



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

Chamber Ref: FTS/HPC/CV/22/4163

Re: Property at Braeside Cottage, 124 New Hunterfield, Newtonloan Toll, Gorebridge, EH23 4LZ (“the Property”)

Parties:

Mr Derek Hunter, 17 Moulin Way, Dunfermline, KY12 7QQ (“the Applicant”)

Mrs Katie Kirkham, 6 Abbey Grange, Newtongrange, EH22 4RD (“the First Respondent”)

Ms Janet Flockhart, 2 McGahey Court, Stobhill Road, Newtongrange, EH22 4NJ (“the Second Respondent”)

Tribunal Members:

Ms H Forbes (Legal Member) and Ms S Brydon (Ordinary Member)

Decision (in absence of the First Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment should be granted against the First Respondent in the sum of £5,826. No order is made against the Second Respondent.

Background

1. This is a Rule 111 application made in the period between 17th November 2022 and 22nd February 2023 whereby the Applicant is seeking an order for payment in the sum of £4,396 in respect of rent arrears, and £1,430 in respect of damage and cleaning. The costs arise from a private residential tenancy agreement in respect of the Property between the Applicant and the First Respondent, which commenced on 24th July 2020. Rent was due in the sum of £1095 per month until March 2021, when it was reduced to £1050. The Applicant lodged a copy of the tenancy agreement, a rent statement, a guarantor agreement purportedly signed by the Second Respondent, and copy correspondence to the Respondents.

2. A Case Management Discussion (“CMD”) took place by telephone conference on 10th May 2023. The Applicant was in attendance. The Second Respondent was in attendance. The First Respondent was not in attendance. The Second Respondent denied she had signed the guarantor agreement and said she had not seen the document until she was served with the case papers. She stated that the signature on the agreement was not hers. She said it was her understanding that the First Respondent had sent in a Time to Pay Direction application (“TTPD”) to the Tribunal by recorded delivery. The Tribunal had not received the application.
3. The Applicant said he had been provided with a copy of the Second Respondent’s driving licence and the completed and signed guarantor form by the First Respondent. He had taken it at face value. There was some discussion about whether to remove the Second Respondent as a party to the application, however, in the absence of express agreement on the matter, the Tribunal decided to request further representations from parties on the matter. The case was continued to a further CMD to allow the First Respondent to submit a further TTPD application or a note of defence to the Tribunal. A Direction was issued in this regard. There was no response to the Direction from the First Respondent.
4. By letter written on 10th May 2023, the Second Respondent reiterated her position that she did not sign the guarantor agreement or agree to be a guarantor, and that she should be removed from the application.
5. By email dated 1st June 2023, the Applicant submitted photographs of a completed TTPD application form from the First Respondent, and made representations concerning the accuracy of financial information in the TTPD. The Applicant asked whether the Tribunal would report the matter of the signed guarantor agreement and alleged fraud to the police. The Applicant was informed that the Tribunal would not be reporting the matter to the police.
6. By email dated 6th June 2023, the Second Respondent submitted photographs of a completed TTPD form from the First Respondent, together with a posting receipt to the Tribunal Centre postcode sent on 5th April 2023 and recorded delivery tracking information to show that it had been signed for on 6th April 2023. Enquiries within the Housing and Property Chamber showed that the TTPD had not been received by the case worker.
7. By email dated 20th June 2023, the Applicant stated that he had reported the matter to the police.
8. A CMD took place by telephone conference on 21st August 2023. The Applicant was in attendance. The Second Respondent was in attendance. The First Respondent was not in attendance. The Applicant said he had been given an incident number by the police, who had informed him that the matter may take some months to investigate. The Applicant said he was uncertain as

to who signed the guarantor agreement and who was liable. He was not in a position to agree to remove the Second Respondent from the application.

