

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under sections 36 and 37 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/PR/18/2712

Re: Flat 0/2, 28 Elizabeth Street, Glasgow, G51 1AD (“the property”)

Parties:

**Mr Dambaru Baral, Flat 3/3 96 Bankhall Street, Glasgow G42 8SP
 (“the applicant”)**

**Mr Mohammed Arif, Ms Khalda Arif, Wardhall Farm, Meadowbank Farm,
Torrance G64 4EY
 (“the respondents”)**

Tribunal Members:

Adrian Stalker (Legal Member) and Frances Wood (Ordinary Member)

Decision

The Tribunal:

(a) determines that on 4 December 2015, Zahid Arif, a person acting on behalf of the respondents, unlawfully deprived the applicant, the residential occupier of Flat 0/2, 28 Elizabeth Street, Glasgow, G51 1AD, of his occupation of that property, and the respondents are accordingly liable to pay the applicant damages assessed on the basis set out in section 37 of the Housing (Scotland) Act 1988;

(b) assesses damages under section 37 in the sum of £18,000.

Accordingly, the Tribunal will make a payment order against the respondents in favour of the applicant, in that sum.

Background

1. This is an application under rule 69 of schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Procedure Regulations”), in which the applicant seeks damages for unlawful eviction. Initially, common law damages in the sum of £16,028.91 were sought. However, the application was subsequently amended, to seek statutory damages under sections 36 and 37 of the Housing (Scotland) Act 1988, in the sum of £18,000.

2. The case has a fairly lengthy history. The alleged unlawful eviction took place on 4 December 2015. The application was made to the Tribunal on 26 September 2018, and originally proceeded to a hearing on 11 January 2019, which took place in the absence of the respondents. At that hearing, the Tribunal decided that the tenancy agreement between the parties, which was created on 23 December 2013, was an assured tenancy under the 1988 Act, but not a short assured tenancy under section 32. That decision led to the amendment of the claim, such that statutory damages, rather than common law damages, were sought. The reasons for the amendment are explained below.

3. Subsequently, the case called for a hearing on a number of occasions during the course of 2019. The hearings were discharged for various reasons. However, some progress was made. In particular, at the hearing on 17 May, Mr Zahid Arif and Ms Sheereen Razaq appeared on behalf of the respondents. Zahid Arif is the respondents’ son. On 17 June, a mandate was then submitted to the Tribunal, in terms of which the respondents indicated that they had instructed GPS Legal and Estate, to act on their behalf, in relation “to complaint raised against us against our property 28 0/2 Elizabeth Street, Glasgow.” Thereafter, Mr Bashir of GPS Legal and Estate appeared for the respondents at the Tribunal hearings. At the hearings on 14 October and 12 December, he was accompanied by Zahid Arif.

4. Mr Bashir prepared a short statement dated 2 July, which was put before the Tribunal at the hearing of 3 July, which briefly outlined the respondents’ position in relation to the application. That was further developed in three statements, all dated 15 July 2019, and further productions, which were lodged with the Tribunal in advance of a scheduled hearing on 29 August. The statements bore to be made by the second respondent Khalda Arif, by Zahid Arif, and by a Mr Yasir Bhatti.

5. It is apparent from these documents, taken with the tenancy agreement, that the following matters are not in dispute between the parties:

- On or about 23 December 2013, the applicant took up occupation of the property 0/2 28 Elizabeth Street, Glasgow, G51 1AD, under a written agreement described as a “short assured tenancy”.
- However, in light of the decision of the Tribunal of 11 January 2019, it was

accepted that the tenancy was assured, but not short assured.

- The property is owned by the respondents. However, only the first respondent, Mohammed Arif, is named as a landlord in the tenancy agreement.
- At all material times, from the creation of the tenancy agreement, to the changing of the locks at the property on 4 December 2015, the respondents' son, Zahid Arif, acted on their behalf, as their agent, in relation to the tenancy. For most of that period, the respondents were in Pakistan.
- On 4 December 2015, Zahid Arif, with the assistance of a Mr Yasir Bhatti, entered the property, removed the applicant's belongings and personal effects, and changed the locks.
- On that date, the applicant was in arrears of rent.
- At that time, no formal steps had been taken by the respondents, or on their behalf, to end the tenancy contract between the parties, or to initiate proceedings for recovery of possession.

6. Given the terms of the statements lodged on behalf of the respondents, the factual dispute between the parties focussed on the following issues:

- The amount of the arrears of rent.
- Whether, prior to 4 December, communications took place, between Zahid Arif and the applicant, by which they made a verbal agreement that the applicant would vacate the property on or about 22 November 2015.
- The assessment of damages for the purposes of section 37 of the 1988 Act, which is discussed below.

Statutory provisions

7. Sections 36 and 37 of the 1988 Act make provision for statutory damages for unlawful eviction. For purposes of this decision, the relevant parts of sections 36 and 37 are as follows:

36.— Damages for unlawful eviction.

