



**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/21/0990

Re: Property at 11 Wilton Hill, Hawick, TD9 8BA (“the Property”)

Parties:

**Mr Graham Berry, co George and James Oliver Solicitors, 13 High Street,
Hawick, TD9 9DH (“the Applicant”)**

Miss Dawn Berry, 11 Wilton Hill, Hawick, TD9 8BA (“the Respondent”)

Tribunal Member:

Jan Todd (Legal Member) and Janine Green (Ordinary Member)

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that an order for payment of the sum of £7,480 be
granted in favour of the Applicant from the Respondent.**

Background

1. The Applicant made an application dated 19th April 2021 for an order for payment of rent arrears from the Respondent in respect of her occupation of the Property along with a conjoined application for payment of eviction. The Applicant initially sought the sum of £7400.
2. The application narrates that there is no written tenancy and it is submitted by the Applicant that this was a verbal tenancy between the Applicant who is the Respondent’s Uncle and his niece the Respondent. The Applicant claims he purchased the property with a view to renting it to his niece the Respondent and a rent was agreed and paid of £220 initially reducing to £200 after the Respondent took over the payment of the cost of the contents and buildings insurance.
3. There were two initial Case Management discussions held on 28th July 2021 and 21st October 2021

4. After the first CMD which was held on 28th July the Tribunal had identified a number of matters on which it required further information and issued a direction to both parties requesting various pieces of information.
5. The Respondent's position as set out at both CMDs and in writing is that she denies there is a lease between herself and the Applicant averring that she thought the Property had been purchased for her to be the owner of although her name is not on the title deeds. The Respondent submitted a written statement averring that "she signed over her property at 24 Skye Road Dunfermline, Fife to her father Victor Berry and was assured in turn that the Property would be bought for her by her Uncle Graham Berry to be her own." The dispute is therefore over whether or not there is a tenancy created under the Housing (Scotland) Act 1988 and if rent is due at the rate alleged by the Applicant of £200 per month.
6. **The 2nd CMD Discussion** the Applicant did not attend this discussion but was represented by his solicitor Mr Alistair Johnstone from Harper Macleod solicitors. The Respondent also attended but was not represented.
7. The Tribunal had advised the Respondent to try and seek legal advice at the first CMD and enquired if she had done so. She advised that she had tried to do so but found that she was not able to speak directly to a solicitor or legal agency due to past traumatic experiences but did receive some advice from Shelter through an intermediary. The Tribunal again indicated it would be in her interests to obtain legal representation if she could.
8. The parties had responded as follows to the previous direction:-
 - The Applicant had lodged a rent statement which Mr Johnstone confirmed was probably drawn up for this Tribunal. He also confirmed he was not aware of any written request sent by the Applicant to the Respondent seeking payment of rent but only aware of letters sent by his own firm and that of the other solicitors used by the Applicant namely John Collie of Collie and sons in Hawick
 - Mr Johnstone confirmed that he had thought the rent due was only from September 2016 when in fact he has been advised it was charged from the beginning of the lease in August 2014 with a 10 week grace period to allow the Respondent to make changes to the Property. He also advised that the rent was changed when it was agreed that the Respondent would pay the buildings and contents insurance directly and this is why in the AT6 form the rent specified is from a later date. Mr Johnstone confirmed that this error was due to his misunderstanding of the situation.
 - Mr Johnstone advised the Applicant is registered as a landlord with the Council and provided his registration number. He could not advise if the Applicant had any other properties he lets out or when he registered as a Landlord although he mentioned he had seen a letter from Scottish Borders Council dated in 2014 regarding an application to register as a landlord. The Tribunal indicated they would like to see this letter and have confirmation if the Applicant owns any other properties that he lets or has let out and when he started renting out any such other property.
 - Mr Johnstone has advised that the Applicant believes various safety certificates were given to the Respondent but he does not have copies neither

was Mr Johnstone aware if there is evidence of payment being made by the Applicant for the inspections and granting of these certificates.

