Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/CV/24/2974

Re: Property at 53 Gibralter Gardens, Dalkeith, Midlothian, EH22 1EG ("the Property")

Parties:

Slash Property Ltd, Hillside, Alkerton, Banbury, Oxfordshire, OX15 6NL ("the Applicants")

Mr Mark Edward Horne and Mr Robert James Fraser Horne, both sometime 53 Gibralter Gardens, Dalkeith, Midlothian, EH22 1EG ("the Respondents")

Tribunal Members:

George Clark (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be granted and made an Order against the Respondents for Payment to the Applicants of the sum of £3,971.76.

Background

1. By application, dated 28 June 2024, the Applicants sought an Order for Payment in respect of rent that they contended had become lawfully due to them by the Respondents.

2. The application was accompanied by a copy of a Short Assured Tenancy Agreement between the Parties commencing on 27 January 2016 and, if not ended by either Party on 29 July 2016, continuing on a monthly basis until ended by either Party giving two months' notice to the other Party, and a Rent Statement showing arrears at 27 June 2024 of £1,566. The sum being sought was, however, £1,083, as the Applicants already had an Order for Payment issued by the Tribunal for arrears of £483. The Applicants stated that the arrears were increasing by £230.50 per month, as the Respondents were refusing to pay more than £669.50 per month, against a rent of £900.

3. The Respondents provided written submissions on 10 and 11 December 2024. There were three emails in total, with a number of supporting documents. Two of the emails related to a rent increase on July 2023, from £650 to £750 per month. This had, however, already been the subject of proceedings before the Tribunal (CV/23/3285) and the Tribunal's Decision had been appealed to the Upper Tribunal (UTS/AP/24/0020). The Upper Tribunal refused the appeal by the Respondents, the outcome being that the decision of the First-tier Tribunal that the Applicants were entitled to increase the rent to £750 was upheld. The Tribunal is bound by decisions of the Upper Tribunal, so was not prepared to consider further any issue relating to the rent increase which took effect on 27 July 2023.

4. The third email related to a rent increase intimated to the Respondents on 5 February 2024, imposing an increase from £750 to £900 per month from 27 March 2024. The Respondents argued that this increase had come only 8 months after the increase in 2023 and did not comply with a rule that the rent cannot be increased more than once every 12 months.

5. A Case Management Discussion was held by means of a telephone conference call on the morning of 18 December 2024. The Applicants were represented by Mr Neil Reid of Neil Reid Property, Bonnyrigg. The Respondent Mr Robert Horne was present.

6. The Tribunal told the Parties that, as it was bound by the decision of the Upper Tribunal, it was unable to consider any issues regarding the rent increase from 2023. It was bound to hold that the Applicants were entitled to charge rent at £750 per month from 27 July 2023. The only matter that the Tribunal could consider was whether the Applicants were entitled to give notice on 5 February 2024 of a further rent increase, to £900 effective from 27 March 2024, and to charge a further £150 per month from that date. Accordingly, the Tribunal would be making an Order for Payment of, as a minimum, the arrears based on the rent being £750 per month and, if the Tribunal found in favour of the Applicants, the amount of the Order would increase to £900 per month from 27 March 2024.

7. The Applicants' representative told the Tribunal that, in an effort to settle the matter once and for all. the Applicants would be content to forego the proposed increase of £150 per month, provided the Respondents accepted that they would pay £750 per month from 27 July 2023 onwards. They had refused to pay more than £669.50 per month, this being a rent figure arrived at by a Rent Officer before the Tribunal application CV/23/3285. The Upper Tribunal had held, in the Respondents' appeal against the Tribunal's decision on that application, that the Rent Officer's determination was based on an assumption which, in the case of the present tenancy, was false, namely that the tenancy agreement did not contain a contractual provision entitling the landlord to increase the rent.

8. After a short adjournment, Mr Horne, advised the Tribunal that he wished to proceed to a full evidential Hearing, as he was contesting the validity of the

rent increase notice and also wished to put an argument based on Section 71 of the Consumer Rights Act 2015. He was reminded by the Tribunal that it was not competent for it to revisit the Upper Tier Tribunal's decision. The Applicants' representative told the Tribunal that, if the matter was proceeding to a Hearing, the offer to settle on the basis of a rent of £750 should be regarded as withdrawn.