9. A hearing was set down to hear evidence on two issues:
 - (i) Did the Second Respondent sign the guarantor agreement and is she liable for the sums sought?
 - (ii) Consideration of any TTPD application made by the First Respondent.
10. The Tribunal issued a Direction to the First Respondent, ordering her to submit photographs of the TTPD application or a fresh application, together with evidence of her income and expenditure. The First Respondent was informed that she should be aware that a failure to do so would be likely to result in an order for payment being made against her in the full sum sought, without the benefit of paying by instalment. The First Respondent was urged to attend the hearing.
11. On 15th September 2023, parties were notified of a hearing set down for 23rd November 2023.
12. By email dated 21st September 2023, the First Respondent lodged photographs of the TTPD application. The First Respondent did not comply with the Direction order to produce evidence of her income and expenditure.
13. By email dated 4th October 2023, the Applicant informed the Tribunal that he could not accept the First Respondent's TTPD proposal.
14. On 12th October 2023, parties were notified that the hearing would proceed on 23rd November 2023.

The Hearing

15. A hearing took place by telephone conference on 23rd November 2023. The Applicant was in attendance. The Second Respondent was in attendance. The First Respondent was not in attendance.
16. The Tribunal considered the terms of Rule 29. The Tribunal determined that the requirements of Rule 24 had been satisfied, and it was appropriate to proceed with the application in the absence of the First Respondent.

The Applicant's position

17. The Applicant said he had been in touch with the police on the matter of alleged fraud, but they have a huge backlog and will get back to him. The Applicant confirmed he wished to proceed against both Respondents.

18. The Applicant said the First Respondent responded to an online advert to rent the Property, which he described as a detached property at the medium end of the market. It was clear from the advert that a guarantor was required. The Applicant said he was told by the First Respondent that the Second Respondent was 'quite rich' and had a good income. The First Respondent had shown him photos of her previous house and said she was house proud. The First Respondent viewed the Property and paid a deposit to secure it prior to the tenancy commencing.
19. The Applicant issued a tenancy agreement and a guarantor agreement to the First Respondent. Both documents were dated and returned to him on 23rd July 2020. The guarantor agreement was purportedly signed by the Second Respondent. A copy of her driving licence was provided to the Applicant. The tenancy agreement was purportedly electronically signed by both Respondents. The Applicant said he had no reason to think the guarantor's signature on the agreement was not *bona fide*.
20. The Applicant was aware the First Respondent was in receipt of benefits including a disability benefit for a child. She had said there would be no difficulty in paying the rent, and that had been the case for the first 12 to 18 months. The First Respondent then got into difficulty paying the rent, accruing arrears. She moved out of the Property and he was very surprised to see the condition in which it was left. He sent photographs to the First Respondent and contacted her regarding the collection of her belongings. The First Respondent said the Applicant was stressing her by contacting her. He then decided to contact the Guarantor by Messenger. He provided a copy of the guarantor agreement and the driving licence photograph. He got no response, so he sent a letter by Recorded Delivery. There was no response.
21. Responding to questions from the Tribunal, the Applicant said he has three properties for let and he has been letting for around 15 years. He has used guarantors before but has never met a guarantor prior to entering into any agreement. All contact has taken place electronically. The Applicant said he was aware the witness to the Second Respondent's signature on the guarantor agreement was the First Respondent's boyfriend. The Applicant said he had not taken legal advice on guarantor agreements, but had used the Scottish Government template for the tenancy agreement, and the separate guarantor agreement as a 'belt and braces' approach. The Applicant said he had issued all the documents by email to the First Respondent, and she returned the completed documents. He had then signed the tenancy agreement. All signatures were dated 23rd July 2020 and the tenancy commenced the following day. He had no contact with the Second Respondent. The Applicant said he had also asked for a utility bill from the guarantor, which he did not get. He did not chase this up, as the guarantor's address was on the driving licence.
22. The Second Respondent did not wish to carry out any cross-examination of the Applicant.

