

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 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/CV/18/2599

Re: Property at 138 High Road, Saltcoats, KA21 5QR (“the Property”)

Parties:

Mr John Gerard McClumpha, Mrs Maureen McClumpha, 2 Diddup Drive, Stevenston, KA20 4AF (“the Applicants”)

Mr Tony Jenkins, Ms Siobhan Jenkins, formerly of 138 High Road, Saltcoats, KA21 5QR and now residing at 85 Warrix Avenue, Irvine, KA12 0DW (“the Respondents”)

Tribunal Members:

Neil Kinnear (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that

Background

This is an application for a payment order dated 27th September 2018 and brought in terms of Rule 70 (Application for civil proceedings in relation to an assured tenancy under the 1988 Act) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicants sought in their application payment of arrears in rental payments of £2,900.00 in relation to the Property from the Respondents, and provided with their application copies of the short assured tenancy agreement, rent arrears statement and bank statements.

The short assured tenancy agreement had been correctly and validly prepared in terms of the provisions of the *Housing (Scotland) Act 1988*, and the procedures set out in that Act had been correctly followed and applied.

A Hearing was held on 28th November 2018 at Ardrossan Civic Centre, Glasgow Street, Ardrossan. The Second Applicant appeared, and she and the First Applicant were represented by Mr Blair. The First Respondent appeared, and was not represented. He indicated that he also represented his wife, the Second Respondent.

The First Respondent indicated that he accepted that rent arrears had accrued in respect of the property until around August 2018. At that time, the Second Applicant provided a document signed by her to the local Council, apparently in connection with the Respondents' application for a council house, confirming that she accepted that there was no rent outstanding at that date. The First Respondent stated that he had possession of this document at the Property, but had not brought it with him today.

He explained that thereafter, rental had been paid except for the last month's rental which had not yet been paid due to his wife changing her bank account. He indicated that this would be paid shortly.

The Second Applicant and Mr Blair had not previously been advised of the Respondent's position, and the Tribunal adjourned the Hearing to allow Mr Blair to take instructions.

After reconvening the Hearing, the Second Respondent confirmed that she denied that she had at any time waived the outstanding rental which had accrued, and denied that she had provided a document signed by her to the local Council confirming that she accepted that there was no rent outstanding at that date.

The Applicants' position is that no such waiver of rental had been given to the Respondents, and that the sums sought in this application remained due and outstanding.

The Second Applicant confirmed that she had spoken to Jackie Galloway at the local council, but that she had at no time either in writing or orally confirmed that no rent was outstanding.

The First Respondent stated in response that he had also spoken to Jackie Galloway at the local council, and that this lady confirmed to him that the Second Applicant had said to her that there was no rental outstanding. He wished time to produce the document he had referred to, and to obtain a statement from Ms Galloway.

Mr Blair opposed an adjournment of the Hearing. He argued that this would be prejudicial to his clients' interests, and that they should not have to wait further for this matter to be determined.

The Tribunal adjourned to consider the parties submissions. On reconvening, the Tribunal advised the parties that although it had some sympathy with Mr Blair's

submissions against an adjournment, it felt that it would be unjust to determine the case without permitting the Respondents to produce the document the First Respondent had referred to, which was clearly crucial to determining this matter.

The Tribunal felt that it would also be unjust to refuse the Respondents the opportunity to obtain a statement from Ms Galloway, who both parties accepted had discussed the position with the Second Respondent and would appear to be likely to give crucial confirmation of what was said by the Second Applicant.

The overriding objective of the Tribunal is to deal with proceedings justly and in a manner which is proportionate to the complexity of the issues and the resources of the parties in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

Rule 28(1) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal at its discretion on its own initiative at any time to adjourn a hearing. Rule 28(4) allows the Tribunal to adjourn a hearing to allow a party to produce evidence (i) if satisfied that the evidence relates to a matter in dispute, and (ii) that it would be unjust to determine the case without permitting the party to produce the evidence.

In these circumstances, the Tribunal adjourned the Hearing for the above reasons, and issued a direction to the Respondents to produce the document referred to by 12th December 2018.

The Continued Hearing

A Hearing was held on 16th January 2019 at Ardrossan Civic Centre, Glasgow Street, Ardrossan. The Second Applicant again appeared, and she and the First Applicant were again represented by Mr Blair. The First Respondent again appeared, and was not represented. He indicated that he again also represented his wife.

The Tribunal noted that since the previous Hearing, the Applicants had amended the sum sought in their application to £5,000. The increased figure represented three further months of rental arrears which they allege had not been paid by the Respondents. The Applicants provided an updated rent arrears statement disclosing this amount.

The Tribunal also noted that the Respondents had failed to comply with the Tribunal's direction to produce by 12th December 2018 the document signed around August 2018 by the Second Applicant, Mrs Maureen McClumpha, addressed to North Ayrshire Council and apparently in connection with the Respondents' application for a council house, confirming that she accepted that there was no rent outstanding at the date of the document.

The First Respondent invited the Tribunal to again adjourn the continued Hearing to allow the Respondents to obtain legal advice. He advised that he and his wife had made telephone calls in December to identify a lawyer prepared to represent them in

this matter, but had been unsuccessful. In early January, he had succeeded in identifying a lawyer prepared to act for them, and had an appointment on 15th January 2019, which his proposed lawyer had to cancel. He wished the opportunity to consult his lawyer about this matter.