9. After a further short adjournment, Mr Horne confirmed that it was his wish to proceed to a Hearing.

10. The Tribunal continued the application to an evidential Hearing and issued a Direction to the Respondents to provide in advance of the Hearing any arguments on which they intended to rely with regard to the validity of the second rent increase notice dated 5 February 2024, concerning the service of this notice less than one year after the previous one, dated 22 June 2023, and Section 71 of the Consumer Rights Act 2015.

11. On 20 January 2025, Mr Andrew Wilson, Service Manager, Housing & Money Advice, of Community Help & Advice Initiative ("CHAI") made written submissions on behalf of the Respondents. He stated that neither the First-tier Tribunal ("FTS") nor the Upper Tribunal had determined that the rent review clause was not unfair within the meaning of Section 71 of the Consumer Rights Act 2015 ("the 2015 Act"). He contended that, as the Upper Tribunal decision was narrowly framed, being restricted to the fairness of the decision-making process conducted by the FTS, the fairness of the clause itself and, therefore, the rent lawfully due after the FTS decision, were still judiciable. Guidance and case law on unfair contract terms prior to the 2015 Act showed that residential tenancies are consumer contracts and most recent authority suggested that the consolidation of the law on unfair contract terms into the 2015 Act has not altered its applicability to residential tenancies (Adrian Stalker, *Evictions in Scotland,* 2nd Edition, at pp73-74). The Guidance to which he was referring was a document entitled "Guidance on unfair terms in tenancy agreements", issued in September 2005.

12. The Respondents' representative referred to Section 62 of the 2015 Act, which provides that an unfair term of a consumer contract is not binding on the consumer and that "A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. He cited three examples from Part 1 of Schedule 2 to the 2015 Act of consumer contract terms which may be regarded as unfair, and submitted that the present contract fell foul of all of them. They are:

    "Paragraph 11 – A term which has the object of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.
    Paragraph 14 A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer

has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.
Paragraph 15 A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded."

13. The Respondents' representative referred to Guidance issued by the Competition and Markets Authority in 2015, which stated "A term is most likely to cause an unfair imbalance if it alters the balance in rights and obligations that the law would have struck if left to itself" and he contended that Clause 5.2 of the tenancy agreement creates a significant imbalance compared to that of a statutory assured tenancy as provided in Section 24 of the 1988 Act, which would require notice of six months unless the clause provided for an increase by reference to fixed factors not wholly within the control of the landlord. The Respondents submitted that, taking into account the factors detailed by them, Clause 5.2 is an unfair term, that it is therefore not enforceable and thus the Respondents are not liable for the increased amount demanded by the Applicants.

14. On 23 January 2025, the Applicants responded to the Respondents' representations. It was their understanding that there is no restriction on increasing the rent in a Short Assured Tenancy more than once in any calendar year. If the Respondents felt that the increase was unfair, they could simply have given notice and moved, but the view of the Applicants was that the Respondents were aware that the rent for a similar property in the area would have been close to £1,000 per month, so they did not exercise the option to leave. The Respondents had refused to pay the uplifted rents of £750 and £900 and had refused to explain their reasons for refusal. They had also failed to pay any rent from October 2024 onwards and refused to communicate at all regarding rent. They had also refused to agree to the release to the Applicants of the tenancy deposit and to provide a forwarding address when they left the Property. The view of the Applicants was that the Respondents' arguments should not be heard, as disclosure of address must be a foundation line in any legal process. The legal position had been proven in the earlier application, in which their appeal had been refused, but the Respondents had refused to accept that, then breached the tenancy agreement by paying no rent at all.

15. On 12 February 2025, the Applicants provided further submissions, in which they stated that they wished to add to their claim a sum in respect of costs and the costs of cleaning, removal of furniture, gardening and lock changes, incurred by the Applicants after the Respondents moved out, leaving furniture and other items, damaged locks and failing to return the keys to the Applicants' present address. They repeated that they had been prepared to settle their claim on the basis of rent at £750 per month, but this offer had been rejected by the Respondents at the Case Management Discussion.

The Hearing

16. A Hearing took place by means of a telephone conference call on the morning of 20 February 2025. The Applicants were represented by Mr Neil Reid. The Respondent, Mr Robert Horne was present and was represented by Mr Andrew Wilson of CHAI.

