



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 (“the 2016 Act”) and Rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended (“the Regulations”)

Chamber Ref: FTS/HPC/CV/24/2102

Re: Property at Flat 3, 5 Bells Mills, Dean Village, Edinburgh, EH4 3DG (“the Property”)

Parties:

Iain Percival, 21A Drummond Place, Edinburgh, EH3 6PN (“the Applicant”)

Michael Layton (otherwise Michael Layon, Suzanne Hollywood (otherwise Suzanne Hollwood), Flat 3, 5 Bells Mills, Dean Village, Edinburgh, EH4 3DG (“the Respondent”)

Tribunal Members:

Nicola Weir (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment in the sum of £13,650, plus interest, be granted.

Background

1. By application lodged on 7 May 2024, the Applicant applied to the Tribunal for a payment order in the sum of £5,850 in respect of rent arrears plus interest thereon. Supporting documentation was submitted in respect of the application, including a copy of the tenancy agreement and a rent statement.
2. Following initial procedure, on 24 May 2024, a Legal Member of the Tribunal with delegated powers from the Chamber President issued a Notice of Acceptance of Application in terms of Rule 9 of the Regulations.

3. This application was subsequently conjoined with an application for eviction based on the rent arrears which was lodged with the Tribunal and accepted at a later date. Both applications thereafter proceeded together.
4. On 23 August 2024, Sheriff Officers served a copy of the Application and supporting documentation on the Respondent, together with intimation of the date, time and details of the Case Management Discussion ("CMD") to take place by telephone conference call on 23 September 2024. Written representations were to be lodged by 12 September 2024.
5. On 9 September 2024, an application to amend the sum claimed in respect of the conjoined payment application was lodged on behalf of the Applicant by email, together with an updated rent statement. The rent arrears had increased to £13,650 and the total sum claimed to £15,181.38. Apart from the rent arrears, the Applicant was also claiming contractual interest at the rate of 8% on all late payments of rent and reasonable costs, including legal costs, in terms of the tenancy contract amounting to £1,531.38. Invoices in respect of these costs were lodged as supporting documentation.
6. On 11 September 2024, the second-named Respondent, Suzanne Hollywood, emailed the Tribunal requesting an extension of time in order to submit a Time to Pay Application in respect of the payment application and also requesting a postponement of the CMDs. The request cited illness and health issues, particularly pertaining to herself, as the reason for this request, explaining that they required more time to complete a Time to Pay Application and wished a postponement of the CMD due to their personal circumstances. There were no representations contained in the Respondent's email relating specifically to the eviction application. The request was not circulated to the Applicant's representative due to the sensitive, medical information that it contained. It was circulated to the Tribunal Members on 20 September 2024 (the Friday before the CMD on the Monday) and considered by them that afternoon. The Tribunal decided to refuse the postponement request, that good reason had not been shown for the CMDs not proceeding as scheduled and requested that the first-named Respondent, Michael Layton, join the CMD by telephone on behalf of both Respondents if Ms Hollywood was unable to attend. Given the timeframe available, there was little point extending the timeframe for written representations. Authority was also sought for the Tribunal to circulate the Respondent's email to the Applicant's representative but no response was received on this point from the Respondent prior to the CMD.

Case Management Discussion

7. The CMD took place on 23 September 2024 at 2pm by telephone conference call. The Applicant was represented by Mr Greg Smart of Gilson Gray, solicitors and Mr Michael Layton, the first-named Respondent.
8. After introductions and introductory remarks by the Legal Member, who explained the purpose of the CMD, the Legal Member also advised regarding the Respondent's postponement request, the timing of that, the reason why it

had not been circulated to the Applicant's representative and the reasons it had been refused. Mr Layton was asked if the Respondent was happy for their email now to be circulated to the Applicant's representative but Mr Layton stated that they would prefer if it was not, because of the sensitive information it contained.

