



**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/CV/23/2352

Parties

Ms Kelcy McPherson (Applicant)

Mr Juan Albinana Morrio (Respondent)

191/4 Gorgie Road, Edinburgh, EH11 1TT (House)

1. On 16.7.23 an application for repayment of a deducted part of a deposit was received by the First-tier Tribunal (FTT). The application was made under Rule 111 of the Procedural Rules being an application for Civil Proceedings in relation to a private residential tenancy in terms of S 71 (1) of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act).
2. The Respondent's address is the same address as the property to which the application relates.
3. The FTT asked the applicant whether the respondent had been residing at the same

property during her tenancy and she confirmed on 10.8.23 that the landlord had been residing in the property during the duration of the lease.

4. The FTT had twice advised the applicant that it cannot accept the case under this rule if the landlord was a resident landlord and advised her to obtain legal advice. The applicant did not reply to the last correspondence from the FTT dated 28.8.23 by the date stated as the last date for a reply, which was 11.9.23.
5. The case 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 Tribunal has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION

8. The jurisdiction of the Tribunal in civil matters arising out of a Private Residential Tenancy in terms of the 2016 Act is set out in s 71 of the Act 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. (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.
9. The tenancy was entered into on 1.3.23 and thus after the coming into force of the 2016 Act. The 2016 defines Private Residential Tenancies in s 1 as follows: " Meaning 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."
10. In terms of schedule 1 a tenancy cannot be a Private Residential Tenancy if there is a Resident landlord. The provision states:
"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 Private Housing (Tenancies) (Scotland) Act 2016 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)."

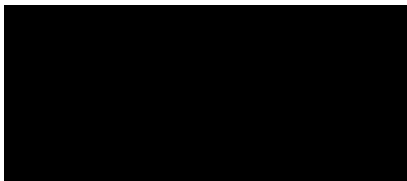
11. In terms of the documents lodged, the tenant and the landlord occupied the property during the tenancy period. In terms of schedule 1 the tenancy agreement cannot be a Private Residential Tenancy and thus the jurisdiction for any civil matter arising out of said tenancy did not transfer to the Housing and Property Chamber of the FTT under s 71 of the Act.
12. The Tribunal does not have jurisdiction over this dispute and thus it would not be appropriate to accept the application.

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
2 October 2023