17. The Tribunal heard from the Parties first on the issue of whether it was competent for the Applicants to increase the rent more than once in any 12-month period. Mr Reid's position was that there was no restriction on how often the Applicants could increase the rent and that the Cost of Living (Tenant Protection) (Scotland) Act 2022, which was in force when the rent increases had taken place, did not apply to Short Assured or Assured Tenancies which contained a rent increase clause. Mr Wilson's view was that, if the contract term was unfair in terms of the 2015 Act, Section 24 of the Housing (Scotland) Act 1988 applied, restricting increases to one every 12 months. He suggested that the Applicants had decided on a second increase in order to punish the Respondents for challenging the first one. Mr Reid's response was that the first increase had still left the rent significantly below the open market rent, but, as the Respondents had refused to accept even that figure, they had had no choice but to bring it up to nearer the market rate.

18. The Tribunal then heard evidence in relation to the Respondents' contention that Clause 5.2 of the tenancy agreement was unfair in terms of the Consumer Rights Act 2015 ("the 2015 Act").

19. Mr Wilson told the Tribunal that, as the rent increases were said to be made on the basis of contract, the consequence would be that the Applicants had the power to increase the rent at any time to any figure they chose. His contention was that the earlier decision of the First-tier Tribunal, upheld by the Upper Tribunal, could be distinguished from the present application, as neither Tribunal had considered the fairness of the contract term relating to rent increases. The Respondents were not looking to revisit those decisions or the Order for Payment that resulted from them, but if the present Tribunal held that Clause 5.2 of the tenancy agreement was an unfair contract term, it was entirely unenforceable against the Respondents. His view was that the clause was unfair, as it allowed one party to dictate to the other the contract terms. There was no mention of how often the landlord could increase the rent and the period of notice to be given by the tenant was too short to allow him to withdraw from the contract before a proposed rent increase came into force. Mr Wilson accepted that a tenant under a Short Assured Tenancy has the right to refer the rent at any time to a Tribunal, but it was possible that the Tribunal would not make a determination in any individual case.

20. The Tribunal questioned why these arguments were not made before the Upper Tribunal and why its decision was not then appealed. Mr Wilson responded that the question before the Upper Tribunal had not been whether the contract term was unfair, but rather whether the First-tier Tribunal was required at its own instance to consider the Consumer Rights Act when it had not been raised by the Parties.

21. Mr Reid told the Tribunal that the rent increase notice specifically states that if a tenant has any queries about the rent increase, they should not hesitate to contact him. The matter could have been resolved had the Respondents contacted him, but they had either refused or failed to do so. The Respondents had never explained why they refused to pay rent and would not provide a forwarding address. The Applicants had generously offered to settle the case in December 2024 and the Respondents were even now disputing the release of the deposit. Mr Reid felt that this justified a claim to add the charges that the Applicants had outlined in the written representations of 12 February 2025.

22. For the Respondents, Mr Wilson contended that these claims could not be added as there was no vouching or supporting evidence. The Respondents were refusing to agree to the release of the deposit to the Applicants until the outcome of the present Hearing was known.

Findings of Fact

- The Parties entered into a Short Assured Tenancy Agreement for a tenancy commencing 27 January 2016 for an initial period to 29 July 2016 and, if not terminated on that date, continuing thereafter on a monthly basis until ended by either party giving 2 months' notice.
- The tenancy remained a Short Assured Tenancy after the initial period, as neither Party gave notice to terminate it on 29 July 2016.
- The tenancy became a statutory assured tenancy on 29 May 2024, when the period of notice contained in a Notice to Quit served on behalf of the Applicants expired.
- As at the date of the application to the Tribunal, the tenancy was still a Short Assured Tenancy.
- The rent payable at the date of intimation of the rent increase effective 27 March 2024 was £750 per month.
- The tenancy agreement contained a clause entitling the landlord to increase the rent on giving one month's notice.
- The tenancy ended on 9 January 2025.

Reasons for Decision

23. The Tribunal considered first the matter of the rent increase notice. The Tribunal held that the tenancy was not a statutory assured tenancy when the intimation of the increase in rent was made on 5 February 2024. It only became a statutory assured tenancy on 29 May 2024, when the period specified in the Notice to Quit, dated 29 February 2024, expired. Up until that point, the Respondents remained tenants under a Short Assured Tenancy ("SAT"). Accordingly, the provisions of Section 24 of the Housing (Scotland) Act 1988 (6 months' notice of rent increase) did not apply, as the tenancy was a SAT, and was subject to the provisions of Sections 32-35 of the 1988 Act.