(1) This section applies if, at any time after 3rd December 1987, a landlord or any person acting on his behalf unlawfully deprives the residential occupier of any premises of his occupation of the whole or part of the premises.

...

(3) Subject to the following provisions of this section, where this section applies, the landlord shall, by virtue of this section, be liable to pay to the former residential occupier, in respect of his loss of the right to occupy the premises in question as his residence, damages assessed on the basis set out in section 37 below.

(4) Any liability arising by virtue of subsection (3) above—

- (a) shall be in the nature of a liability in delict; and
- (b) subject to subsection (5) below, shall be in addition to any liability arising apart from this section (whether in delict, contract or otherwise).

(4A) Any action to enforce liability arising from this section must be raised in the First-tier Tribunal unless the residential occupant's claim is founded on the premises in question being subject to a Scottish secure tenancy or to a short Scottish secure tenancy (within the meaning of the Housing (Scotland) Act 2001 (asp 10))

(5) Nothing in this section affects the right of a residential occupier to enforce any liability which arises apart from this section in respect of his loss of the right to occupy premises as his residence; but damages shall not be awarded both in respect of such a liability and in respect of a liability arising by virtue of this section on account of the same loss.

...

(6B) If, in proceedings to enforce a liability arising by virtue of subsection (3) above, it appears to...the First-tier Tribunal -

- (a) that, prior to the event which gave rise to the liability, the conduct of the former residential occupier...was such that it is reasonable to mitigate the damages for which the landlord would otherwise be liable,...

the First-tier Tribunal may reduce the amount of damages which would otherwise be payable to such amount as it thinks appropriate...

(7) In proceedings to enforce a liability arising by virtue of subsection (3) above, it shall be a defence for the defender to prove that he believed, and had reasonable cause to believe—

- (a) that the residential occupier had ceased to reside in the premises in question at the time when he was deprived of occupation as mentioned in subsection (1) above...

(8) In this section—

- (a) “residential occupier”, in relation to any premises, means a person occupying the premises as a residence whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises;
- (b) “the right to occupy”, in relation to a residential occupier, includes any restriction on the right of another person to recover possession of the premises in question;
- (c) “former residential occupier”, in relation to any premises, means the person who was the residential occupier until he was deprived of or gave up his occupation as mentioned in subsection (1) or subsection (2) above (and, in relation to a former residential occupier, “the right to occupy” and “landlord”

shall be construed accordingly).

37.— The measure of damages.

(1) The basis for the assessment of damages referred to in section 36(3) above is the difference in value, determined as at the time immediately before the residential occupier ceased to occupy the premises in question as his residence, between—

(a) the value of the landlord's interest determined on the assumption that the residential occupier continues to have the same right to occupy the premises as before that time; and

(b) the value of the landlord's interest determined on the assumption that the residential occupier has ceased to have that right.

(2) For the purposes of the valuations referred to in subsection (1) above, it shall be assumed—

(a) that the landlord is selling his interest in the premises on the open market to a willing buyer;

(b) that neither the residential occupier nor any member of his family wishes to buy; and

(c) that it is unlawful to carry out any substantial development of any of the land in which the landlord's interest subsists or to demolish the whole or part of any building on that land.

(3) Subsection (8) of section 36 above applies in relation to this section as it applies in relation to that.

...

8. Prior to enactment of these provisions, unlawful eviction was a delict in Scots law. Under section 36(5), the right of the dispossessed occupier to seek damages at common law is preserved, but the Court or Tribunal cannot award both common law and statutory damages. Where damages for unlawful eviction are sought in sheriff court proceedings, it is common to seek statutory and common law damages in the alternative.

9. In this case, the applicant originally sought damages at common law. As is explained in the paper attached to his original application to the Tribunal, common law damages were thought to give rise to higher figure, if the tenancy was a short assured tenancy. Given the very limited security of tenure available to short assured tenants, the difference between the figures in section 37(1)(a) and (b) is not great, because any person purchasing the property can make arrangements to gain vacant possession, fairly quickly, by raising proceedings under section 33 of the 1988 Act. However, the Tribunal decided, on 11 January 2019, that the tenancy was not short assured. Consequently, the applicant's agents then obtained a report from David Ross of Allied Surveyors, opining that, on the basis that the tenant's right to occupy the property was under an assured tenancy, the difference between the two figures in section 37(1)(a)

and (b), as at 4 December 2015, was £18,000. Accordingly, the application was amended. The claim became one for statutory damages under sections 36 and 37, for the sum of £18,000.

10. At an earlier hearing before the Tribunal on 8 October 2019, it was accepted by Mr Bashir, on behalf of the respondents, that Zahid Arif had taken possession of the tenancy property, on behalf of the respondents, without obtaining a court order. It was also accepted that, given the statements lodged by the respondents, the defence to the claim for statutory damages was that stated in section 36(7)(a), that the defender “believed, and had reasonable cause to believe...that the residential occupier had ceased to reside in the premises in question at the time when he was deprived of occupation”.