The Second Respondent's position

23. The Second Respondent said she was aware that her daughter, the First Respondent, was moving into a new property, as she had used the Second Respondent's garage to store some furniture. The Respondents were on speaking terms at that time, but they later fell out due to issues with the First Respondent's health. The Second Respondent said she was aware her daughter had a boyfriend, but they never met.
24. The Second Respondent said there had been no discussion about being a guarantor for the First Respondent. If there had been, she would have probably agreed, but she would have wanted to meet the landlord first. She had been guarantor for a grandson purchasing a car previously and she had to go to the garage with her grandson to sign the documents.
25. The Second Respondent said she first became aware of the issue when she received a private message on Messenger from the Applicant, with copy documentation. She did not answer him as she felt it was unprofessional to contact her in this way. She spoke to the First Respondent at the time and she told her it was all being dealt with and not to worry about it. The Second Respondent said she never saw the tenancy agreement, and she did not sign the guarantor agreement.
26. The Second Respondent said the driving licence lodged was hers. Asked by the Tribunal how it could have come to be in the possession of the First Respondent, she said it was either in her purse or lying somewhere in her home. Her daughters were frequent visitors and would have access to her purse. Asked whether her daughter visited on 23rd July 2020, the Second Respondent said she probably had visited with her four grandchildren. Asked by the Tribunal if she could identify where the photograph of her driving licence was taken, the Second Respondent said she did not recognise the setting. Responding to questions from the Tribunal, the Second Respondent said she and the First Respondent were on speaking terms in July 2020.
27. The Second Respondent said it was clear the signature on the guarantor agreement did not match her signature on the driving licence. Asked whether she had discussed this with the First Respondent after she became aware of the Tribunal application, she said she had, and the First Respondent had said that the Second Respondent signed the agreement. The Second Respondent said, due to issues with her daughter's health, she did not want to fall out with her. The First Respondent had told her she was completing the TTPD application and she was paying the debt. The Second Respondent said the First Respondent was unlikely to have had a guarantor before as she owned her own house. She had sold her house, and the Second Respondent had assumed she had enough money to pay the rent on the Property. There had been no discussion about being a guarantor.

Cross-examination of the Second Respondent

28. The Second Respondent said she had signed as a guarantor for her grandson 10 years ago. Her garage had been half full with the First Respondent's belongings for two to four months before the tenancy commenced. The First Respondent was staying with her boyfriend. The Second Respondent never visited the First Respondent while she was staying with her boyfriend. The Respondents did not see each other much at this time. After the First Respondent moved into the Property, her children would visit the Second Respondent. The Second Respondent did not visit the Property, as she was concerned about the First Respondent's health and changing behaviour, and the people she was hanging about with. The Second Respondent described herself as always being there for the First Respondent.
29. The Second Respondent said she thought the guarantor arrangement had not been professionally done by the Applicant, and was not legal. Asked whether she thought the agreement might not have been enforceable if it was not signed by her, the Second Respondent said probably not. The Second Respondent said she had not been aware that the guarantor agreement was signed on her behalf by her daughter. It was her position she knew nothing about the agreement. She denied she had promised to pay the rent, saying again that there had been no discussion between the Respondents in this regard.

Summing up by the Applicant

30. The Applicant said the Second Respondent had been evasive and hesitant in answering simple questions around whether her daughter spoke to her before entering into the tenancy, and on the matter of the driving licence. It was his position that she was looking to escape liability. The Applicant said he accepted it was more than likely that it was not the Second Respondent's signature on the guarantor agreement, but it was his belief that she knew the position and thought if her signature was not on the agreement, it would not be enforceable. She would have a 'get-out' clause. Based on what the First Respondent had told him at the start of the tenancy, he believed there was an agreement that the Second Respondent would pay. It was his position that the Second Respondent was well aware that the guarantor agreement was signed by someone else on her behalf. Both Respondents and the witness to the signature had conspired in the belief that there would be a 'get-out' clause. That was the Second Respondent's motive and continuing motive throughout this case. The Respondents were jointly and severally liable.

Summing up by the Second Respondent

31. The Second Respondent said would have been willing to swear on oath that she knew nothing about the guarantor agreement. She did not sign the agreement. She said she was not a liar. The Second Respondent said she did not agree with the way in which the Applicant had set up the agreement. It was her position that she would pay sums due for her daughter and would not

want to see her daughter go to court, although she did not have knowledge of the agreement.

Further comment from the Applicant

32. The Applicant said the Second Respondent was giving mixed messages by saying she was willing to pay, and would have been willing to be the guarantor, but she was refusing all requests for payment.

Findings in Fact and Law

33.