24. A SAT is, as the name suggests, a variant of the assured tenancy, and the Grounds for recovery of possession set out in Schedule 5 to the Act apply to both but there is, by virtue of Section 33 of the Act, an additional mechanism

for recovery of possession by the landlord under a SAT and, by Section 34, a completely separate provision for the reference of the rent to the Tribunal for determination. The rent and other terms of a SAT are freely negotiable between the landlord and the tenant. In addition to the Grounds for Recovery of Possession set out in Schedule 5 to the Act, the landlord under a SAT has the right, on giving notice in prescribed form, to recover possession on giving two months' notice (subject to a reasonableness test) and the tenant can at any time refer the rent to the Tribunal for determination. This distinguishes a SAT from an assured tenancy, where the tenant can only apply to the Tribunal on receipt of a Notice of Increase of Rent in the form prescribed by Section 24 of the Act.

25. There is no provision in the 1988 Act which restricts the right of a landlord to increase the rent at any time or restricts increases to one within any 12-month period. The question of rent is a matter of contract between the parties, but the tenant has the right to refer the rent to the Tribunal at any time.

26. Clause 5.2 of the tenancy agreement in the present case states "The Landlord may propose to increase the rent after the end date specified at Clause 4 above. Under such circumstances the Tenant will be given a minimum of 1 month's notice in writing of any proposed change before the beginning of the rental period when the change is to start." The "end date" specified at Clause 4 was 29 July 2016. As the tenancy agreement contained a rent increase clause, the Cost of Living (Tenant Protection) (Scotland) Act 2022, which was in force when the rent increases had taken place, did not apply.

27. The intimation of the rent increase was made on 5 February 2024 and was effective from 27 March 2024. The tenancy agreement allowed the Respondents to end the contract by giving two months' notice.

28. The Tribunal determined that the Applicants, as landlords under a SAT, were entitled to increase the rent at any time after 29 July 2016 and were not bound to follow the procedures set out in Sections 24 and 28 of the 1988 Act. If the Respondents were not willing to accept the intimated increase, they could terminate the lease on giving two months' notice and they could refer the rent at any time to the Tribunal for determination. The Tribunal did not accept the Respondents' argument that, if the contract term was unfair in terms of the 2015 Act, Section 24 of the Housing (Scotland) Act 1988 applied, restricting increases to one every 12 months. Even in the absence of Clause 5.2 of the tenancy agreement, the Applicant could have increased the rent at any time and could do so more than once in any 12-month period. Accordingly, the Tribunal held that the notice of increase served on 5 February 2024, less than one year after the previous one, dated 22 June 2023, was valid and that Sections 24-25 of the 1988 Act did not apply to the tenancy.

29. The Tribunal then considered the Respondents' argument in relation to the Consumer Rights Act 2015 ("the 2015 Act").

30. The Tribunal agreed that residential tenancy agreements are consumer contracts covered by the 2015 Act. The question for the Tribunal to determine

was, therefore, whether Clause 5.2 of the tenancy agreement was unfair. The Tribunal accepted that it permitted the Applicants to alter the rent unilaterally, without giving any reasons, that the tenancy agreement did not contain any method of determining the level of any rent increases and did not specifically give the Respondents the right to cancel the contract if the rent was too high in relation to the rent agreed when the tenancy agreement was entered into. It was, therefore, arguable that the Clause fell within the scope of the three examples from Part 1 of Schedule 2 to the 2015 Act cited by the Respondents as being consumer contract terms which may be regarded as unfair.

31. Section 73(1) of the 2015 Act, however, states that Part 1 of Schedule 2 to the Act "contains an indicative and non-exhaustive list of terms of consumer contracts that **may** be regarded as unfair", and the heading of Part 1 of Schedule 2 is "Consumer contract terms which **may** be regarded as unfair." The use of the word "may" in both instances is deliberate

32. The "Guidance on unfair terms in tenancy agreements" referred to by the Respondents' representative was issued in September 2005, but it was withdrawn by the Competition and Markets Authority ("CMA") as it "did not take account of developments in case law, legislation, or practices since its original publication", the CMA adding that "It should not be relied on as a statement of law or CMA policy." Accordingly, the Tribunal did not have any regard to the Guidance and did not agree with the suggestion of Adrian Stalker, in the second edition of his *"Evictions in Scotland"*, at p74, that the 2005 Guidance "is still of interest, in giving some indication of contractual terms that may be regarded as unfair." The Guidance was specifically withdrawn. It was succeeded by "Unfair contract terms guidance" issued by the CMA on 31 July 2015, which makes no specific reference to tenancy agreements. That Guidance states: "A term is most likely to cause an unfair imbalance if it alters the balance in rights and obligations that the law would have struck if left to itself"