- Ms Berry advised, on being asked if she had received any request for payment of rent, that she was often asked for money from her uncle but advised this was not for rent. She explained that she just gave him money because that is what she did and until recently she had not resisted these requests. She mentioned that she had some letters that asked for money she felt they were emotionally distressing letters and she was not sure she had kept them and indicated she would need help to look for them. The Tribunal advised that it would be helpful if she could find and provide copies of any of these letters.
- In response to questions she confirmed that she had never received rent statements from the Applicant, and denied receiving any safety certificates or have any one attend to carry out an inspection for any purpose.
- Ms Berry advised that any money she transferred was generally done by bank transfer but she reiterated that she thought the house was bought for her to own although she could not explain why it had been put into the Applicant's name. She further advised that the Applicant used to turn up but she became frightened of him and changed the locks so that he couldn't come in.
- Ms Berry in response to the Tribunal's direction has lodged evidence of payment of buildings and contents insurance for the Property by herself; evidence of the state of the property when it was purchased in August 2014 and a description of what work and how she has changed the property, some letters and messages advising of her involvement in the purchase of the Property. She also confirmed previous assertions that a property that she previously owned in Dunfermline which was transferred to her father at his request was then rented out but all proceeds of rent were sent to her father although she received monthly statements from the letting agent.

given the dispute over whether there was a lease and if so what rent was due the Tribunal agreed that there required to be a hearing and asked the parties for further information as follows:-

1. Bank statements from the Applicant redacted as necessary showing all payments made by the Respondent to him since August 2014 if possible or for at least for the last 7 years.
2. Evidence of when the Applicant became registered as a landlord, including a copy of any correspondence from East Lothian Council regarding the registration.
3. Details of any other houses or property the Applicant owns and rents out jointly or with any other party if any.
4. Any evidence of payment for repairs or improvement carried out and paid for by the Applicant to this Property and any evidence of instruction or payment for any safety certificates for the Property.

From the Respondent:-

1. Copies of any correspondence she has asking for payment of money from the Applicant or Mr Victor Berry.
2. Any medical certificates or statements she wishes to lodge if she feels they would support any of her statements.

3. Any other correspondence or statements from anyone else relating to the purchase or her occupation of the Property.
4. Copies of her bank statements showing the sums of money paid to the Applicant or her father Mr Victor Berry.

The Tribunal also invited the Respondent to seek legal representation and advised that this was a matter purely relating to the question of whether or not there is a tenancy for the Property in which she is obliged to pay rent and therefore can have an eviction action raised under the Housing (Scotland) Act 1988. This is a matter of Scots Law only and if the Respondent does get legal representation then she should advise the Tribunal of the name and contact details of that representative.

Productions lodged and considered at the hearing were as follows:-

For the Applicant

- Copy AT6 18th September 2020
- Copy Notice to Quit dated 17th June 2020
- Track and trace receipt dated 19th June 2020
- Copy S11 notice and letter to Scottish Borders Council dated 23rd April 2021
- Copy pre action requirement letter from Harper Macleod
- 2 handwritten letters from Mr Graham Berry to Dawn Berry referring to rent being due for 11 Wilton Hill, that rent has not been paid and that in these circumstances the Applicant wished to sell the Property. The second letter asking the Respondent when she will be leaving.
- Copy letter from Scottish Borders Council dated 25th August 2014 to Mr Graham Berry confirming his registration under landlord registration and confirming the expiry date would be 3 years on 25th August 2017.
- List of rent payments due and payments made from Mr G Berry
- Copy letter from James and George Oliver dated 28th October 2019 referring to rent being due and advising that if there is no response a Notice to leave will be served.
- Copy letter from Santander UK plc to Mr Graham Berry dated 28th February 2022

For the Respondent:-

- Written statement by Dawn Berry dated 29th September 2021 about purchase and transfer of Skye Road and purchase of Wilton Hill.
- Written statement of "how I chose 11 Wilton Hill"
- Letter of support from 3 organisations dated 5th January 2022
- Screen shots of emails between D Berry and John Oliver
- Letter from Ms Lisa Curran dated 30th September 2021
- Undated written Statement from Ms Donna Rose submitted 24th January 2022
- Written statement of work done on house and photographs of bedroom with bedbug infestation noted.
- Copy Invoice from EIT Electrical inspection to Dawn and Victor Berry dated 4th October 2016 for £300 in relation to 24 Skye Road.
- Letter from Derek Corsar Gas Services to Ms Berry re servicing gas appliance and issuing landlord certification for 24 Skye Rd for £96 dated 24th October 2014