Hearing on 12 December 2019

11. The applicant and his representative, Ms Simpson, of Govanhill Law Centre, were both in attendance at the hearing. Mr Zahid Arif, the respondents’ son, and his representative Mr Bashir, were also both in attendance, along with a witness for the respondent, Mr Yasir Bhatti.

Preliminary issue

12. At the beginning of the hearing, Mr Bashir sought to lodge a report from Shepherd Chartered Surveyors. The report was a desk-top valuation report, in terms of which a surveyor, Mr Hall, opined that the difference between the two figures in section 37(1)(a) and (b), as at 4 December 2015, was £14,000. This report had been sent to the Tribunal clerks by email, and intimated to the applicant’s agent, the day before the hearing. Ms Simpson opposed the lodging of this document.

13. Rule 22 of the Procedure Rules states:

22.— Lodging of documents etc.

Except as otherwise provided in these Rules, or as otherwise specified by the First-tier Tribunal, a party must send to the First-tier Tribunal no later than 7 days prior to any hearing notified under rule 24(1)—

(a) a list of any documents and copies of the documents that the party wishes to rely upon; and

...

(2) Before allowing a document to be lodged late, the First-tier Tribunal must be satisfied that the party has a reasonable excuse.

14. The possibility of the respondents obtaining their own expert report, in respect of the assessment of damages under section 37, had been raised by Mr Bashir at previous hearing in the case, on 8 October. In its decision of 14 October, the Tribunal said, at paragraphs 28-30

28...the Tribunal suggested that parties may wish to discuss how the evidence of the surveyors (assuming one is instructed by the respondents) is to be presented. To require them both to attend the hearing would cause additional expense for the parties, and would tend to increase the length of the hearing. It suggested that the representatives discuss this issue, in advance of the hearing. If a report is provided by another surveyor, perhaps Mr Ross could comment on that, in writing, if so advised.

29. The Tribunal also pointed out that if either party wishes to insist on the attendance of the other party's surveyor, they may seek an order from the Tribunal to that effect, under rule 21 of the Procedure Rules.

30. In the circumstances, the Tribunal considered making a direction requiring the respondents to lodge any further documents, on which they intend to rely, within 21 days. However, it decided, in the circumstances, to leave parties' representatives to decide, between themselves, how best to present any further written evidence on the valuation of the property. However, it would remind parties that all documents require to be lodged within 7 days of the hearing, in terms of rule 22 of the Procedure Rules.

15. As to why the report was not lodged timeously, Mr Bashir gave two reasons. Firstly, he said that his office had been very busy since October. Secondly, he said that he had had difficulty finding a surveyor who was willing to provide valuations as at 4 December 2015.

16. In the view of the Tribunal, those reasons did not amount to a "reasonable excuse" for the purposes of rule 22(2). Mr Bashir was clearly contemplating obtaining a report, as at 8 October. The Tribunal does not accept that there would be significant difficulty in obtaining a desk-top valuation from a surveyor, as at a given date, or that this was a particularly onerous task, which would take more than two months to carry out. The Tribunal's decision of 14 October suggests how parties might approach the leading of expert evidence at the hearing. In particular, it envisages that the applicant's expert Mr Ross could have the opportunity of commenting on any report lodged by the respondents. That was effectively precluded, by the report being intimated less than 24 hours before the hearing.

17. For these reasons, the Tribunal refused Mr Bashir's application to allow the report from Shepherd Chartered Surveyors to be lodged, and no further reference is made to the report.

Evidence of the applicant

18. The applicant's evidence, given in response to questions from his agent, was as follows.

19. The applicant is 61 years old. He is unemployed, and resides at Flat 3/3, 96 Bankhall Street, Glasgow G42 8SP.

20. Throughout the course of the tenancy, he always dealt with Zahid Arif, though he recalled meeting the first respondent on one occasion. He confirmed that item 7, in the

list of documents attached to the application, was the parties' tenancy agreement, dated 23 December 2013. The agreement had been prepared by Zahid Arif and given to him to sign. He remembered going with Zahid Arif to an office of Glasgow City Council, in order that they could produce the agreement, for the purposes of making a claim for housing benefit.

21. On being asked whether he had had any problems with Zahid Arif, he replied: "Yes he locked my door and threw my stuff out. He told me that I would sleep on the street. He warned me of this. All my stuff was outside. Very important stuff. I went to the police. The police came. Mr Arif was there."

22. He could not recall the specific date of when the locks were changed, and suggested that it might have been 22 December 2015. Before the day when the locks were changed, he had not received any letters or documents from the landlords asking him to leave. Neither the landlords nor Zahid Arif had made a verbal request that he leave.

23. On that day, he had been out. When he returned to the property, he saw boxes in the common close, outside the door to his flat, 0/2. He saw that his belongings were in the boxes. These included his clothes, bedding and food which had been taken from the kitchen. Two men, one of whom was Zahid Arif, were still putting the boxes out, when he returned. He did not recognise the other man. He spoke to Zahid Arif, who told him that he could sleep in the street.

