



**Decision made under Section 5(2) of the Debtors (Scotland) Act
1987 by First tier Tribunal for Scotland**

Reference number: FTS/HPC/PY/19/2176

Date Payment Order was granted: 8th May 2019

Parties:

Ms Elizabeth Aire, 1 Baillieston Road, Glasgow G71 7SB ("the Debtor")

Miss Louise Miller, 72 Micklehouse Road, Glasgow G69 6TG ("the Creditor")

Tribunal Members: Ms Aileen Devanny (Chairing Legal Member); Mr Leslie Forrest,
(Ordinary Housing Member).

Order

The First tier Tribunal, having heard evidence from the parties:

Grants a Time to Pay Order under Section 5(2) of the Debtors (Scotland) Act 1987, in the
following terms:

The Debtor is required to pay the sum of Sixty Two Pounds and fifty pence (£62.50) per
calendar month until the full amount has been paid. The first payment must be made no later
than Eighth October 2019 with subsequent payments due on the eighth of the month.

Since the First-tier Tribunal for Scotland (Housing and Property Chamber) has now made a
decision on the Time to Pay Order application, the Interim Order to sist diligence is recalled.

Note of Reasons for Decision following hearing on 11 September 2019

Introduction

On 8 May 2019 the First tier Tribunal for Scotland Housing and Property Chamber ("the
Tribunal") made an order for payment requiring the Debtor to pay the Creditor the sum of
£1500. The Payment Order arose from an application (Case reference

FTS/HPC/PR/18/3478) made by the Creditor under Rule 103 of the Tribunal Procedural Rules for an order for payment where a landlord, the Debtor, has failed to carry out duties in relation to a tenancy deposit.

Procedural History

An application for a Time to Pay Order was received by the Tribunal on 11 July 2019. Additional information was required by the Tribunal before that application could be considered competent. Without withdrawal of the application received on 11 July 2019, an amended application for a Time to Pay Order was received on 1 August 2019. A copy of the Service of the Charge on the Debtor accompanied the original application. On 7 August 2019 the Tribunal considered that the amended application has been properly made and is competent, and ordered that any diligence be sisted until further notice.

The Tribunal served a copy of the application on the Creditor's representative and sought the views on the Debtor's proposal for payment by installments of £22 per month. The Creditor's representative objected to the proposal on the basis that it would take almost 6 years to satisfy the compensatory award; that it is believed that the Debtor has sold the rental property and no account has been offered by her as to how she has utilised the net free proceeds of sale; and the Creditor has incurred considerable costs in relation to the grant of the award and its enforcement. The Creditor had invited settlement of the award by the Debtor who failed to respond.

Relevant legislative provisions

Debtors (Scotland) Act 1987

Section 5.— Time to pay orders.

(1) Subject to section 14 of this Act, this section applies to a debt due under a decree or other document in respect of which—

- (a) a charge for payment has been served on the debtor;*
- (b) an arrestment has been executed; or*
- (c) an action of adjudication for debt has been commenced.*

(2) Subject to subsections (4) and (5) below, the sheriff or the First-tier Tribunal, on an application by the debtor, shall, if satisfied that it is reasonable in all the circumstances to do so, and having regard in particular to the matters mentioned in subsection (2A) below, make an order that a debt to which this section applies (including any interest claimed in pursuance of subsections (6) and (7) below) so far as outstanding, shall be paid—

(a) by such instalments, commencing at such time after the date of intimation in accordance with section 7(4) of this Act to the debtor of the order under this subsection, payable

at such intervals; or

(b) as a lump sum at the end of such period following intimation as mentioned in paragraph (a) above,

as the sheriff may specify in the order.

(2A) The matters referred to in subsection (2) above are—

(a) the nature of and reasons for the debt in relation to which the order is sought;

(b) any action taken by the creditor to assist the debtor in paying that debt;

(c) the debtor's financial position;

(d) the reasonableness of any proposal by the debtor to pay that debt; and

(e) the reasonableness of the objection by the creditor to the offer by the debtor to pay that debt.

(3) An order under subsection (2) above shall be known as a "time to pay order".

Section 14.— Circumstances where direction or order not competent or no longer effective.