- (i) The Applicant provided the First Respondent with an electronic copy of a private residential tenancy agreement in respect of the Property on or around 23rd July 2020.
- (ii) The Applicant provided the First Respondent with an electronic copy of a guarantor agreement on or around 23rd July 2020.
- (iii) On or around 23rd July 2020, the First Respondent returned the electronically signed tenancy agreement to the Applicant. The agreement was purportedly electronically signed by both Respondents.
- (iv) The First Respondent returned the signed and witnessed guarantor agreement to the Applicant together with a photograph of the Second Respondent's driving licence on or around 23rd July 2020.
- (v) The Applicant did not carry out any credit checks on the Second Respondent.
- (vi) The Second Respondent did not electronically sign the tenancy agreement.
- (vii) The Second Respondent did not sign the guarantor agreement.
- (viii) The tenancy commenced on 24th July 2020 at a monthly rent of £1095.
- (ix) In or around March 2021, the rent was reduced to £1050 per month.
- (x) The tenancy ended on or around 30th July 2022.
- (xi) The First Respondent did not pay rent lawfully due.
- (xii) The Applicant is entitled to recover rent lawfully due.
- (xiii) The First Respondent breached the terms of her tenancy agreement by causing damage to the Property, and failing to remove her belongings and clean the Property at the end of the tenancy.

- (xiv) The Applicant incurred costs in rectifying the First Respondent's breaches.
- (xv) The Applicant is entitled to recover costs incurred to rectify the First Respondent's breaches.
- (xvi) The Second Respondent is not jointly and severally liable for the First Respondent's breaches of contract or for the rent that is lawfully due.

Reasons for Decision

34. The Tribunal found all parties to be credible and reliable in their evidence.
35. The Tribunal considered on the balance of probabilities that the Second Respondent did not sign the guarantor agreement. While no expert evidence on handwriting was led before the Tribunal, it was clear that there was a significant difference between the signature on the guarantor agreement and the Second Respondent's signature on the driving licence, and on her written representations to the Tribunal. In reaching their decision, the Tribunal took into account the evidence of the Second Respondent in this regard, finding her evidence credible. Furthermore, the Tribunal took into account the Applicant's concession that it probably was not the signature of the Second Respondent on the guarantor agreement.
36. A guarantor agreement is a cautionary obligation and is covered by the Requirements of Writing (Scotland) Act 1995, and must be in writing. If the Second Respondent did not sign the agreement, there can be no agreement, and no liability on the part of the Second Respondent.
37. The Tribunal was not persuaded by the Applicant's position that there had been a conspiracy between the Respondents and the individual who witnessed the alleged signature on the guarantor agreement to the effect that, if the Second Respondent did not actually sign the document herself, there would be no liability. In any event, even if there had been such a conspiracy, for the reasons set out in paragraph 36, the Second Respondent could have no liability in those circumstances.
38. The Tribunal was surprised that the Applicant had not taken steps on his own behalf to determine that the Second Respondent was agreeable to becoming a guarantor, and to determine her suitability in terms of undertaking a credit check or requesting income details. It would also have been prudent for the Applicant to advise the Second Respondent to take her own legal advice on the guarantor agreement, to ensure that her agreement was freely given, particularly given the close relationship between the Respondents.
39. The First Respondent has sole liability for the debt, which she has accepted as due, by submitting the TTPD application.

40. The Tribunal considered sections 1 and 1(1A) of the Debtors (Scotland) Act 1987 and considered that it would not be reasonable in all the circumstances to grant a Time to Pay Direction. The Tribunal took into account the representations of the Applicant concerning the First Respondent's income and expenditure information in the application form, and her failure to comply with the Tribunal's Direction to lodge evidence to support her income and expenditure. The Tribunal could not be certain of the First Respondent's financial position. The Tribunal also took into account that the debt would take more than four and a half years to clear at a rate of £100 per month. The Tribunal did not consider this to be a reasonable proposal.

Decision

41. The Tribunal grants an order for payment in favour of the Applicant against the First Respondent in the sum of £5,826.

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.

H Forbes

Legal Member/Chair

23rd November 2023
Date