24. He left the building and was able to speak to two police officers who were on patrol. They went back to the property with him. At that point, he was concerned that valuable documents, including his passport, were still in the property. They were in a drawer under the bed.

25. The police officers did not attempt to stop the eviction. At their direction, he gave the keys to the property to Zahid Arif. Also under the direction of the police officers, Zahid Arif went into the property and retrieved documents, which were then given to the applicant. However, he subsequently found that an envelope containing a copy of the tenancy agreement, and receipts for cash payments of rent, had been kept by Zahid Arif.

26. On being evicted, he had nowhere to sleep. He sought assistance from the council on that day, as a homeless person. He was accommodated in a night shelter, and in homeless accommodation, for several months, before moving to his current home.

27. The applicant was asked, in more detail, about the property that was removed from the flat, on the day of the eviction. He explained that, with the tenancy, the landlords had provided a bed, a table, and the white goods in the kitchen.

28. The applicant was taken to copies of four photographs which were lodged as the first item in a supplementary list of documents for the applicant. He confirmed that he had taken the photographs, two days after the eviction. They show cardboard boxes on the tiled floor of the common close to 28 Elizabeth Street. In the first photograph, the rear door of the close, leading out of the back of the building, can be seen in the top left of the picture. The boxes have been placed against the wall of the close. This was just outside the door to his flat, which was 0/2.

29. The applicant took the photographs because someone advised him to do so. He could not remember who gave him that advice. Two days after the eviction, the boxes were still in the close, because he had nowhere to store them.

30. The applicant was then taken to the second item in the same supplementary list of documents. This was a single page document headed "CityBuilding (Glasgow) LLP", and was dated 8 December 2015. It is a pre-printed form, in which the applicant's name, and the property address have also been printed. The applicant confirmed that, by arrangement with the local authority, CityBuilding collected his belongings from the close, and took them into storage. This document was an inventory of the items collected. The items have been entered in the form in handwriting, which is not completely legible, but which includes the following:

Boxes	7
Hockers Bundle	1
Bucket	1
Bags	5
Toaster	
Rucksack	
Bible	
2 Photos	
[Illegible]	
Jogging Trousers	2
Chopping Board	
Tracksuit	

31. The applicant said that the boxes also included foodstuffs and cooking oil, which had been taken from the kitchen. Cooking oil and other food had leaked over items of his clothing. These were ruined, and had to be thrown out.

32. As far as he was aware, the condition of the tenancy property was the same after the eviction, as it had been when he took entry.

33. The applicant was asked again about any communications that had taken place, prior to the eviction. He said that, following a discussion with Zahid Arif, he had gone to the police station in Ibrox. The police told him that the landlord would need a court order to evict him.

34. The applicant was then asked about rent arrears. He received housing benefit from time to time, during the course of his occupation. He maintained that he had kept up with rental payments until the last month. Mostly he paid through his bank account, but sometimes he paid in cash. He no longer had the receipts for cash payments, because they were not among the documents that were handed back to him, on the day of the eviction.

35. During the course of this chapter of his evidence, the applicant insisted, on several occasions, that his bank account statements showed payments that had been made by him. However, Ms Simpson explained that the statements had not been lodged, because they had only been provided to her, the day before the hearing on 12 December 2019.

36. The applicant was then questioned by Mr Bashir. It was put to him that Zahid Arif must have given him a reason for evicting him. The applicant insisted he did not know the reason. He said that “everything was OK”. It was put to him that, on the day of the eviction, he had arrears of over £2,000. This was strenuously denied by the applicant. He said that sometimes he did not pay the rent on time, but he always made up the payments. He was only one month in arrears at the date of the eviction.

37. Mr Bashir then referred the applicant to a rent account. This was lodged and intimated in July 2019, at the same time as the statements to which reference is made in paragraph 4 of this decision. Mr Bashir informed the Tribunal that he had prepared this account himself, on the basis of bank statements that had been provided to him by the respondents and Zahid Arif. The bank statements had not been lodged.

38. The rent account indicated that as at the date of eviction, the arrears were £2,375. The applicant insisted that the statement was absolutely wrong. He reiterated his previous evidence.

39. It was put to the applicant that Zahid Arif had had discussions with him about his rent arrears. The applicant insisted that he had paid the rent. It was also put to him that he had agreed to leave the property, because of the arrears. The applicant denied this, and repeated his evidence about the advice he had received on his visit to Ibrox Police Station.

40. He was asked whether he had received a note from Zahid Arif, before the eviction took place. He denied this.

41. On re-examination by Ms Simpson, the applicant accepted that he had had arguments with Zahid Arif, in which he insisted that he would not leave.

42. The applicant was questioned by the members of Tribunal. He accepted that, a

few weeks before the eviction, Zahid Arif had visited the flat and warned the applicant that he was going to throw him out. At that time, he had lost his job, and was having difficulty paying the rent. That was when he went to the police station to seek advice.

Evidence of Zahid Arif

43. Zahid Arif is 32. He is the son of the respondents. He resides at Wardhill House, Meadowbank Farm, Torrance. He is an MOT Inspector.