- Copy Invoices from Derek Corsar Gas Engineer dated 21st October 2016 (noting landlord as Ms Berry) for servicing gas appliances and issuing landlord certification for £96
- Various Statements and invoice from Your Move to Ms Berry and Mr Berry re 24 Skye Road Dunfermline detailing income from rent and management fees dated November 2011 to March 2012
- 2 statements from Your Move addressed to Ms Berry and Mr Berry dated 26th August and 24th November 2020 re income and expenditure for 24 Skye Road
- Print out from Scotlis.ros.gov.uk re Property at 24 Skye Road Dunfermline showing on 16th April 2007 a transfer for good and onerous causes, a purchase on 9th September 2014 with no price available and a sale on 7th May 2021 for £85,000. Historical prices on 6th August 2004 noted as £60,000 and on 28th October 2005 was noted as £69,500.
- Copy home insurance policy for 11 Wilton Hill from Aviva dated 8th September 2017 to 7th September 2018 policy holder Dawn Berry. Premium noted as £186.47.
- Copy home insurance schedule dated 8th September 2020 to 7th September 2021 from Rainbow Home Insurance premium noted as £338.46.
- List of work done on various rooms at 11 Wilton Hill and estimated costs.
- Invoice dated 16th October 2014 for new replacement gas fire from The Fireplace for £724.

The Applicant wrote on 29th September 2021 requesting an increase in the sum claimed to £10300.

THE HEARING

The Hearing proceeded by way of teleconference given the difficult relationship of the parties. It took place on 15th March 2022 and Mr Johnstone was in attendance for the Applicant with the Respondent also in attendance but without any legal representation. Mr Johnstone advised he wished to call Mr John Oliver first to allow him to leave after giving evidence. About half an hour into the hearing the clerk advised that the Applicant wished to join the call and the Tribunal adjourned to allow him to do so. The Tribunal then resumed.

Witnesses.

Mr John Oliver

5. Mr Johnston called Mr John Oliver as his first witness.
6. Mr Oliver confirmed his full name was John Anthony Lindsay Oliver and that he was a solicitor qualified since 1976 specialising in conveyancing, trusts and executries and working for George and James Oliver WS.
7. Mr Oliver advised under questions from Mr Johnstone that he purchased a house at 11 Wilton Hill for Mr Graham Berry but on the instructions of Dawn Berry. Mr Johnstone asked him to clarify who he was instructed to purchase the property for and he replied "Mr Graham Berry he was the owner." When asked why he was speaking to Ms Berry Mr Oliver advised that Mr G Berry had told him to correspond with Dawn regarding the purchase because she was based in Hawick at the time. Mr Johnstone asked if she ever said why she was involved

in the process and Mr Oliver advised that she said she was corresponding on behalf of Graham Berry and that she never said anything that indicated she was the purchaser. On 30th July 2014 Mr Oliver wrote to Mr Graham Berry the applicant, at his address in England enclosing a copy of the offer, advising he was buying without the aid of a mortgage and setting out his fees along with the usual terms of business. He then advised that he had an e-mail from Dawn on 1st August saying “hopefully we will hear from them soon and Graham will be up soon with his I.D.

8. Mr Oliver confirmed he did not send a copy of the offer to Ms Berry and that Mr Graham Berry did not say the wrong party was named on the offer but was happy that he was named as the purchaser. Mr Oliver explained that all the ID came from Mr Graham Berry, that he had Mr Berry’s driving licence and passport and that nearer the completion of the transaction he asked Ms Dawn Berry for a note of Mr Berry’s national insurance number for the LGFT and she wrote back with his NI number. Mr Oliver confirmed that he “did not ask for her number”.
9. Mr Oliver advised that it was not discussed with him who would be occupying the property but confirmed that he was told by Mr Berry that Dawn would collect the keys for settlement. At that point Mr Oliver advised he did not know Ms Berry would be occupying the Property.
10. Mr Oliver confirmed that the date of entry and date of settlement was 29th August 2014 and that the transaction settled satisfactorily. He advised that Ms Berry contacted him shortly after that to advise about certain defects principally to a fire and drain.
11. Mr Johnstone then asked Mr Oliver if he became aware of the dispute between Mr Graham Berry and Ms Dawn Berry and he advised that yes Mr Berry advised him that rent had stopped and the last payment was made on 9th June 2018, he asked me what he could do and I told him he had to negotiate (he believed the rent arrears were around £5000 at this time) failing which he would have to serve notice. Mr Oliver then reported that he left it with him (Mr Berry) and I don’t know what exactly happened but my understanding was that she had been paying rent from 2014 and that when asked he advised it would be best to contact a specialist in this matter and I received instructions to serve notice in June 2020.
12. Mr Oliver confirmed that he was initially contacted by the applicant by phone and he was advised he could correspond with Ms Berry. Mr Oliver confirmed he did not know what Mr Berry intended to do with the Property but that the money was transferred directly into his bank account and Ms Berry collected the keys on 29th August 2014. Mr Oliver advised that he wasn’t sure why Ms Berry was in the Property but did confirm she advised him of some issues and the previous owners needed to resolve them.
13. The Respondent then asked some question of Mr Oliver. She asked firstly why did he think I was instructing the purchase of the Property at 11 Wilton and he responded saying that “he was told I had authority to receive instructions from you because you were in Hawick and he (the Applicant) was in England.” Mr Oliver went on to confirm that “I didn’t