9. Mr Layton was then asked to confirm the Respondent's position regarding the payment application. He was asked a number of questions by both Tribunal Members. He confirmed that they were not denying the rent arrears or other sums claimed but, as per the representations lodged by Ms Hollywood, they were looking for time to repay the debt. Mr Layton was asked if they had taken any housing or financial advice. Mr Layton said that they had telephoned a few places but were still considering their options and had not gone as far as actually instructing anyone to assist them.
10. Mr Layton was asked about the background to the rent arrears and what had led them to stopping paying any rent after February 2024. He stated that this was due to the illnesses of he and Ms Hollywood. Due to the severity of their health conditions, they were unable to work. He said that things had just spiralled out of control. He reiterated that they admit the amount owing and do want to repay the debt. This is why they had requested more time to complete the Time to Pay application. On being asked if they had contacted the landlord or his letting agent or solicitors when difficulties arose to advise of the reasons for the arrears or to try and agree a payment plan, Mr Layton stated that they had advised the letting agents that they had health issues. They had not made offers to pay as they had found it difficult to get their heads around. Mr Layton was reluctant to provide details of their current income and expenditure, even in general terms. When asked about benefits, Mr Layton stated that they were not in receipt of Universal Credit or any Disability/PIP type benefits, nor had they made application for benefits. Mr Layton repeated that they were looking into things but still considering their options. He was not in a position to make any payment offer at the moment or commit to any payment arrangement, even in relation to the ongoing rental payments of £1,950 per month. He confirmed that they do not have savings or capital which would enable them to make a lump sum payment towards the arrears.
11. Mr Smart was then asked to address the Tribunal on behalf of the Applicant in relation to the payment application. He referred to the application to increase the sum sought which had been submitted on behalf of the Applicant and requested that it be granted. He stated that the rent arrears had amounted to between £5,000 and £6,000 when the application was lodged and are now significantly higher than that, amounting to £13,650 plus interest and reasonable costs, totalling £15,181.38. The rental income is needed by the Applicant to supplement his own income from his pension as he is retired. He is not a professional landlord and this is the only property that he rents out. There is no longer a mortgage over the Property but he is now having to look to other means to supplement his own income. He is severely disadvantaged by the high rent arrears and the fact that no rental payments have been made over a period of many months. Mr Smart confirmed that he does not accordingly have instructions to agree to a Time to Pay application and that, in any event,

the Respondent has not actually made any payment offer. Mr Smart was asked if the Applicant was aware of the Respondent's health issues and explanation for the rent arrears. He confirmed that the letting agent last had contact with the Respondent on 29 July 2024 and had been informed that the Respondent had medical conditions but had not been provided with any justification for rent not being paid or received any payment offers. Mr Smart requested that an order for the full amount sought be granted.

12. Mr Smart was asked for more information regarding the interest and reasonable costs claimed. He confirmed that the tenancy contract allows interest to be claimed by the Applicant on all late payments of rent at the rate of 8% and his instructions are to seek to recover interest in these terms, rather than the Tribunal just adding interest from the date of any order. In respect of the reasonable costs, he referred to the Invoices lodged in relation to the legal costs incurred by the Applicant to date, although conceded that there is not much detailed information in the invoices, such as a breakdown of the total charges. Mr Smart indicated that the fees were probably calculated on a 'time in line' method. The Legal Member indicated that in order for the tribunal to assess whether the costs claimed are "reasonable" in terms of the contract clause, the Tribunal would likely need further information, such as the number of hours charged and the hourly rate for the person(s) who carried out the work. Mr Leyton did not have any comments to make in relation to this particular matter.
13. The Tribunal Members adjourned to discuss the application in private and, on re-convening, advised that the application would be adjourned to a further CMD but, meantime, the Tribunal would issue a Direction requiring the Respondent to submit a fully completed Time to Pay application within 28 days, which would be forwarded to the Applicant's representative to take instructions and respond. The Direction would also require the Applicant to lodge further details regarding the interest and other costs claimed, again within 28 days. It was explained that, if no Time to Pay application was lodged by the Respondent within the 28 days, the Tribunal would seek to determine the application on the basis that no time to pay had been sought. The Tribunal also explained that it may be possible, depending on the circumstances, for the Tribunal to determine this application without the need for a further CMD.
14. Following the CMD, a CMD Note was issued to parties detailing the discussions which had taken place, together with a Direction in the terms specified above, both dated 23 September 2024.