44. Mr Arif was questioned by Mr Bashir. He confirmed that he had arranged for the parties' lease to be drawn up and signed. He had gone with the applicant to the council offices to present the lease as evidence for the purposes of claiming housing benefit.

45. The applicant lived at the property for about two years. His rental payments were irregular. Mr Arif went to speak to him about the arrears "quite a few times". He and the respondents let the situation go on. He then made an agreement with the applicant that he was going to vacate the flat in September 2015, as he described in his statement of 15 July 2019. Mr Bhatti came with him to the flat on several occasions, in the period before the eviction. The applicant agreed to vacate. He said he had accommodation arranged, that he was going to move into.

46. Mr Arif was asked about the events of 4 December 2015. He entered the flat with Mr Bhatti. There was not much in there. A lot of it looked as if it had been discarded. He had not attempted to contact the applicant on that day. He and Mr Bhatti bagged and boxed what was there, and started putting it out in the close.

47. Mr Bashir asked Mr Arif whether the applicant had turned up at the flat, on that day. Mr Arif replied: "After we'd bagged everything, he did turn up. He turned up and said he was still there. I explained to him that he had agreed to vacate."

48. The applicant then left, but came back later, with the police officers. He said that he had documents. Mr Arif had insisted that there was nothing in the flat. He had gone inside the flat, with the applicant. They looked in the drawers under the bed. There was nothing there. The police officers told the applicant to hand the keys back.

49. Mr Arif was then questioned by Ms Simpson. He accepted that, throughout the course of the tenancy, he had been managing the property for his parents. They left the decisions to him.

50. He was then taken to his statement of 15 July 2019. He was asked how he could be so specific about the dates, in the statement. He said that he had written down the dates in a pad. He confirmed that the pad had not been lodged in evidence.

51. In the statement, Mr Arif maintains that he called out to the property on 20 November 2015. This was to check whether the applicant was in the process of

moving, as he had agreed. On finding that there was no response, when he knocked at the door, he had written a note, and posted it through the letterbox. He was asked what the note said. Mr Arif indicated that the note said: "We spoke to you. Please contact us. If we don't receive anything from you, we will enter the property". When he returned to the property on 4 December, the letter was still there on the other side of the door. He was asked why that letter was not lodged in evidence. He said that he no longer has the letter.

52. Ms Simpson noted that in his evidence to Mr Bashir, Mr Arif had said that on 4 December, the applicant had come back to the flat, had said that he was "still there". She put to Mr Arif that it must have been clear, on the basis of that statement, that the applicant had not left. Mr Arif said that there was nothing, in the property, to indicate that he was staying there. The items left at the property looked as if they had been discarded. There was nothing in the fridge.

53. Ms Simpson, asked why, on the basis of the applicant saying he was "still there", Mr Arif did not stop the eviction and use the correct procedure. Mr Arif said: "He told me he was going to leave. We agreed. There was nothing wrong with what happened. He said he was leaving." Mr Arif was then asked whether he had followed up this agreement (that the applicant would leave) in writing. Mr Arif accepted that he had not.

54. He knew that the correct legal procedure would have entailed contacting a solicitor and taking legal advice. He didn't see the need to do that as he had an agreement with the tenant that he would leave.

55. Ms Simpson referred Mr Arif to a passage in his statement in which he said: "On 24th November 2015 I entered the property along with Mr Bhatti and on inspection it appeared to me that the tenant had moved out of the property with very minimum personnel effects throughout the property in a discarded manner. Then I returned along with Mr Bhatti on 4th of December 2015 and bagged whatever I thought belonged to the tenant in bags and put the bags in the close outside the flat, to take them to my vehicle for storage".

56. Mr Arif reiterated that the items were minimal, and appeared to be discarded things of no value. He was asked why he hadn't simply thrown them out. Why did he plan to "to take them to [his] vehicle for storage"? He replied that items did not belong to him. He wanted to clear the property to clean it. He intended to keep the contents in storage in case the applicant wanted or needed them.

57. Mr Arif was then referred to the statement of PC Natalie Hughes dated 14 June 2019, which was lodged with the Tribunal papers by letter from the applicant's agents dated 25 June 2019. In that statement, PC Hughes describes her attempts to make inquiries into a complaint made by the applicant of unlawful eviction, being an offence under section 22 of the Rent (Scotland) Act 1984.

58. In that statement, PC Hughes confirms that she obtained a phone number for Mr Arif. In March 2016 she spoke to him. She states that Mr Arif “was not forthcoming...and would not provide a forwarding address or contact details. He said only that his dad had gone to Pakistan...I spoke with Zahid Arif again on 12 December 2017 who became hostile and told me that his parents were out of the country and wouldn’t provide contact details.” The statement ends by indicating that it was considered, by the police, that there was sufficient evidence that an unlawful eviction had taken place. If the respondents had been traced, they would have been charged. A report was submitted to the Procurator Fiscal on 27 March 2018. PC Hughes has heard nothing further since then, regarding the progress of any criminal proceedings.