33. Residential leasing is a highly regulated area of law in Scotland, with legislation restricting the rights of landlords to summarily terminate tenancies and remove tenants without reason and enabling tenants to refer to the Tribunal a notice of increase of rent if it is an Assured Tenancy under the Housing (Scotland) Act 1988 or a Private Residential Tenancy under the Private Housing (Tenancies) (Scotland) Act 2016. More recently, the Scottish Government introduced a system of rent control. Tenants under a Short Assured tenancy have, subject to a reasonableness test, lower security of tenure than Assured Tenants or tenants under a Private Residential Tenancy, but they do have one very important advantage, namely that they can refer their rent at any time to the Tribunal for determination.

34. In the present case, Clause 5.2 of the tenancy agreement was clear and unambiguous. After the end of the initial period of the tenancy, the landlords could increase the rent at any time. The tenants, however, had the statutory right, which they did not exercise, to refer the rent at any time to the Tribunal for determination. They also had the right to terminate the contract at any time after 29 July 2016 on giving two months' notice. Accordingly, the Tribunal did

not hold that the Clause “alters the balance in rights and obligations that the law would have struck if left to itself.” It is very common for landlords to seek to increase rents by giving notice, and there is a statutory framework in place to safeguard tenants by enabling them to challenge proposed increases. The view of the Tribunal, therefore, was that Clause 5.2 is not an unfair contract term. Adequate safeguards exist for tenants

35. The Tribunal accepted that the rent increase would have come into force before the earliest date on which the Respondents could have vacated the property after giving the requisite period of notice, but they could immediately have referred the rent to the FTT. Tension between the Clauses and the legislation did not make the contract term unfair. It would have been a matter for a court to resolve, should a dispute have arisen between the Parties as to the correct interpretation of the contract.

36. Having determined that the notice of increase served on 5 February 2024 was valid and that Clause 5.2 of the tenancy agreement was not an unfair contract term, the Tribunal then considered the question of rent arrears. The Tribunal had told the Parties at the Case Management Discussion that it was bound to accept that the rent was increased from £650 per month to £750 per month with effect from 28 August 2023 and held, following the Hearing, that the rent increased to £900 per month on 27 March 2024. The tenancy ended on 9 January 2025. The Respondents had already had an Order for Payment made against them in the sum of £483. The Applicants had provided the Tribunal with a Rent Statement which calculated the arrears to the end of the tenancy on the basis of the two increases referred to, and the Tribunal agreed with those calculations. The arrears of rent when the tenancy ended were £3,971.76. The Applicants had added to this figure two late payment charges of £25 each, for the final two months in which the Respondents paid no rent at all. Clause 5.1 of the tenancy agreement states that late or non-payments will incur an administration fee of £25 per payment, and the Tribunal decided that it was prepared to include these charges in the Order for Payment, as, whilst the Respondents were contesting the validity of the rent increase notice of 2024, they were not contending that no rent was due, yet they paid nothing at all, and the tenancy agreement stated that they were administrative fees, so were not premiums. The Tribunal did not regard the charging of such fees as unreasonable, given the likelihood that reminders or other communication would become necessary if the Respondents failed to pay the rent on time.

37. The Tribunal refused to award any compensation to the Applicants for the time spent on dealing with the application and the proceedings before the Tribunal. Whilst the Tribunal had not accepted the Respondents’ contentions regarding the validity of the rent increase notice of 2024 or that Clause 5.2 of the tenancy agreement was unfair, they were entitled to make these arguments in defending the case against them. The Tribunal also decided that it would not be appropriate to consider the Applicants’ request that the Tribunal consider adding to their claim a sum in respect of the costs of cleaning, removal of furniture, gardening and lock changes, incurred by the Applicants after the Respondents moved out, leaving furniture and other items, damaged locks and failing to return the keys to the Applicants’ present

address. It appeared to the Tribunal that these were matters to be adjudicated upon in the first instance by the administrator of the tenancy deposit scheme which holds the deposit. Any outstanding costs remaining after that adjudication would have to be the subject of a separate application, should the Applicants wish to pursue the matter further.

38. 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.

_____ **3 March 2025**

Legal Member/Chair **Date**