

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/19/1677

Re: Property at Flat 0/2, 43 Eversley Street, Tollcross, Glasgow, G32 8HS (“the Property”)

Parties:

Mrs Lianna McCormack, 8 Speyburn Place, Stepps, G33 6JD (“the Applicant”) represented by Fineholm Letting Services Limited, 114 Union Street, Glasgow, G1 3QQ

Mr John McCann, formerly of Flat 0/2, 43 Eversley Street, Tollcross, Glasgow, G32 8HS and now are 3 South Vesalius Street, Flat 1/1, Shettleston, Glasgow (“First Respondent”)

and

Mrs Christina Townsley, 10 Myreside Drive, Carntyne, Glasgow, G32 6EA (“Second Respondent”)

Tribunal Members:

Jim Bauld (Legal Member)

Decision (in absence of the Respondents)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that a payment order should be made in favour of the Applicant for payment by the Second Respondent of the sum of ONE THOUSAND NINE HUNDRED AND FOUR POUNDS AND FIFTY TWO PENCE (£1904.52).

Background

1. By application received on 30 May 2019, the Applicant sought an order under section 71 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”) and in terms of rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Regulations”). The order sought was one of payment of outstanding rent arrears in respect of a tenancy at the property.
2. On 19 June 2019 the application was accepted by the Tribunal and referred for determination by the Tribunal. A Case Management Discussion (CMD) was set to take place on 9 August 2019 at the Glasgow Tribunal Centre, York Street, Glasgow.

Case Management Discussion

3. The Case Management Discussion took place on 9 August 2019. The Applicant was represented by two members of staff from Fineholm Letting Services Limited, namely Sally Beard, the managing director and Ellen Hamilton, the office manager. Neither of the Respondents were present.
4. The Tribunal explained the purpose of the CMD to the representatives of the Applicant and the powers available to the Tribunal to determine the matter. The Tribunal asked various questions with regard to the application and to matters which had arisen on the application.
5. It was noted that when the application was lodged the Applicant had no address for the First Respondent. The tenancy had ended on 22 June 2019. The Tribunal had contacted the First Respondent by email but at no point had any papers been served upon him intimating the Case Management Discussion to him. No request had been received for service of the application upon him by service by advertisement on the Tribunal’s website. The Applicant’s representatives indicated that they now had a forwarding

address for the First Respondent at 11B Gartocher Terrace, Gartocher, Glasgow, G32 0HE. The Clerk to the Tribunal indicated that the First Respondent had provided another forwarding address namely 3 South Vesalius Street, Flat 1/1, Shettleston, Glasgow.

6. The Tribunal noted that the Second Respondent had been properly served with intimation of the Case Management Discussion. Papers had been served upon her by Sheriff Officers on 25 June 2019 intimating the date and time of the Case Management Discussion. The Second Respondent was not a tenant of the property but had signed a separate agreement where she agreed to act as a guarantor to indemnify the landlords in respect of any losses incurred by them as a result of any breach of the terms of the tenancy agreement on the part of the First Respondent.
7. The Tribunal questioned the Applicant's representatives with regard to what were the potential issues arising in this matter. As the First Respondent had received no intimation of the Case Management Discussion, the Tribunal indicated that it would not be able to make any orders against him today. If orders were to be sought against the First Respondent, the Case Management Discussion would require to be adjourned and a later date fixed.
8. The tribunal also raised with the Applicant's representatives the potential difficulties arising from previous decisions of the First-tier Tribunal in respect of similar applications which had been made for payment orders against persons acting as guarantors in tenancy agreements. The legal member of the tribunal was aware of a number of decisions which had been made by other First-tier Tribunals in which the First-tier Tribunal had made decisions to reject applications being made for payment orders against guarantors in tenancies. Reference is made to a decision under tribunal reference number FTS/HPC/CV/18/1571 dated 2 August 2018 in which the First-tier Tribunal member decided that an application against a guarantor required to be rejected on the basis that the tribunal did not have jurisdiction. This was based on the provisions of section 16 of the Housing (Scotland) Act 2014 in which certain functions of the Sheriff Court "in relation to actions arising from"

certain tenancies were transferred to the First-tier Tribunal. A similar provision is contained within section 71 of the Private Housing (Tenancies) (Scotland) Act 2016 in which the First-tier Tribunal has the competence and jurisdiction that the Sheriff Court would have had in civil proceedings “arising from a private residential tenancy”. The Applicant’s representatives produced to the Tribunal a decision of the Upper Tribunal for Scotland dated 24 July 2019. This was a decision of Sheriff Nigel Ross sitting as an Upper Tribunal member in a case raised on behalf of Mr Kenneth Anderson against Mr Gavin Stark. The case reference number is UTS/AP/19/0012. That case was an appeal against a similar rejection by the First-tier Tribunal that in an application for payment arising from a guarantee that the First-tier Tribunal had no jurisdiction.

9. In his decision, Sheriff Ross indicates that the First-tier Tribunal does have jurisdiction in these cases. He sets out his view that a guarantee does “arise from” the tenancy. He indicates that the words “arising from” should be interpreted in a way which invites a wide and inclusive approach. He points out that the model lease form which has been prepared by the Scottish Government in respect of the private residential tenancy contains a clause relating to a guarantor. He concludes that a guarantee of performance of the obligations of the tenant under the private residential tenancy was regarded by the Scottish Government as an integral part of the lease. Accordingly he concludes that the guarantee agreement is an agreement “arising from” the private residential tenancy within the meaning of section 71 of the 2016 Act and that the First-tier Tribunal does have jurisdiction. He also confirms that it does not matter whether the guarantee is drafted as part of the tenancy agreement itself or contained in a separate document. In this particular case the guarantee is contained within a separate document.

10. The Tribunal member noted the decision of the Upper Tribunal and indicated to the Applicant’s representatives that he had been unaware of the terms of this decision. The decision of the Upper Tribunal has not yet been published on the website of the Scottish Courts Service. It had not been circulated to members of the First-tier Tribunal. Accordingly it was not possible for the legal

member to have been aware of this decision despite its importance and its impact upon this particular case.

11. The tribunal then held further discussions with the Applicant's representatives. The Applicant's representatives thereafter confirmed that they wished to withdraw the application against the First Respondent but to pursue a payment order against the Second Respondent. The Tribunal consented to the request to withdraw the application against the First Respondent. Such withdrawal is allowed in terms of Rule 15 of the 2017 Procedure Rules. The Tribunal also agreed to grant the payment order against the Second Respondent on the basis that the order was within the jurisdiction and competence of the Tribunal.

Findings in Fact

12. The Applicant and First Respondent were respectively the landlord and tenant of a tenancy at the property which was dated 6 July 2018.
13. The tenancy was a private residential tenancy in terms of the 2016 Act. The Second Respondent signed a guarantor agreement dated 20 June 2018 in which she agreed to indemnify the Applicant in respect of any losses incurred by the Applicant as a result of any breach of the terms of the tenancy agreement which had been entered into by the First Respondent.
14. The First Respondent owed rent arrears to the Applicant which at the date of application to the Tribunal amounted to £1904.52.
15. The Second Respondent is liable to make payment of those arrears in terms of the guarantee agreement which she signed

Decision

16. The Tribunal decided to grant an order for payment against the Second Respondent to the Applicant in the sum of £1904.52.

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.

Jim Bauld

Legal Member/Chair

9 August 2019

Date