Mr Blair strongly opposed this request, and noted that the Respondents had already been granted a previous adjournment of this application. They had had ample opportunity to obtain legal advice, and today appeared to have done nothing to advance matters since the previous hearing. He submitted that it would be unjust and unfair to his clients to grant a further postponement of this application.

The Tribunal adjourned to consider the parties' submissions. On reconvening, the Tribunal advised the parties that after careful consideration, the Tribunal was not prepared to grant a further adjournment of this application and refused the First Respondent's request.

The Respondents had previously been granted an adjournment, and had had ample opportunity to obtain legal advice. The Tribunal felt that it would be unjust to allow a further adjournment and to further delay dealing with this application.

The overriding objective of the Tribunal is to deal with proceedings justly and in a manner which is proportionate to the complexity of the issues and the resources of the parties and to avoid delay so far as compatible with the proper consideration of the issues in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

Thereafter the Tribunal continued with the Hearing. Both parties had already substantially advanced their respective positions at length in their submissions both today, and at the previous Hearing on 28th November 2018. Parties and the Tribunal agreed that the parties' submissions should be treated as their evidence to avoid needless repetition of what had already been said. The parties confirmed that neither had any further witnesses whom they wished to give evidence today.

The First Respondent confirmed that he accepted that the sum of £2,900 was the rental which would have been due to the date of this application in terms of the lease agreement, but stated again that the Second Applicant had agreed to waive this amount in writing. His position today, however, was that the Second Applicant had waived the rental due in consideration of the Respondents carrying out substantial renovation works to the Property.

The First Respondent stated that the Respondents had left the Property after the locks were changed and the Applicants resumed possession on 21st December, and that the Respondents' papers and some belongings remained there, including a copy of the document which was the subject of the Tribunal's direction, which was the reason why the Respondents had not complied with that direction. The First Respondent confirmed that the Respondents' new address is 85 Warrix Avenue, Irvine, KA12 0DW.

The First Respondent accepted that no further rental payments had been made since August 2018, contrary to what he had said at the previous Hearing. He

explained that this was due to a miscommunication between him and his wife, for which he apologised. He accepted that these sums were due and unpaid, save for those for the month of December which he alleged were not due to the Applicants as a result of the Respondents leaving the Property on 21st December 2018.

Mr Blair and the Second Applicant both explained to the Tribunal that the Applicants accepted that the Respondents had carried out some work to the Property, but that they had only agreed to meet the cost of some of this work which had been invoiced by the First Respondent to them and which they had paid. They were able to produce copies of these invoices.

The First Respondent accepted in response that he had rendered invoices for some of this work, and that those invoices had been paid.

Mr Blair invited the Tribunal to accept the Applicants' evidence, and to grant an order for payment for the full amount now sought of £5,000.

The First Respondent invited the Tribunal to accept the Respondents' evidence and grant an order for 3 months' rental of £2,100.

Statement of Reasons

Section 16 of the *Housing (Scotland) Act 2014* provides as follows:

"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)).

(2) But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

(3) Part 1 of schedule 1 makes minor and consequential amendments."

Accordingly, the Tribunal now has jurisdiction in relation to claims by a landlord (such as the Applicant) for payment of unpaid rental against a tenant (such as the Respondent) under a short assured tenancy such as this.

The Tribunal considered the terms of the short assured tenancy agreement and the copy rent arrears statement provided, and was satisfied that this disclosed *ex facie* an outstanding balance of rent arrears as at today's date in the sum sought of £5,000.00.

The questions for the Tribunal were whether it accepted the Respondents' evidence that the Second Applicant had waived payment of the £2,900 of rent arrears otherwise due as at September 2018, and whether it accepted that the Respondents were not liable for rental for the month of December 2018.

After careful consideration of the evidence, the Tribunal is not prepared to accept the evidence of the Respondents. Their position is that the Second Applicant waived the Applicants' right to claim outstanding rental of £2,900 in writing, and that they retained a copy of this document.

Despite a direction from the Tribunal dated 28th November 2018 to produce this document by 12th December 2018, the Respondents have failed to do so. On the First Respondent's own evidence, he had access to his written records until at least 21st December, and so could (and should) have been able to produce this by 12th December.

The Tribunal also noted the First Respondent's apparent change of position on the basis on which he asserts the Second Applicant agreed to waive the rental due. At the Hearing on 28th November, he stated that this was apparently in connection with the Respondents' application for a council house. However, at today's continued Hearing he stated that this was in consideration of the Respondents carrying out substantial renovation works to the Property.

The Tribunal noted that when the Applicants produced various copy invoices for some of this work, the First Respondent accepted that he had provided them with these invoices for the work, and that these invoices had been paid.

For these reasons the Tribunal was accordingly not prepared to accept the evidence of the Respondents that the Applicants had waived in writing their entitlement to some of the rental due under the tenancy agreement.

Further, the Tribunal did not accept the Respondents' evidence that they were not due rental for the month of December, in circumstances where they accepted that they had not left the property until the locks were changed on 21st December.

That being so, the Tribunal accepts that outstanding rental for the Property in terms of the tenancy agreement is due by the Respondents to the Applicants in the sum of £5,000.00.

Decision

In these circumstances, the Tribunal will make an order for payment by the Respondents to the Applicants of the sum of £5,000.00.

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.

Neil Kinnear

Legal Member/Chair

16/01/19

Date