



**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/18/3178**

**Re: Property at 135/6 High Street, Dalkeith, EH22 1BE (“the Property”)**

**Parties:**

**Mr Thomas Burnet and Mrs Margaret Burnet, c/o Allingham Solicitors, 4A  
Buckstone Terrace, Edinburgh EH10 6PZ (“the Applicant”);**

**Ms Edith Cavel Dickson Henderson, 49 Burghlee Terrace, Loanhead,  
Midlothian, EH20 9BF (“the Respondent”)**

**Tribunal Members:**

**Gerge Clark (Legal Member) and Ann Moore (Ordinary Member)**

**Decision (in absence of the Respondent)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that it had jurisdiction to hear the application and that the application should be granted. The Tribunal made an Order for Payment by the Respondent to the Applicant of the sum of £5,831.11. The Tribunal refused the application for payment of interest on that sum and refused the application for expenses.**

**Background**

By application, received by the Tribunal on 22 November 2018, the Applicant sought an Order for Payment by the Respondent of the sum of £5,831.11, with interest thereon at 8% per annum from the date of citation until payment and for the expenses of the application.

The application was accompanied by a copy of a Short Assured Tenancy Agreement commencing on 14 July 2017. The Short Assured Tenancy Agreement incorporated a Guarantee by the Respondent, binding her as “cautioner, co-obligant and full debtor for and along with the Tenant that the Tenant will duly make payment of all rents and other rents and other sums due to the Landlord and will duly perform the whole other obligations of and observe all other conditions binding on the Tenant directly or indirectly under or by virtue of the Lease and that in all respects liability

repossession related cases, so was wide enough to include an application for payment against a Guarantor in a Short Assured Tenancy. The Guarantee was entirely dependent for its existence upon the Short Assured Tenancy.

Mr Runciman then referred the Tribunal to the decision of Sheriff Jamieson in *Parker v Inkersall Investments Ltd* (2019 S.L.T (Sh.Ct.) 41) at paragraphs 31-45. The action had been dismissed by the Sheriff on the ground that it had been raised in the wrong forum. In that Decision, Sheriff Jamieson had added a "Postscript on the FTT's 'civil jurisdiction'", as he felt that the case illustrated the possibility of misunderstandings about the extent of the Tribunal's civil jurisdiction in relation to private rented housing cases. He had referred to a decision from Sheriff Hamilton sitting in the Upper Tribunal, suggesting that the transfer of the sheriff's jurisdiction to the Tribunal might be unrestricted if the legislation was silent on such restriction. (*Friel v Lafferty* UTS/AP/17/0009). Sheriff Jamieson's view was that, as there was nothing to suggest that either Section 16(1)(c) of the 2014 Act or Section 71(a) of the Private Housing (Tenancies) (Scotland) Act 2016 restricted the transfer of the sheriff's jurisdiction to the Tribunal in respect of any matter **arising from** assured and private residential tenancies, its civil jurisdiction may well extend to any remedy within the sheriff's jurisdiction, provided the action or civil proceeding **arises from** an assured or private residential tenancy.

Sheriff Jamieson had added that a more cautious interpretation might be to limit the transferred jurisdiction to **contractual** disputes arising from the tenancy itself (including rent arrears and breach of the statutory repair obligation) as only these directly **arise** from the tenancy in question and that an overly literal interpretation of what was meant by the sheriff's jurisdiction might result in consequences not intended by the Parliament. For example, the sheriff still had jurisdiction to make anti-social behaviour orders in relation to assured and private residential tenancies and to make orders for transfer of these tenancies between spouses or cohabitants or between civil partners, all under relevant statutes. No amendments had been made to the relevant Acts, transferring these statutory applications to the jurisdiction of the Tribunal. As the Parliament could easily have done this, the implication was that it intended these functions to stay with the sheriff. On the other hand, the Tribunal had been vested with jurisdiction over a large number of statutory applications in respect of assured and private residential tenancies. Some of these were formerly vested in the sheriff but had been transferred to the jurisdiction of the Tribunal by virtue of statutory provisions, such as the various transfers of jurisdiction made by Schedule 1 to the 2014 Act. Sheriff Jamieson instanced the transfer of jurisdiction of sanctions in relation to tenancy deposits.