59. On being referred to this statement, Mr Arif confirmed that he had spoken to the police on two occasions. They had asked to speak to his father. He told the police that his father was in Pakistan. He denied that he had been hostile. He said that he was not asked for an address. He did not know why neither of his parents had made contact with the police.

60. Mr Arif was also questioned by the members of the Tribunal. He was asked whether he had tried to contact the applicant on 24 November or 4 December, to arrange for him to collect his belongings. He said that he did, but there was no answer. He accepted that on 4 December, he had gone along with boxes, in order to collect up those belongings.

61. He was also asked whether, in making an agreement with the applicant that he would leave, they had discussed what was to happen with the keys. Mr Arif said that it had not occurred to him to make such an arrangement. As the applicant still had keys, he had decided to have the locks changed.

Evidence of Mr Bhatti

62. Mr Bhatti was questioned by Mr Bashir. He confirmed that he is a friend of Mr Arif. He visited the flat with him in September 2015. He said that Mr Arif had given the applicant verbal notice to leave the property, during the course of that visit.

63. He confirmed, in accordance with his statement, that he had visited the property with Mr Arif on 20 and 24 November, and 4 December 2015. A note was left for the applicant on 20 November. Mr Arif wrote the note and put it through the letterbox. On 24 November, they entered the property. It looked, to him, as if the property had been vacated. He saw unopened letters. It was not tidy. It looked as if there was less stuff there, than when he had previously visited.

64. On 4 December, he went with Mr Arif to clear out the property. The applicant returned to the flat as they were doing this. There was a conversation between the

applicant and Mr Arif. He did not hear what was said. The applicant went away, and returned with two police officers. The applicant was asking for documents. Mr Arif had taken the police officers into the property, to confirm that there were no documents left in the flat.

65. Ms Simpson asked Mr Bhatti how long he had been friends with Mr Arif. Mr Bhatti said that they had been close friends for about 12 years. She also asked how he could be so specific about the dates given in his statement, which was prepared more than three years after the events it described. Mr Bhatti confirmed that the dates were given to him by Zahid Arif.

66. He had not seen what was written in the note left at the property by Mr Arif. It was still there, when they returned on 4 December.

67. Mr Bhatti was also asked about the basis for his impression, on 4 December, that the property was no longer occupied. He said that it was untidy, it smelled damp, the milk in the fridge was out of date, there was food in a pan that looked as if it had been there for a while. He also thought that there was less clothing and shoes there, than had been apparent in his visit in September. He could not remember how many boxes or bags had been filled, on 4 December.

Ms Simpson's submission

68. Ms Simpson asked the Tribunal to find, under section 36(3) of the 1988 Act, that the respondents were liable to pay the applicant damages assessed on the basis set out in section 37, and to assess the damages under section 37(1) as £18,000.

69. She noted that no documentary evidence had been lodged by the respondents of any agreement between the parties, under which the applicant had agreed to leave. Nor had the respondents lodged the note that was said to have been posted through the letterbox by Mr Arif. She questioned whether it was credible that Mr Arif could give very specific evidence as to dates, in a statement prepared in July 2019, so long after the events of 2015.

70. Mr Arif's evidence in relation to the applicant's property at the flat was contradictory. Initially he said it was rubbish, but then accepted that perhaps it had value. On hearing from the applicant, on 4 December, that he was "still there" at the flat, a reasonable landlord would have taken a step back. He had not done so.

71. Mr Bhatti's evidence ought to be treated with caution. He was a close friend of Mr Arif. He gave evidence based on a statement, the content of which was at least partially supplied by Mr Arif.

72. Ms Simpson argued that, under section 36(7), Mr Arif did not believe, and did not

have reasonable cause to believe, that the applicant had ceased occupation of the flat. She took the Tribunal to the decision of Sheriff Poole, in *Mackay v Leask* 1996 HousLR 94. She noted the similarities between the facts in that case, and the present dispute. In *Mackay v Leask*, the landlord had changed the locks while the tenant was away. She also sought to defend the action under section 36(7). At paragraphs 18-14 to 18-16, Sheriff Poole said:

18-14. In support of the defence under s36(7) of the Act Mr James Ross and a large number of other witnesses employed by him to clear and redecorate the flat gave evidence. I took the view that I required to approach that evidence with caution. Mr James Ross is the husband of the defender and took the principal part in all the transactions. All the rest of the defender's witnesses, apart from a Mr O'Keefe, were friends, employees, tenants or family of Mr James Ross...

18-15. Although Mr James Ross was dismissive of what he saw in the flat, even he conceded that there were personal belongings lying about the flat to the extent of about two bin bags full when he entered the flat to supervise redecoration. Mr David Jardine who was a friend and business associate of Mr James Ross saw personal belongings there "at the end of November and December". Mr Ian Ross, a brother, saw items such as Chinese takeaway cartons lying about, either at Christmas 1991 or Christmas 1992, and Mr Robert Clive, a tenant and employee of Mr James Ross saw personal belongings "back in 1992" at the flat. No keys were handed over by the pursuer to the defender or Mr James Ross...