know what was going to happen after that but your relationship then was good. It was a joint thing you both contacted me.”

14. Ms Berry then questioned why would she be the one to view the Property if the title was not to be put in her name and Mr Oliver responded by saying that he did not know why viewed the Property but he had instructions to purchase the property in Mr Berry’s name and that “I had strict instructions to put it in his name and you supplied me with Graham’s NI number.” Mr Oliver also added “there was no question about it being in your name I never asked for your details.”
15. Ms Berry then asked Mr Oliver if he remembered being involved in 24 Skye Road and signing that property over from herself to Mr Victor Berry. Mr Oliver could not remember being involved and advised he would have to investigate that. He advised there was no correspondence about Skye Road in his file for 11 Wilton Hill.

Mr Graham Berry.

16. The next witness to give evidence was Mr Graham Berry who confirmed his full name is Mr Graham Victor Berry, retired. He confirmed that Ms Dawn Berry the Respondent was his niece and Mr Victor Berry was his younger brother. He confirmed that he was the sole owner of 11 Wilton Hill Hawick the Property.
17. When asked when he became aware of the Property he advised that Dawn his niece had been living in temporary rented accommodation in Hawick and needed somewhere to live, that he had recently inherited some money from his parents and decided the sensible thing to do would be to help her out and invest in a property. He advised that since “I trusted her completely and wanted to help her I suggested I could invert my inheritance to help her and me.” He advised the arrangement was that she would find somewhere suitable for her to live and I would purchase it on the condition she looked after it and paid me some rent. There was no question of her owning the property. He added I don’t know why she is behaving like this.
18. The Applicant advised that the arrangement was discussed when they visited at her rental property in Hawick and discussed purchasing a property for her so that she had somewhere safe and affordable to live and to give me an income and help her out. On being asked if rent was specifically mentioned Mr Berry stated “Dawn asked me how much rent I would be charging. £70 a week was what she was paying and I said I would charge £220 a month” and it was fine.
19. Mr Berry confirmed he does not own any other property apart from the one he lives in and he does not see himself as a landlord just an uncle. He advised that he contacted the local office to enquire about registering as a landlord and was told he needed to because he was going to rent the property to his niece. Mr Johnstone asked the Applicant if he thought the Respondent understood what was discussed at this meeting and he advised “Yes she is not stupid she understands perfectly that I would own the property and she would pay rent.” He went on to state she was over the moon as it was a nice property at a rent she could afford.