The Applicant's solicitor asked the Tribunal to hold that the present application, an action for Payment by a Guarantor under a Short Assured Tenancy, fell within the ambit of "any matter arising from" an assured tenancy as described by Sheriff Jamieson. There would be no Guarantee but for the existence of the Short Assured Tenancy and there was nothing in the First-tier Tribunal Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations") which restricted the Tribunal's jurisdiction in relation to Guarantees. Mr Runciman also referred the Tribunal to its previous Decision in *Scottish Midland Co-operative Society Ltd v Brown*, which was an action for Payment against a Guarantor, in which the issue of jurisdiction had not been raised and an Order for Payment had been made. That Decision was available on the Tribunal's website (FTS/HPC/CV/18/1305, dated 8 January 2019).

The Applicant's solicitor also referred the Tribunal to the Decision of the Tribunal in *Ross v Robertson and Robertson* (FTS/HPC/CV/18/1571, 2 August 2018), in which the Tribunal had rejected an application in circumstances very similar to the present case, but told the Tribunal that it had followed the *Sauchiehall Street* case, which he had suggested to the Tribunal should not be relied on, particularly in light of the extensive analysis in the Decision of Sheriff Jamieson in the *Parker* case.

Finally, Mr Runciman invited the Tribunal to consider the prospects of the Applicant raising an action in the sheriff court, standing the Decision of Sheriff Jamieson in the *Parker* case. He asked the Tribunal to accept that it had jurisdiction to determine the application and requested that an Order for Payment be made as sought.

### **Reasons for Decision**

The Tribunal accepted the argument set out by the Applicant's solicitor that the *Sauchiehall Street* decision should not be followed, because the matter at issue there was whether jurisdiction lay in Scotland or in England, whereas in the present case, it was clear that jurisdiction lay in Scotland. The Guarantee in that case related to a commercial lease and was contained within a separate document from the lease itself, whereas the Guarantee in the present application was contained within the body of the lease document and depended for its existence entirely upon the Short Assured Tenancy Agreement. The Tribunal accordingly held that it was reasonable to conclude that the application was an "action arising from" the Short Assured Tenancy.

The Tribunal found Sheriff Jamieson's analysis, in the *Parker* case, of the Tribunal's jurisdiction, to be very useful and noted in particular his comment that an overly literal interpretation might result in consequences not intended by the Parliament. The Applicant's solicitor had invited the Tribunal to consider, standing the observations of Sheriff Jamieson in the *Parker* case, the prospects for success of an attempt to raise proceedings in the sheriff court, the only resort which would be open to the Applicant should the Tribunal determine that it did not have jurisdiction. The view of the Tribunal was that the present application was in respect of an action formerly within the sheriff's civil jurisdiction arising from assured tenancies and that it was encompassed by Section 16(1)(c) of the 2014 Act.

The Tribunal noted the Decision of the Tribunal in *Scottish Midland Co-operative Society Ltd v Brown*. That case did not fortify the view of the Tribunal in the present case, as the issue of jurisdiction had not been raised at all, but the Tribunal was of the view that it had been correctly decided.

The Tribunal, having distinguished the present case from the *Sauchiehall Street* case, accepted the argument made by the Applicant's solicitor that the Decision of the Tribunal in *Ross v Robertson and Robertson* should not be relied on.

The Tribunal noted the written representations made by the Respondent and, whilst they did not provide her with a defence to the present application and had not been tested in evidence, the Tribunal would nevertheless hope that the Applicant would have regard to them in considering whether the tenant under the Short Assured Tenancy might be in a position to access funds to reduce his indebtedness to the Applicant and at least partially relieve the Respondent of the financial consequences of the Order the Tribunal had determined to make.

The Tribunal was not, in all the circumstances of the case, prepared to make an Order for payment of interest on the sum included in the Order for Payment. The Short Assured Tenancy Agreement contained a provision for payment of interest on unpaid rent, but the Applicant was seeking interest at the judicial rate from the date

of citation until payment and a significant proportion of the sum sought did not relate to arrears of rent.

The Tribunal refused the Applicant's request for expenses of the application. Rule 40 of the 2017 Regulations states that the Tribunal may award expenses 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". The Tribunal did not consider that the Respondent's conduct in the present case had been unreasonable.

### **Decision**

The Tribunal determined that it had jurisdiction to hear the application and that the application should be granted. The Tribunal made an Order for Payment by the Respondent to the Applicant of the sum of £5,831.11. The Tribunal refused the application for payment of interest on that sum and refused the application for expenses.

### **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.**

G. Clark

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**Legal Member/Chair**

*25 February 2019*

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**Date**