

Housing and Property Chamber
First-tier Tribunal for Scotland



**DECISION AND STATEMENT OF REASONS OF ANDREW UPTON, 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

Flat 7, 151 King Street, Aberdeen, AB24 5AE ("the Property")

Case Reference: FTS/HPC/EV/19/2799

**Miss Kirstin MacKinnon, Miss Lois Morrison, Miss Kayla Thorpe ("the
Applicants")**

Mr Alexander MacNab, Mrs Katrina MacNab ("the Respondent")

1. On 9 September 2019, an application was received from the applicants. The application was made under Rule 103 of the Procedural Rules, being an order for sanction of a landlord for failure to comply with the Tenancy Deposit Schemes (Scotland) Regulations 2011. No documents were provided in support of the application.

DECISION

1. 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."

2. After consideration of the application, the attachments and correspondence from the applicant, I consider that the application should be rejected on the basis that it appears to be frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules, and I have good reason to believe that it would not be appropriate to accept the application within the meaning of Rule 8(1)(c) of the Procedural Rules.

REASONS FOR DECISION

3. '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"*. It is that definition which I have to consider in this application in order to determine whether or not this application is frivolous, misconceived, and has no prospect of success.
4. This Application is confused. It purports to be made under Rule 103, and yet seeks an order for repayment of the Tenancy Deposit. Thus, the Application proceeds under the Rule related to a failure to comply with the 2011 Regulations, but seeks an order which one would expect to see sought in an Application under Rule 111, which are civil proceedings related to a Private Residential Tenancy. In fairness to the Applicants, I have considered the Application under both Rule 103 and Rule 111 in reaching this decision.

Rule 103

5. In terms Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011:-

"9.—

(1) A tenant who has paid a tenancy deposit may apply to the [First-tier Tribunal]¹ for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.

(2) An application under paragraph (1) must be made no later than 3 months after the tenancy has ended."

6. In the Application, the Applicants state that the tenancy ended on 1 June 2019. Thus, to be made on time, the Application would have required to be made by no later than 1 September 2019. In fact, the Application is dated 4 September 2019, and was received by the Tribunal on 9 September 2019. Accordingly, if the Application is an Application under Rule 103, then it has been made out of time and cannot succeed.

Rule 111

7. In terms of the Procedural Rules:-

"5.— Requirements for making an application

- (1) An application is held to have been made on the date that it is lodged if, on that date, it is lodged in the manner as set out in rules 43, 47 to 50, 55, 59, 61, 65 to 70, 72, 75 to 91, 93 to 95, 98 to 101, 103 or 105 to 111, as appropriate.
- (2) The Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.
- (3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held to be made on the date that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement.

...

111. Application for civil proceedings in relation to a private residential tenancy

Where a person makes any other application to the First-tier Tribunal by virtue of section 71(1) (First-tier Tribunal's jurisdiction) of the 2016 Act, the application must—

- (a) state—
 - (i) the name and address of the person;
 - (ii) the name and address of any other party; and
 - (iii) the reason for making the application;
- (b) be accompanied by—
 - (i) evidence to support the application; and
 - (ii) a copy of any relevant document; and
- (c) be signed and dated by the person.”

8. In this case, the Applicants did not provide evidence to support the Application. Crucially, they did not provide a copy of the tenancy agreement that they were founding upon. The Tribunal wrote to the Applicants on 10 September 2019, 8 October 2019, 4 November 2019 and 28 November 2019. On each of those occasions, the Tribunal requested, amongst other things, a copy of the tenancy agreement. On each of those occasions, the response received by the Tribunal did not address the questions asked (in particular, whether the Application was properly made under Rule 103 or ought to have been made under Rule 111) and, crucially in my view, did not provide a copy of the tenancy agreement.

9. The Applicants have failed to co-operate with the Tribunal's requests for information. In particular, without a copy of the tenancy agreement or, at least, an explanation of why it was not available. It is regrettable that the Applicants did not provide the information requested from them on four separate occasions by the Tribunal. Had they done so, the Application would likely have been allowed to proceed under Rule 111. However, in the circumstances, it is my view that the requirements of Rule 111 have not been met, and that the Application ought therefore to be rejected.

10. It will be a matter for the Applicants whether they wish to make a further

Application under Rule 111 and provide all documentation that they have in support of it.

11. However, for present purposes and the foregoing reasons, this application must be rejected upon the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedure Rules and, separately, that I have good reason to believe that it would not be appropriate to accept the application within the meaning 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.

Andrew Upton
Legal Member
18 December 2019