18-16. I concluded that from the evidence before me the defender had not established that she had believed or had reasonable cause to believe that the pursuer had left the flat.

73. Ms Simpson noted that in this case, the extent of the applicant's belongings were far more than two bin bags full. Similarly, the keys had not been handed back.

74. Most tellingly, however, Mr Arif had accepted that, on the day of the eviction, the applicant had told Mr Arif that he was still living at the property. That, in itself, was sufficient to refute a defence under section 36(7).

75. Ms Simpson accepted that the applicant's position was vague in several respects, and his evidence on his contact with Mr Arif, before the eviction, was inconsistent. However, his overall position was clear, and had remained unchanged, since he made his complaint to the police.

76. The applicant's unlawful eviction had been reported to police to the police by him. It was clear from PC Hughes' statement that there had been sufficient evidence to charge Mr Arif and the respondents with an offence under section 22 of the 1984 Act.

Even on Mr Arif's evidence, neither he, nor the respondents, had made any attempt to proactively engage with police to put forward their own position. Their defence was created, during the course of 2019, in order to resist the applicant's claim in this case.

77. Ms Simpson then took the Tribunal through the reports prepared by Mr Ross of Allied Surveyors, dated 15 February and 12 August 2019. She invited the Tribunal to accept Mr Ross's opinion, uncontradicted by any other expert evidence, that the difference between the two figures for the purposes of section 37(1) of the Act was £18,000.

Mr Bashir's submission

78. Mr Bashir's submission was brief. He said that Mr Arif had acted on the basis that he had an agreement with the applicant that he was going to leave. It was clear from the rent statement that there were significant arrears. The applicant had not been truthful about that, which affected his credibility.

79. He suggested that the damages ought to be limited, in light of the arrears, though that submission was not made by reference to any part of sections 36 or 37, or any reference to authority. It was unjust that an award of damages be made on the basis set out in section 37, as the respondents had no intention of selling the property.

Findings in fact; findings in fact and law

80. The Tribunal has already noted, at paragraph 5 above, the issues that were not in dispute. In addition, and on the basis of the evidence, the Tribunal makes the following further findings in fact:

- (a) During the period between September and November 2015, the applicant was in arrears of rent.
- (b) At that time Zahid Arif and the applicant had discussions regarding the tenancy. These took place when Mr Arif visited the property.
- (c) The applicant did not, in September 2015, agree to leave the property.
- (d) Because of the rent arrears, Mr Arif asked the applicant to leave.
- (e) This prompted the applicant to seek advice at Ibrox Police Station, where he was advised that he could not be evicted without a court order.
- (f) During the course of a subsequent discussion with Mr Arif, the applicant indicated that he could not be evicted with a court order, and would not be leaving. That subsequent discussion took place at some point between September and 4 December 2015.
- (g) When Mr Arif and Mr Bhatti attended the property on 4 December 2015, they did so with at least seven cardboard boxes, which they intended to use to pack up the applicant's belongings.
- (h) Those belongings including clothing, food, and the other items listed at

paragraph 30 of this decision. There were enough items to fill the seven cardboard boxes.

- (i) These belongings were not rubbish, and did not have the appearance of having been abandoned or discarded by the applicant.
- (j) While Mr Arif and Mr Bhatti were taking out the boxes, the applicant returned, having gone out earlier in the day. He had a discussion with Mr Arif, in which he indicated, by saying that was “still there” at the flat, that he was continuing to live there.
- (k) Given that discussion, and the extent of the applicant’s property that was still at the property, the Mr Arif did not believe, and did not have reasonable cause to believe, that the applicant had ceased to reside at the property.
- (l) As at 4 December 2015, the applicant was still residing at the property.
- (m) As at 4 December 2015, the value of the respondents’ interest in the property, determined on the assumption that the applicant continued to have the right to occupy, as an assured tenant, was £22,000. The value of their interest on the assumption that the applicant had ceased to have that right, was £40,000.

81. The Tribunal found, in fact and in law, that:

- (a) On 4 December 2015, Mr Arif, acting on behalf of the respondents, unlawfully deprived the applicant of his occupation of the property.
- (b) That accordingly, the respondents are liable to pay to the applicant, in respect of his loss of the right to occupy the premises in question as his residence, damages assessed on the basis set out in section 37 of the Housing (Scotland) Act 1988.
- (c) That the level of damages assessed on the basis of section 37 of the 1988 Act is £18,000.

82. As to these findings, the Tribunal would wish to make the following observations.

83. It was not in dispute that Zahid Arif, who acted on behalf of the respondents at all material times, had carried out an eviction while the parties’ tenancy was ongoing, and without having obtained a court order. In order to defend themselves against a claim for damages for unlawful eviction under sections 36 and 37 of the 1988 Act, the respondents had sought to advance a case, under section 36(7), that Zahid Arif believed, and had reasonable cause to believe, that the applicant had ceased to reside in the property.