20. The Applicant stated that he did not prepare a written agreement because he “trusted her completely” but the property to be rented was 11 Wilton Hill and the rent was to be £220 a month and I was the landlord and she was the tenant.
21. Mr Johnstone then asked the Applicant to look at the redacted bank statements lodged and asked why there were no payments received from August 2014 to October 2014. Mr Berry responded advising that the previous owner was an elderly lady and it needed updating and he had agreed there would be a rent free period for 10 weeks to allow the Respondent to carry out basic redecorating to allow her to live there comfortably to her own taste. Mr Berry advised that payments thereafter came by bank transfer monthly into his account that the payments made came from the Respondents bank account and that they were for rent.
22. When asked Mr Berry was not clear why there was no payment in November 2014, or April or May 2015. He advised that he could not remember but thought it should have been paid. He also advised that he prepared the statement of rent paid when he was asked to send it to the Tribunal. When asked why there appeared to be no payments in July/August and September 2015 he advised he mentioned Ms Berry was having financial difficulties or that another job needed done on the Property. He stated that he did not keep full records because he trusted the Applicant completely.
23. Mr Johnstone then referred to the bank records and asked if the reference to “Faster payment receipt re rent from Miss Dawn Berry” would have meant that was payment from Dawn and confirmed that the payments always had rent paid from D Berry on them. He advised that rent was due to be paid every month but did not have an explanation for why certain payments appeared to be missing such as November 2014, April and May 2015, August and September 2015, and November 2015. The Applicant did however state that there were 2 payments of £220 paid in April 2016 one of which he put toward the rent due in February 2016 and the May 2016 rent he explained he waived because the Respondent’s mother had just died and he did not expect her to pay rent when she had just lost her mother.
24. The Rent statement and bank statements showed a change in sums received to show £200 due from August 2016. The Applicant advised this reflected a change agreed with Dawn. He advised that he “was not that efficient and it would help him if Dawn looked after the insurance it made sense for her to look after this herself” and that they agreed rent would be reduced by £20 and this was agreed in a conversation at the property in August.
25. On being asked about a payment of £170 in September 2016 the Applicant advised he could not remember why this was a for a lower amount but said that he vaguely remembered that there was a roof problem and maybe she had to pay for some roof repairs.
26. On being asked why there were no payments in January 2017, April 2017, July 2017 and December 2017 with only £40 paid in November 2018, the Applicant stated that re the January payment he would have queried this but it just wasn’t paid, and that in November 2017 he was

liable for a roof repair and that the rent was probably reduced because of this but the Applicant could not remember exactly. He was not sure why there was no payment in December 2017 and confirmed however that in 2018 there was a double payment made in May and June 2018 which he then used to pay the months of March and April 2018. He confirmed there were no further payments made after July 2018.

27. The Applicant then advised that he wrote and telephoned the Respondent asking why she was not paying rent. Two hand written letters have been lodged and were referred to by Mr Johnstone. Mr Berry confirmed that Ms Berry refused to speak to him or pay rent. He finally had to ask Oliver to send a letter asking for rent. He advised that he cannot afford to carry on like this and felt he had to evict the Respondent, and Mr Oliver put him in touch with Mr Johnstone.
28. Mr Johnstone asked if rent was due apart from when there was a roof repair and the month of a bereavement and Mr Berry confirmed it was. He denied that he had ever agreed to let her live there without paying rent. He also advised that he sent her a letter saying that "we could not continue and could not afford to let her live there rent free otherwise we would have to take legal action. He advised that he gave her 2 weeks and rang her up and she accused me of bullying and harassing her." The Applicant also advised that the Respondent had never denied that rent was due. He confirmed that he could not afford to let the situation carry on and that he approached Mr Oliver regarding this in 2018 and that as this has gone on for 3 years he cannot afford this.
29. Mr Johnstone then asked where the money came from to purchase the property and the Applicant advised it came from an inheritance from his parents. He advised that when he first decided to help her in June/July 2014 the Respondent would come down to visit me or he would visit her and exchange phone calls. He advised that he was aware that Ms Berry had a long term relationship and it had broken down, that Ms Berry then met another friend and started living in the High Street in Hawick and that he went up and visited her with her parents maybe in June or July of 2014 and we discussed the possibility of me buying a property. Mr Berry could not remember the exact details of the conversation but mentioned as he had money in the bank this is what was discussed. Ms Berry then told me she had found a suitable property and we visited it and agreed to purchase it. Mr Berry advised that he got Mr Oliver's name from Mr Victor Berry as he believed Mr Victor Berry had used him in the past.
30. On being asked if there were any repairs needing done Mr Berry advised it was liveable but needed updated. He added that when I was up there just after the purchase I realised there was a problem with drainage pipes and thought the solicitor we pursued the previous owner and agreed to get the drainage sorted out. He also confirmed that he gave the Respondent 10 weeks rent free to get a new Kitchen and shower put in, which he said her parents helped with. He confirmed that he believed her father Mr Victor Berry had done quite a lot of work on the property such as replaced the tiles, shower, hedging. He advised that there were no written letters or documentation regarding the lease but Dawn was meant to pay rent from day one but

I gave her 10 weeks rent free at the start and also did not charge for the month her mother died. The Applicant went on to confirm under questioning from the Tribunal that if “Dawn told me jobs needed done we had agreements and she would pay a reduction. I have also paid for odd jobs to be done and paid the person upstairs for the roof.”

