

# Housing and Property Chamber First-tier Tribunal for Scotland

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**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) in relation to the application by the Respondent to recall the Decision by the Tribunal dated 6<sup>th</sup> September 2018 under section 30 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.**

Chamber Ref: FTS/HPC/CV/18/1245

Re: Property at 2/1 30 Greenlaw Drive, Paisley, PA1 3RIJ ("the Property")

Parties:

Mr Leslie Gray, Farmfield House, Law Brae, West Kilbride, KA23 9BP ("the Applicant")

Michael Wilson, Solicitor of Walker Laird, Solicitors (The Applicant's Representative').

Ms Sarah-Jane Caldwell, 66 Oakshaw Street West, Paisley, PA1 2DE ("the Respondent")

Sinead Machin, Solicitor of Complete Clarity, Solicitors (The Respondent's Representative').

Tribunal Member:

Jacqui Taylor (Legal Member)

## **Decision**

**The Tribunal, having considered the Respondent's application to Recall its Decision dated 6<sup>th</sup> September 2018 refused the application and the original decision by the Tribunal dated 6<sup>th</sup> September 2018 remains.**

### **1. Background**

The Respondent applied to the Tribunal for Recall of the Tribunal's Decision dated 6<sup>th</sup> September 2018, which Decision was issued on 8<sup>th</sup> September 2018. The Respondent's application for Recall was received by the Tribunal on 22<sup>nd</sup> February 2019. The Respondent averred that in the event that the application for Recall is

granted the Respondent she should not be liable for the outstanding rent as it was being lawfully withheld until the necessary repairs had been carried out.

## **2. Documents lodged with the Tribunal.**

Documents lodged with the Tribunal by the Respondent were:

- 2.1 Notice of Referral dated 10<sup>th</sup> July 2014.
- 2.2 Repairing Standard Enforcement Order.
- 2.3 Determination by the Private Rented Housing Committee dated 22<sup>nd</sup> September 2014.
- 2.4 Determination by the Private Rented Housing Committee dated 22<sup>nd</sup> June 2015.
- 2.5 Notice to Renfrewshire Council dated 22<sup>nd</sup> June 2015 intimating that the Landlord had failed to comply with the Repairing Standard Enforcement Order.
- 2.6 Completion Certificate of Work dated 15<sup>th</sup> December 2015.

## **3. Case Management Discussion**

This case called for a Case Management Discussion (CMD) at 2pm on 30<sup>th</sup> May 2019 at The Glasgow Tribunals Centre, 20 York Street, Glasgow.

The Applicant's Representative Michael Wilson of Walker Laird Solicitors, attended the CMD on behalf of the Applicant. The Applicant did not attend the CMD.

The Respondent's Representative Sinead Machin of Complete Clarity Solicitors, attended the CMD on behalf of the Respondent. The Respondent did not attend the CMD.

## **4. The Tribunal identified with the parties' Representatives the following agreed facts at the CMD:**

- 4.1 The Respondent had not attended or been represented at the Case Management Discussion on 6<sup>th</sup> September 2018.
- 4.2 The Original Decision by the Tribunal was dated 6<sup>th</sup> September 2018 had been issued following the Case Management Discussion on 6<sup>th</sup> September 2018. The Tribunal had determined that the sum of £1395.21 is due by the Respondent.

4.3 The Respondent had applied to the Tribunal for Permission to appeal the Original Decision on 23<sup>rd</sup> December 2018.

4.4 The Tribunal refused the Respondent's application for Permission to Appeal in terms of their decision dated 3<sup>rd</sup> January 2019.

4.5 A Repairing Standard Enforcement Order had been issued by the Private Rented Housing Committee dated 22<sup>nd</sup> September 2014 which required the Landlord (The Applicant) to 'Replace the controls that are missing from the storage radiators to ensure that the radiators can be used for space heating in the manner intended.'

4.6 A Completion Certificate had been issued by the Private Rented Housing Committee dated 15<sup>th</sup> December 2015.

## **5. Application for Recall.**

The Respondent's Representative, Sinead Machin, had lodged written representations which in summary, advised that the Respondent had not lodged the application for Recall timeously as she resided in China. She did not receive the letter from the Tribunal dated 8<sup>th</sup> September 2018 and the written decision until she returned home from China shortly before Christmas 2018. Her father died in January 2019 and this was why the Respondent had delayed in obtaining legal advice and lodging the application for recall. Also the Respondent fully intended to defend the application on the grounds that the Applicant was in breach of the tenancy agreement in a number of respects regarding the condition of the Property and that rent was not due for that reason.

