated that he was seeking compensation of £2000 for misrepresentation/moral damages for stress and inconvenience in respect of matters relating to a proposed private residential tenancy that was not entered into.
2. The application was considered by the Tribunal and further information was requested by letter dated 21st March 2022, as follows:

Your application has been made under Rule 111 of the Tribunal's Procedure Rules which is in respect of civil proceedings arising from a Private Residential Tenancy. The Tribunal notes that no actual tenancy was entered into. The Tribunal also notes that the application is against the Letting Agent. The Tribunal asks you consider whether or not your

application should be raised under Rule 95 in respect of the Letting Agent's breach of the Letting Agents Code of Practice which applies to both tenants and landlords. If you accept that the application should be raised under the Rule then please withdraw this application and submit a fresh one under Rule 95.

3. By email dated 22nd March 2022, the Applicant replied as follows:

I have obtained some advice and was advised to clarify some points regarding the case--that perhaps this was a misunderstanding or not clear from what was initially submitted?

They are not on the Letting Agent Register, but they are on the Landlord Register. On the ad, they included this information: HMO License Landlord registration no 11297/260/23210 Technically, they are not a letting agent. They have also clarified this on their website. They are a private landlord--a company that owns several properties for letting. Hence, even if their actions/ violations rather match to the elements of the Letting Agent's Code of Practice, they are not a letting agent, and thus I am supposing that rule 95 doesn't apply to them. I have gone through the elements/ documents relating to Rule 95. While it appears that they have violated several elements of the Code of Practice, they are technically not classified as a letting agent. So the advice given to me was that Rule 111 is still probably the Rule to go for with respect to this application.

I would also like to amend the "details of the order being sought from the Tribunal": -verbal and written apology from the handling employee/representative (Kirstie) and the company, including a commitment note to professional and ethical practice of business moving forward -financial compensation of £2000 for loss and moral damages that caused me to spend lots of time processing this case and causing anxiety, distress/ undue stress, and so much inconvenience -make this offence permanent on the company's record / landlord register and be taken into consideration towards their license renewal -any other appropriate or applicable sanction/penalty for misleading tenants through false advertising and unethical business practices

4. The application was considered by the Tribunal and further information was requested by email dated 28th March 2022 in similar terms to the original request for information.

5. By email 29th March 2022 dated the Applicant responded as follows:

This application is being made in connection to another application that is already scheduled for a case management discussion: FTS/HPC/PR/21/3082.

Yes, I declined the tenancy and did not become a tenant, but transactions have transpired. I have made a deposit on the property, and they returned it to me after deducting what they called/claimed as "administrative fees."

A contract has been formed although discontinued. The four elements of a contract were met: offer, acceptance, consideration, and intent to create legal relations.

The payment of deposit triggers the tenancy. The tenancy agreement was supposed to follow after that but they never sent it to me on time as well. I was able to decline the tenancy before they were able to send me the tenancy agreement.

I agreed to pay the deposit prior to the viewing of the room on the basis of trust that the company advertised truthfully--that they have complied with the terms and conditions of the advertising website, Spareroom.co.uk, which prescribes advertisers to post/ upload photos or videos that are current and accurate representations of the room being advertised.

In their response to the first case (FTS/HPC/PR/21/3082), they said, "The photograph shown was from our library file; since the photo was taken the room had been redecorated from magnolia to grey with a blue feature wall, new furniture and headboard." Clearly, it was not a current and accurate representation of the room, and there was a misrepresentation and intent to mislead prospective tenants.

As there was a transaction that transpired, and the company actually charged me with an "administration fee", which is an illegal premium, a contract was formed and a certain form of tenancy was made. Having had the first case/ application (FTS/HPC/PR/21/3082) reached a case management discussion means that this application/case should be taken into consideration under the Tribunal's jurisdiction, as they are related and arose from being charged an illegal premium. Therefore, this case falls under other "issues hat are not covered by a specific Rule but that arise from the relevant type of tenancy", and thus I am making an application under Rule 111 (Application for Civil Proceedings).

6. The application was considered by the Tribunal and further information was requested by email dated 21st April 2022, as follows:

The Private Housing (Tenancies) (Scotland) Act 2016 defines the private residential tenancy as follows:

“1Meaning of private residential tenancy

(1) A tenancy is a private residential tenancy where—

(a) the tenancy is one under which a property is let to an individual ("the tenant") as a separate dwelling,

(b) the tenant occupies the property (or any part of it) as the tenant's only or principal home, and

(c) the tenancy is not one which schedule 1 states cannot be a private residential tenancy.

(2) A tenancy which is a private residential tenancy does not cease to be one by reason only of the fact that subsection (1)(b) is no longer satisfied."

You state there was no written contract and that you yourself decided that you did not wish to enter into a Private Residential Tenancy once you had viewed the room. A civil contractual claim generally is litigated in the Sheriff Court unless specific legislation transfers jurisdiction to another court or tribunal. The First – tier Tribunal jurisdiction is limited by the specific transfer provisions. S 111, as previously explained, limits the jurisdiction of civil payment claims under this rule to claims arising out of a Private Residential Tenancy and not out of any other contract. Please state why you think that an actual tenancy was created, bearing in mind the provisions of S 1 of the 2016 Act as stated above.

The Applicant was asked to respond by 5th May 2022, failing which the application may be rejected. There was no response from the Applicant.

7. The application was considered by the Tribunal and the further information was requested again by email dated 8th June 2022, with a response date of 22nd June 2022, failing which the application may be rejected. No response was received from the Applicant.

8. The application was considered further on 22nd July 2022.

Reasons for Decision

9. The Tribunal 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;-

(c) they have good reason to believe that it would not be appropriate to accept the application;

(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.

10. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham 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"*.
11. The application cannot proceed in the absence of the requested information. No private residential tenancy was created between the parties, therefore there does not appear to be a legal basis for the application that would allow the Tribunal to proceed in terms of Rule 111, which limits the jurisdiction of civil payment claims under this rule to claims arising out of a private residential tenancy and not out of any other contract
12. Applying the test identified by Lord Justice Bingham in the case of ***R v North West Suffolk (Mildenhall) Magistrates Court*** (cited above) the application is frivolous, misconceived and has no prospect of success. It would not be appropriate to accept the application. The application is accordingly rejected.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal 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.

H. Forbes

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Legal Member/Chair

22nd July 2022
Date