(1) It shall be competent to make a time to pay direction or a time to pay order only in relation to a debtor who is an individual and only if, and to the extent that, the debtor is liable for payment of the debt concerned in either or both of the following capacities—

(a) personally;

(b) as a tutor of an individual or as a judicial factor loco tutoris, curator bonis or judicial factor loco absentis on an individual's estate.

(2) A time to pay direction or a time to pay order shall cease to have effect on the death of the debtor or on the transmission of the obligation to pay the debt concerned during his lifetime to another person.

(3) Where a time order for the payment by instalments of a sum owed under a regulated agreement or a security has been made under section 129(2)(a) of the Consumer Credit Act 1974 it shall not thereafter be competent to make a time to pay direction or a time to pay order in relation to that sum.

Main issues for decision at the hearing

1. In the circumstances is a time to pay order competent
2. Is the Tribunal satisfied that it is reasonable in all the circumstances to make a time to pay order, having particular regard to the matters mentioned in Section 5 (2A) of the 1987 Act stated above. If so, what would be affordable instalment/ lump sum payments.

Written and Oral Submissions

The Tribunal considered the application and written response at a hearing in Glasgow on 11 September 2019. The Creditor was not present as she was unwell and she was represented by Mr David Doig, solicitor. The Debtor and a supporter, Ms Shirley Cant, were present.

After introductions, the Chairperson explained the papers before the Tribunal and the procedure which would be followed. She explained the legislative provisions in Section 5(2A) of the 1987 Act which the Tribunal must have regard to in determining if it is reasonable in the circumstances to make an order. She invited parties at the start to state their position. There was no change in position to that specified in the Debtor's written application and response from the Creditor.

The Chairperson then addressed each element of Section 5(2A) in turn and invited the parties to provide evidence or make comment.

(a) the nature of and reasons for the debt in relation to which the order is sought;

A copy of the Rule 103 determination which included statement of reasons for the determination dated 8 May 2019 was circulated with the agreement of both parties. This explained the nature of the debt and reasons for the payment order in the sum stated.

The parties expanded and agreed that the tenancy, which was the subject of the Rule 103 application, related to a house at 26 Bressay Grove, Glasgow. Mr Doig produced a Rightmove statement of house prices which disclosed that this house had been bought on 20 May 2008 for a sum of £108,500 and sold on 24 April 2019 for a sum of £125,000. The Debtor agreed that this was accurate and this disclosed the sums paid and received by her when she bought and then sold the house which was the subject of the tenancy with the Creditor.

The Debtor explained that she had purchased the house for her daughter and her then partner. The house was legally in her name and she was the mortgage holder. The deposit has been provided by her daughter and her partner but they had been unable, due to market pressures which prevailed in 2008, to obtain a mortgage in their own names. Due to a relationship breakdown the house became vacant and an arrangement was made that the house would be rented with the mortgage being paid from the rent and the net rental after deductions being paid by the Debtor to her daughter. The Debtor was the landlord in terms of the tenancy as she was the owner. The Debtor explained that the net free proceeds after redemption of the mortgage of around £100,000 was paid to her daughter and her former partner. The sum passed to them was £17,000. £8,000 from the £17,000 represented the

return of funds originating from the Debtor's daughter and then partner. The Debtor was vague on the specific expenses which amounted to the sum of £8,000 deducted from the balance after redemption of the mortgage before the net free sale proceeds of £17,000 were paid. She was pressed on this and stated estate agent fees, lawyer's fees, home report and costs of repairs to the house before sale which the Debtor covered in a loan which she repaid from the sale proceeds.

The Debtor was asked about the reasons for not retaining a sum to cover any potential liability in relation to ongoing proceedings before the Tribunal in relation to failure to lodge the tenancy deposit in an approved scheme. A hearing had been fixed for 8 May 2019 in relation to the tenancy deposit proceedings, some 2 weeks after the sale of the house owned by the Debtor. The Debtor did not provide a satisfactory answer beyond that she did not know if any award would be made or, if so, the amount. She had earlier stated that she had offered the Creditor at the time of the sale a sum of £500 over and above the tenancy deposit of £500.

(b) any action taken by the creditor to assist the debtor in paying that debt;

The Creditor's representative reiterated the information already contained in his written response that he had invited settlement before involvement of sheriff officers but had received no response. He had written twice to the Debtor following receipt of the payment order.