Sinead Machin also advised the Tribunal that the Respondent had asked the Tribunal Administration to send correspondence to her by email as she resided in China but the Tribunal Administration had only sent the Decision and covering letter by recorded delivery post to 66, Oakshaw Street, West, Paisley being a property the Respondent rented out. Whilst the letter had been signed for it had not been signed for by the Respondent.

The Respondent had lodged written representations to the effect that the Respondent, as guarantor, ought only to be held liable where the sums in rent are due and payable and this is not the case in respect of this rental property. The rent was being withheld by the Respondent's sister Sharon Caldwell, on account of the disrepair status of the property. It was averred that as the repairs required by the

RSEO had not been carried out by the Applicant the property was wholly uninhabitable. Sharon Caldwell was left with no alternative but to leave the Property and move in with the Respondent in May 2018. The Respondent, in her role as guarantor for her sister, should not be held liable for the outstanding rent, as it was rent that was being lawfully withheld until the necessary repairs had been carried out.

At the CMD Mrs Taylor asked Sinead Machin if her client, or indeed the Tenant Sharon Caldwell, had warned the Landlord that rent would be withheld if the repairs had not been carried out and if the retained rent had been put to one side in a separate account. She advised that as far as she was aware no letters had been sent to the Landlord advising that rent would be withheld if the repairs were not carried out. Also she did not know if the rent had been placed in a separate account. Sinead Machin further advised the Tribunal that the signature on the guarantee was not her clients. She explained that she had applied to the Tribunal for copies of the original productions and she had only received these on the 22<sup>nd</sup> May 2019. She sent copies to her client by email and only received instructions from her client on 29<sup>th</sup> May 2019 to the effect that the signature on the guarantee was not the Respondent's. She emphasised that the Respondent was not denying that she had signed the guarantee just that the signature on the guarantee produced with the application is not the Respondent's. She did not seek an adjournment to allow additional time to lodge productions or call witnesses to support her client's contention.

Michael Wilson, the Applicant's Representative had lodged written representations to the effect that the Respondent had been aware of the CMD which was held on 6<sup>th</sup> September 2018. He produced an email from the Respondent to her sister forwarding the email from the Tribunal to the Respondent of 14<sup>th</sup> August 2018, advising the Respondent of the new date and seeking information from Sharon Caldwell. He also provided a screenshot which appeared to be messages from the Respondent asking Sharon Caldwell or their father to attend the Case Management Discussion on 6<sup>th</sup> September 2018. The Case Management Discussion of 1<sup>st</sup> August 2018 had been continued to 6<sup>th</sup> September 2018 to allow the Respondent to be present or be represented at the Case Management Discussion on 6<sup>th</sup> September 2018. There is no good reason to allow the application for recall to be received late

as the Respondent had sufficient time to obtain advice and make the application for recall had she wished to do so. Also the charge had been served and the days of charge had expired.

Michael Wilson advised at the CMD that the original rent statement lodged with the original Application showed that the rent had not been withheld but that Sharon Caldwell had made the following rent payments: 11<sup>th</sup> May 2015: £406.16; 8<sup>th</sup> June 2015: £406.15; 6<sup>th</sup> July 2015: £406.16 and 30<sup>th</sup> October 2015: £500. He further advised that a Completion Certificate had been issued by the Private Rented Housing Committee following completion of the works. Also that Sharon Caldwell had applied for a rent relief order of a 90% reduction in the rent but this had not been granted. In summary there is no good reason to allow the application for Recall to be received late.

**Decision of the Tribunal in relation to the application for recall.**

Section 30(1) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that an application for Recall can be made where a decision had been made in absence because the party did not take part in the proceedings or fail to appear or be represented at a hearing.

Section 30(2) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the application for Recall must be made in writing to the Tribunal and state why it would be in the interests of justice for the decision to be recalled.

The Tribunal determine that the Application for Recall was competent as (i) the Respondent did not take part in and was not represented at the Case Management Discussion on 6<sup>th</sup> September 2018 and the Tribunal Decision dated 6<sup>th</sup> September 2018 had been made following that Case Management Discussion and (ii) the application had been made in writing and (iii) the Application stated that the Respondent wished to fully defend the Application which the Tribunal considered was sufficient to meet the requirement for the Application to state why it would be in the interests of justice for the decision to be recalled.

Section 30(4) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Application for Recall must be received within 14 days of the date the decision.

The Respondent's Application for Recall had not been received timeously.

Section 30(5) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may extend the period of 14 days, on cause shown.