31. The Applicant also confirmed that when the Respondent first moved in he believed there had been a gas engineer to check the boiler and heating but he had no documents.

Mr Victor Berry

32. This was the third and final witness for the Applicant. Mr Victor Berry advised his full name was Victor Clive Berry and he was a self – employed engineer and he confirmed that he is the father of the Respondent and brother of the Applicant.
33. He confirmed that he has no interest in the Property at 11 Wilton Hill but was aware that his brother owned it and his daughter rented it. He explained that his brother Mr Graham Berry bought it so his daughter Ms Dawn Berry could move out of the flat she rented to somewhere she could afford and that would give his brother an investment.
34. Mr Victor Berry denied being at a meeting where this was discussed but said he had discussions with his wife (Jean) who said “Graham was buying somewhere so Dawn could rent it off him.” He advised this would have been in early 2014 a few weeks after Stella and Dawn split up, that his wife told him Graham was buying this as an investment and Dawn was sleeping on a couch in a friend Lucy’s bungalow in Hawick. Mr Victor Berry could not remember the address but advised he had visited there with his wife and met Dawn, Lucy and her parents. *He then realised that Dawn and Lucy were a couple ??? is this relevant do we need to keep this*
35. He advised that Dawn and Graham discussed the purchase of the Property and sorted it out themselves. Once she moved in “I told her it was a nice pad and a lot more affordable and good for the dogs as it has a bit of a garden at the back”.
36. When asked if Mr Victor Berry had done any work on the house he advised that he had made and fitted some gates; built a fence installed a shower given to Dawn from Lucy’s father, helped install a new cooker and work tops in the kitchen and cleared sewage pipes a couple of times. Mr Berry advised he did not charge for this work.
37. When asked why it would be financially better for his daughter to live in the Property Mr Victor Berry advised it was because “my brother was only charging a nominal rent”. It was more affordable than the High St flat and he advised Dawn had struggled with her finances. He advised he thought the rent for this Property was £50 and that it was Dawn who had told him that. Mr Johnstone then asked if Ms Berry had said she was going to live in the Property for free and he replied “No.”.
38. Mr Johnstone then asked Mr Victor Berry to explain the situation with 24 Skye Road Fife. Mr Victor Berry advised that his daughter and a partner (Kerry) were in the Royal Marines and applied for a mortgage

between them and bought the property at 24 Skye Rd Fife. He confirmed that they came to visit him and his wife and told us they had bought it. He advised he visited them a couple of times but within a couple of months they had split up and Dawn contacted himself and his wife and told them Kerry had beaten her up. He advised Kerry had not been paying her share of the mortgage and "we helped out paying some money to Dawn to clear arrears and the mortgage". A few months later he advised Dawn came down to see his wife and himself with a new girlfriend Kate who she hoped would move into the house and work in Scotland. Mr Victor Berry advised he realised Kerry was still on the joint mortgage and could claim half the property. He advised he spoke to Dawn and agreed we should get Kerry off the title. He advised they spoke to a firm of solicitor's Ross and Connell to get her off the mortgage, got a letter from Kerry saying she didn't want the property and as Dawn couldn't take the mortgage on her own we got the mortgage changed to Dawn and myself.

39. Mr Victor Berry then advised that a new partner of Dawn's moved in - a Stella Holmes. By this time, Dawn, he said had left the Marines and they wanted to move from Dunfermline to a flat in Selkirk that had been bequeathed to Stella. He confirmed that Skye Road was placed on the market to sell, but it failed to sell and after 2 years was taken off and rented out by Your Move in Dunfermline. He confirmed the rent from the lease was paid into his bank account and it just covered the mortgage payments but there were other costs such as for the garden, alarms and repairs. He advised it was rented out for a number of years, starting in 2010. In 2014 he advised that he found out that Dawn had got into serious debt, around £15,000 but "I wasn't happy to bail her out" so Jean and I purchased Skye Road to clear the debts. He believed this was done through Oliver's in Hawick. Mr Victor Berry advised that it was his wife who made told him of how seriously Ms Berry was in debt, which he thought was due to pay day loans and vehicles. He estimated he may have paid around £60,000. He advised that by this time Dawn was already living in the Property at 11 Wilton Hill and that Skye Road had nothing to do with Wilton Hill. Mr Berry advised that he thought he had contacted Oliver's solicitors around August/September 2014, that they had discussed it with Ms Berry and she was quite happy that he would clear up the debt and she would not use pay day loans anymore. Mr Berry advised that he paid around £56,000 to clear the mortgage on Skye Road, gave £15,000 to Dawn. He advised that he thought the mortgage had been 110%, that the house in Skye Road had been bought for £64,000 but the mortgage he thought was £70,000 and the house was sold in March 2021 for £84,000.
40. With regard to his parents will Mr Victor Berry advised that money was left to him and his brother Mr Graham Berry only. He advised that he gave Dawn and Craig her brother some money maybe £20,000 each.
41. Under questions from Ms Berry who advised that she thought the house at Skye Road should be signed over to her alone on the instructions of the Marines, Mr Victor Berry explained that Ross and Connell solicitors, had told him he had to get a letter from Kerry Silk