Further Procedure

15. No Time to Pay Direction was submitted by the Respondent within the time limit stated in the Direction, nor to date.
16. In response to the Direction, the Applicant's representative emailed the Tribunal on 10 October 2024, with written submissions on the interest and costs claimed, in terms of the amended application, as had been requested. The submissions made reference to the relevant clauses in the tenancy agreement, contained a

calculation on the total interest owing on the late payments as at 1 October 2024 and providing further detail in respect of the legal costs claimed in terms of the three invoices already produced, totalling £1,531.38. The Applicant's representative confirmed having copied these written submissions direct to the Respondent. The Tribunal Administration also circulated a copy to the Respondent. No response has been lodged by the Respondent.

17. On 22 October 2024, the Applicant's representative emailed the Tribunal querying whether a Time to Pay application had been lodged by the Respondent in terms of the Direction. The Tribunal Administration emailed in response on 28 October 2024 to advise not. On 5 November 2024, the Applicant's representative emailed again to advise that they were keen to obtain a payment order on behalf of the Applicant and to avoid the delay and costs involved in a further CMD.
18. The Tribunal considered the written representations received on behalf of the Applicant and the fact that the Respondent had not taken the opportunity afforded to them in terms of the Direction to submit a completed Time to Pay application to the Tribunal. The Tribunal considered, in these circumstances, that there was no requirement to convene a further CMD or an Evidential Hearing and proceeded to make their decision on the payment application in terms of Rule 18 of the Regulations (*power to determine the proceedings without a hearing*).

Findings in Fact

1. The Applicant is the owner and landlord of the Property.
2. The Respondent is the joint tenant of the Property by virtue of a Private Residential Tenancy commencing on 1 July 2022.
3. The rent in terms of the tenancy was £1,950 per calendar month.
4. Rent was paid until in or around March 2024, from which time the rent account has been continuously in arrears.
5. The last rent payment was £1,950, paid on 1 February 2024.
6. No payments have been made since then and rent arrears of £13,650 are owing.
7. The Respondent has been called upon to make payment of the rental arrears or enter into a satisfactory payment arrangement but has failed to do so.
8. The Respondent has remained in possession of the Property.
9. The Respondent admits the level of rent arrears.

10. The Respondent had requested time to submit a Time to Pay application.
11. The Tribunal issued a Direction dated 23 September 2024, requiring any Time to Pay application to be submitted by the Respondent within 28 days.
12. No Time to Pay application was received within the stated time limit, nor since.
13. The Respondent did not oppose the additional sums sought in terms of the application in respect of interest and legal costs and submitted no written representations to the Tribunal in response to the Applicant's further representations in response to the Direction in this regard.
14. The Applicant is entitled to unpaid rent in the sum of £13,650, together with the contractual interest sought at the rate of 8% per annum on each late rental payment due until payment is made.
15. The Applicant is not entitled to the legal costs sought of £1,531.38.

Reasons for Decision

1. The Tribunal gave careful consideration to the background papers including the application and supporting documentation, the written representations from the Respondent in support of their request for a postponement of the CMD, the oral representations made by the Applicant's agent and the Respondent, Mr Layton, at the CMD and the further written representations lodged on behalf of the Applicant in response to the Tribunal's Direction.
2. The Tribunal considered that there was no material before it to contradict the information from the Applicant in respect of the rent arrears. The Tribunal had regard to the terms of the tenancy agreement, the rent statements produced and the oral submissions at the CMD. The Applicant had properly and timeously amended the application in accordance with rule 14A of the Regulations to amend the amount of rent arrears sought from £5,850 when the application was lodged, to £13,650 as at 1 September 2024. The Respondent did not deny the level of arrears. The Tribunal was satisfied that the sum of £13,650 was owing by the Respondent in respect of rent incurred by them during the tenancy.
3. The Tribunal also considered the Applicant's claim for interest on the late payments of rent, until payment, at the rate of 8% per annum. The Tribunal had regard to the terms of the tenancy agreement (clause 8), the oral and written submissions of the Applicant's representative in this regard and the fact that there was no opposition from the Respondent in respect of this matter. The Tribunal noted that, as had been requested in terms of their Direction, the Applicant's representative had provided a calculation of the interest owing (£362.43) as at 1 October 2024 but also that he had clarified that he was not requesting an order for a specified amount of interest in terms of the Order, given that the amount of interest would continue to increase until payment was

made. The Tribunal was satisfied that the Applicant was entitled to contractual interest at the rate of 8% in the manner sought by the Applicant.