The Tribunal considered the whole circumstances of the case. The Original application was dated 15<sup>th</sup> May 2018. The case had called at Case Management Discussions on 1<sup>st</sup> August 2018 and 6<sup>th</sup> September 2018. The Tribunal accepted the said email produced by the Applicant's Representative dated 14<sup>th</sup> August 2018 and the said screen shot as being evidence that the Respondent knew of the Case Management Discussions. The Respondent had sent the Tribunal Administration an email dated 30<sup>th</sup> July 2018 which stated:

'My sister, the tenant (Sharon Caldwell) requested for a variety of repairs to be made repeatedly over a substantial period of time and was ignored.

She went to Citizens Advice who advised her on every action she took. The Paisley rep was Kevin Montgomery.

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Also involved was environmental health from Renfrewshire Council, who inspected the property as it was mouldy and this was changing colour and spreading-damaging personal property and the health of his sister, who has disabilities and her nephew who has respiratory difficulties.

My sister's lawyer is currently dealing with proceedings against this Landlord on behalf of my sister.'

Notwithstanding the terms of this email full written representations had not been lodged on behalf of the Respondent until 22<sup>nd</sup> May 2019. The Tribunal considered

that the Respondent's approach suggests a casual approach to the Tribunal process.

The Respondent's written representations state that the Respondent ought only to be liable where the rent is due and payable. The rent was being withheld by the Respondent's sister Sharon Caldwell on account of the disrepair status of the Property. They state that the required repairs were not carried out under the Repairing Standard Enforcement Order and the Property became wholly uninhabitable. The Respondent should not be liable for the outstanding rent as it was being lawfully withheld until the necessary repairs had been carried out.

The Tribunal considered if the written representations were correct in fact and law.

The Respondent's Written representations state that the Property became wholly uninhabitable as the works required by the Repairing Standard Enforcement Order had not been carried out. This is factually not correct. The RSEO required the Landlord to replace missing storage heater controls. The Respondent did not lodge any further documents evidencing their position that the Property was wholly uninhabitable. The fact that missing storage heater controls had not been repaired did not result in the Property being wholly uninhabitable.

The Tribunal considered the authority of Adrian Stalker: Evictions in Scotland which states: 'Withholding rent is a remedy open to a defender if a landlord is in breach of its repairing obligations. However there are two important prerequisites to the exercise of this right. First, as the purpose of exercising this remedy is to prompt the landlord to carry out the repairs, the tenant must warn the landlord that he is about to cease paying rent, unless the necessary repairs are effected. Secondly, withholding the rent entails that the Tenant puts it to one side. Once the repairs have been effected, his obligation to pay the rent, including the withheld rent revives subject to any claim he may have for an abatement over the period during which the repairs were delayed.'

The Respondent's Representative, Sinead Machin, had advised the Tribunal that she had no information as to whether a letter had been sent to the Applicant advising that the rent was being withheld due to the condition of the Property also she was unable to confirm if the rent had been put into a separate account. Also Sinead Machin did not dispute the oral representations made by the Applicant's

representative to the effect that rent payments had been made by Sharon Caldwell and that the rent had not been withheld. In addition the works required by the Repairing Standard Enforcement Order had been completed and a Certificate of Completion had been issued.

The Tribunal determined that the said essential prerequisites for withholding rent have not been met by either the Tenant Sharon Caldwell or the Respondent.

With regards to the oral representations made at the CMD to the effect that the signature to the guarantee is not that of the Respondent, the Tribunal noted that no evidence had been presented to support this contention and no adjournment had been sought to enable the Respondent to lodge such evidence. The Tribunal were therefore unable to consider this further.

The Tribunal was mindful of the observations of Lord Carloway in the case *Khaliq v Gutowski* [2018] CSIH 66 when he states that the procedural rules are designed to meet the requirement of access to justice and fairness, and this is fairness to all parties. If one party is given excessive latitude, other parties can be prejudiced and that can include the progress of an action and the associated expense.

Given the whole circumstances of the case the Tribunal finds that even although the Respondent had an arguable case for lodging the application for Recall late due to the following:

(i) The Respondent had been aware of the Case Management Discussion held on 6<sup>th</sup> September 2018 but chose not to attend or be represented.

(ii) There are no established grounds on which the Tenant, Sharon Caldwell or the Respondent would have been entitled to withhold the rent that was lawfully due the Tribunal and

(iii) It would be unfair to the Applicant to delay the matter further.

The Tribunal refuses the application for Recall as it had not been lodged timeously and the original decision by the Tribunal dated 6<sup>th</sup> September 2018 remains.



## Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may seek permission to appeal directly from the Upper Tribunal for Scotland on a point of law only. That party must seek permission to appeal within 30 days of the date the decision was sent to them. The request for permission to appeal must be in writing and you may wish to consult the Scottish Court and Tribunals Service website which includes an application form with information on the details required.

**J Taylor**

Signed .....



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Chairperson Date: 30<sup>th</sup> May 2019