84. However, the evidence led before the Tribunal did not support that assertion. Firstly, Mr Arif and Mr Bhatti accepted that they had gone to the flat and filled a number of cardboard boxes with the applicant’s belongings. The record taken by City Building, as indicated at paragraph 30 above, was that there were seven boxes. It is also apparent, from the photographs taken by the applicant, that there were items on top of the boxes. On any reasonable view, the sheer volume of the applicant’s belongings

at the tenancy were not such as to indicate that he had ceased occupation. As was pointed out by Ms Simpson, that volume was significantly greater than was the case in *Mackay v Leask*. Both Mr Arif and Mr Bhatti suggested that the property looked as if it was rubbish that had been abandoned by the applicant. The Tribunal accepted the applicant's evidence as to the nature of items, which included clothing, bedding and food. It did not find the evidence of Mr Arif, to the effect that the flat looked abandoned, to be credible. It also did not accept Mr Bhatti's evidence to that effect, given his relationship with Mr Arif, and the fact that the content of his statement appears to have been provided, at least in part, by Mr Arif.

85. Secondly, Zahid Arif, in answer to a question from Mr Bashir (see paragraph 47 above), disclosed that, when the applicant appeared at the property on 4 December 2015, he told Mr Arif that he was "still there" at the property. It was clear that this meant he was still living there. Significantly, Mr Arif's answer was to insist that the applicant made an agreement to leave. Accordingly, on his own evidence, he proceeded in the belief that the applicant had made a previous agreement to leave, and ought to be held to it. That is quite different from a belief that the applicant had ceased to occupy the property, as at 4 December 2015.

86. It appeared to the Tribunal that, in his submission on the evidence, Mr Bashir did not attempt to advance an argument that section 36(7) applied. Rather, he attempted to emphasise two factors: that the applicant had agreed to leave, and that he was in significant rent arrears. This, it seemed to the Tribunal, was more apt to amount to submission under subsection (6B) of section 36, to the effect that, because of the conduct of the applicant prior to the eviction, it would be reasonable to mitigate the damages for which the respondents would otherwise be liable (though Mr Bashir did not mention that provision in his submission).

87. There was no dispute that, on 4 December 2015, the applicant was in arrears of rent. However, it was difficult for the Tribunal to form any clear view as to the level of arrears. The sole evidence as to the amount was the rent account prepared by Mr Bashir. However, he did not ask Mr Arif to speak to that account, or the level of arrears. Nor did he produce the bank statements on which it was apparently based. The applicant, for his part, strongly insisted that the amount shown in the account was far higher than the true figure. In the circumstances, the true level of rent arrears was not clear.

88. The Tribunal was not satisfied that it would be appropriate to mitigate damages on the level of rent arrears, in any event. Even on the basis of the rent account prepared by Mr Bashir, it was apparent that the applicant was continuing to make payments of rent, throughout 2015. In the account, his last payment was on 23 November 2015, 11 days before the eviction. Most of the arrears were due to a period of non-payment in 2014 (if the rent account is to be believed). In that case, Mr Arif and the respondents had a long period of time in which to address the rent arrears in the correct and lawful

manner, by raising eviction proceedings on the grounds of three months' rent arrears, to which there would have been no defence.

89. As to the suggestion that the applicant agreed to leave, the Tribunal preferred the applicant's evidence. That seemed inherently unlikely, given that he had nowhere else to go. The Tribunal also accepted the evidence of the applicant that: following a discussion with Mr Arif, he had sought advice from the police as to whether he could be evicted without a court order; and thereafter, he told Mr Arif that he would not leave without an order being obtained. Even if there had been some prior suggestion that he would leave, that conversation ought to have made it clear, to Mr Arif, that the applicant had not agreed to cease occupation.

90. For these reasons, the Tribunal concluded that an unlawful eviction had taken place, that there was no defence under section 36(7), and that it was not reasonable to mitigate damages under section 36(6B).

91. As to the level of damages, the Tribunal was taken to the two reports from Mr Ross, of Allied Surveyors. His first report, of 15 February 2019, gave valuations, for the purposes of section 37(1)(a) and (b) of £45,000 and £27,000, a difference of £18,000. His second report took account of information, produced by the respondents, that as at 4 December 2015, the property suffered from dampness, and required remedial work to address that problem. In that case, said Mr Ross in his second report of 12 August 2019, the two figures ought to be reduced, to £40,000 and £22,000, but the difference was still £18,000.

92. As Mr Bashir's attempt to lead contrary evidence was not allowed by the Tribunal (see paragraphs 11 to 16 above), he was not in a position, in his submission, to dispute Mr Ross's opinion. Accordingly, the Tribunal accepted the figures given in Mr Ross's report of 12 August.

Conclusion

93. The Tribunal accordingly decided to make a payment order, for the respondents to pay to the applicant the sum of £18,000.

94. The Tribunal's decision was unanimous.

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.

Adrian Stalker

Signed

Date 8th January 2020