4. The Tribunal then considered the Applicant's claim for legal costs amounting to £1,531.38 and had regard to the fact that, again, there was no opposition from the Respondent on this matter, the oral and written submissions of the Applicant's representative in this regard, together with the terms of the tenancy agreement (clause 8) and the three invoices submitted as vouching for the legal fees plus VAT charged to the Applicant by his representative's firm, Gilson Gray LLP, namely:-

- (1) Invoice 088755 in the sum of £690.18 dated 31 May 2024, stated to be 'relating to preparation of Notices to Leave ; and a Form F application'
- (2) Invoice 090116 dated 28 June 2024 of which £420.00 was sought, stated to be 'relating to submission of a Form E application'
- (3) Invoice 094176 dated 9 September 2024 in the sum of £421.20, stated to be for 'preparation and attendance at 2 x Case Management Discussions'

The relevant part of clause 8 of the tenancy agreement states as follows:-

"The Tenant shall be held liable for any further reasonable costs incurred by the Landlord through the Tenant's failure to pay rent on time, including, but not limited to any administrative charges or late fees made by the Landlord's bank, any expenses incurred by the Landlord in pursuing the Tenant for payment or said unpaid rent, legal or otherwise."

In response to the Tribunal's Direction, the Applicant's representative had provided further detail in respect of the invoices, including the hourly rates charged by his firm, the hourly rate of the person who carried out much of the work claimed for and further explanation regarding some elements of the work being charged to the Applicant on a fixed fee basis. The Applicant's representative had stated in his written representations that the basis for this part of the claim was contractual in nature, in the same way as the rent and interest claims, and was not a request for judicial expenses to be awarded by the Tribunal in terms of Rule 40 of the Regulations.

However, having carefully considered the matter, the Tribunal determined that it would not be reasonable to grant the legal costs part of the Applicant's claim. The Tribunal noted that clause 8 was restricted to "reasonable costs" incurred by the Applicant, including "expenses incurred by the landlord in pursuing the Tenant for payment of said unpaid rent, legal or otherwise". In the Tribunal's view, some of the legal costs sought to be recovered by the Applicant were clearly related to the eviction application, seeking to recover possession of the property, as opposed to unpaid rent, and would therefore not be recoverable in terms of clause 8.

However, the Tribunal considered that, in principle, it would not be reasonable to grant an order for any of the legal costs sought as part of this application. In the Tribunal's view, all of the legal work specified in this claim (perhaps with the

exception of the preparation of the Notices to Leave – a pre-requisite to an eviction application) would ordinarily be covered in terms of a ‘judicial expenses’ claim in respect of the Tribunal payment and eviction applications. In terms of Section 64 of the Tribunals (Scotland) Act 2014, *“the Tribunal may award expenses so far as allowed in accordance with Tribunal Rules”*. Rule 40 of the Regulations then states that the Tribunal *“may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense”*. It is not considered that the Respondent’s conduct in respect of this application was unreasonable and there were no submissions on behalf of the Applicant alleging this. Accordingly, the Tribunal considers that this claim for legal costs, if allowed, would have the effect of circumventing the usual strict rules applying to expenses claims before the Tribunal. The Applicant would not have to satisfy the test regarding unreasonable conduct on the part of the Respondent and the costs charged would not have to be fully assessed through the taxation process. In these circumstances, the Tribunal determined that it would not be reasonable to grant this part of the application and refused the claim for legal costs of £1,531.38.

5. The Respondent, having been given the opportunity to submit a completed Time to Pay application to the Tribunal, had not done so. Accordingly, the Tribunal concluded that it had sufficient information before it to grant an order in the sum of £13,650 in respect of unpaid rent, plus interest at the rate of 8% per annum on the basis sought and that there was no requirement for a further CMD or Evidential Hearing in respect of this application.
6. 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.

Nicola Weir

Legal Member

2 December 2024
Date