(c) the debtor's financial position;

Considerable time was taken exploring the Debtor's finances. The details provided within the application form were referred to. In addition, the Debtor produced a recent charge served on her by sheriff officers for council tax for the years 2016/7 and 2018/9 for the sum of £611.06. This was an additional debt not mentioned in her application form. She clarified that she is entitled from September 2019 to State Retirement Pension of £109 per week which is paid 4 weekly. She has made enquiries and is also entitled to Pension Credit and this will allow her to claim certain health benefits. These pension payments will bring her weekly income to a sum of £163.25, which is an additional £23 beyond her current income as shown in her application form. She did not believe that she would be able to claim Pension Credit if she continued to work and, therefore, her intention was that she would give up her existing part time work. She currently receives financial support from her daughter and her new partner but this will cease when she starts to receive a pension. She has not approached her daughter to explain her financial predicament, partly brought about by the tenancy of the house from which her daughter derived a lump sum and rent for a considerable period.

(d) the reasonableness of any proposal by the debtor to pay that debt;

The Debtor explained that she had no funds to replace household items and had no “slack” in her finances. She felt that £22 per month was a reasonable instalment offer from her finances. She had not had the benefit of a lawyer and had relied on CAB for assistance with the application. She accepted that she had had representation for the tenancy deposit proceedings.

(e) the reasonableness of the objection by the creditor to the offer by the debtor to pay that debt.

Mr Doig raised a number of issues and asked the Tribunal to refuse the application. He opposed a time to pay order on various grounds:

- a. On an affordability basis as the Debtor had no funds in reserve and would be unable to maintain instalment payments, particularly in light of the additional council tax arrears which had recently come to light which would result in a diminution of funds;
- b. It would be unreasonable for the Creditor to be expected to wait over five years for settlement of the award assuming no further change in the Debtor's circumstances;
- c. The delay and costs to the Creditor of the proceedings and enforcement to date;
- d. The mechanism and maneuvering by the Debtor to alienate funds and her lack of anticipation of an award in relation to the tenancy deposit proceedings. Before giving away money to family, she should have made provision for potential debts. These actions had prejudiced the Creditor. At best, he described the Debtor's actions as having a basis in imprudent decisions.

Reasons for Decision

A time to pay order is legislatively competent in the circumstances described.

The Debtor was generally frank about her finances and regular outgoings. However, there was a pattern of confusion when she was asked awkward questions, such as when Mr Doig was asking questions about the capital sum paid to her daughter without retention of a sum to cover any award from the Tribunal proceedings and when he pointed to her assertion to the Tribunal at the hearing on 8 May 2019 that she remained, as at that date, the heritable proprietor of the house at Bressey Grove. She disputed that this later statement was accurately recorded in the statement of reasons. The Debtor was unwilling to consider if her

daughter may be willing to assist her given the gratuitous payment she had received from the Debtor following the recent sale of the house.

The Tribunal acknowledges that it is the Debtor's statutory right to seek an instalment payment of the debt. However, the Tribunal must consider if it is reasonable in all the circumstances to do so. The Tribunal acknowledges that currently the Debtor has limited income and would be unable to immediately pay the debt in full from her own finances. From 8 October 2019 she will receive state pension payments every 4 weeks. With the pension credits this will provide an increase of £23.25 on her present weekly income, making a net disposable weekly income, after current outgoings, of £29.25. She may well have to make an arrangement for payment of additional council tax arrears from this sum, but it still leaves scope to increase her affordable monthly payments beyond the offer she made of £22 per month. Given the increase in the Debtor's income, the Tribunal considers that a reasonable instalment per calendar month would be £62.50, which equates to just over £15.50 per week. State pension is paid 4 weekly and the Tribunal was invited to make monthly instalments by the Debtor to coincide with her first pension receipt on 8th October 2019. This instalment arrangement will result in settlement of the debt within two years, which the Tribunal noted was a period which Mr Doig in a communication dated 2 August 2019 considered to be an acceptable period for repayment. The Tribunal considered this to be reasonable arrangement in all the circumstances.

Appeal provisions

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.

A.Devanny

Legal Member/Chair

Date

11th September 2019