confirming she had no further interest in the Property. He advised he had to go outside the gate at the Marine Base having phoned her. He got her to sign a letter and that enabled himself and Dawn to take over the mortgage. He confirmed Kerry did not have a solicitor. Ms Berry advised that she was unaware this had taken place. Mr Berry went on to advise that he got in touch with Ross and Connell as it was the same firm Ms Berry had used to buy the house. He went on to confirm the transfer of title to their joint names took place around 16th April 2007.'s

Evidence from Ms Dawn Berry

42. Ms Berry submitted two written statements on 29th September 2021 in response to discussions at the first CMDs and these set out her position succinctly. In the first statement she advised that he had purchased a property at 24 Skye Road in 2005 with her then partner, that in 2007 she was violently assaulted by that partner and as they were both working in the military she confirmed that it was settled that her partner would sign over the house to her sole ownership and be redeployed to another base. The Respondent notes she was on a lot of pain medication at this time. She then confirms her father Mr Victor Berry came to see her and told her he would take care of it but that he put the property half into his name rather than her sole name and that "he did not buy into the property or pay me any money towards this at all." In 2009 the Respondent advises that her father came to visit and told her she had to move because he was selling the house. She advised that she "complied without question despite being extremely distressed. I was unable to challenge any of this and just did as I was told". The Respondent then advises she moved to Selkirk in the borders to live with a new partner as she had to quit her job as she couldn't find anywhere to stay in the (Fife) area at short notice. She goes on to say she stayed there for 5 years but that this relationship was an abusive one where she was violently assaulted and left and stayed with the family of a friend for a short while before renting a property in High Street in Hawick. She confirms her father and Uncle came to help me move my things into the property I was renting as well as some garages and this is when they suggested me signing over my property to my father in return for buying me a house in the Borders. The Respondent advises she signed over 24 Skye Road to her father " in return for as I was told for 11 Wilton Hill to be mine. My property in Dunfermline was worth considerably more than the property in Hawick." The Respondent goes on to say that "a few months after moving into the new home and spending money on carpets etc. my uncle started me for money it was "normal" for me to be treated like this by them and at the time I just continued to do as I was told without questioning." The Respondent ends this statement by saying she believes the property at 24 Skye Road has been sold for a lot less than it is worth.
43. The Respondent's second written statement reads "How I chose 11 Wilton Hill. I was given a budget by my uncle and father for the

property of up to £80,000. I looked at lots of different properties in the Scottish Borders but mainly in Hawick as properties were cheaper. I chose 11 Wilton Hill due it have having a garden (I have dogs) period features, high ceilings and bay windows. It was in need of updating throughout and needed some work done to it which was reflected in the price. I felt like this would be a good investment for me. That I could invest in this being my forever home. I was the one who contacted the estate agents and requested viewings etc...I told Graham that I had chosen a property and we proceeded with the sale. I was the main point of contact with the estate agents/solicitor (Mr John Oliver) as you can see from the e-mail screenshots. I organised all of the particulars leading up to during and after the sale. I was handed the keys on the move in date set by the sellers not as a tenant but as an owner/ occupier.”

44. Ms Berry gave evidence at the end of the first day and most of the second day of the hearing. In her opening statement she confirmed what she had put forward in writing about the purchase of Skye Road and why she moved to the Borders. She explained that when half the house at Skye Road was signed over to Mr Victor Berry, she was very ill and medicated from a brain injury. She advised that she does not remember being at a solicitors or half the house being signed over to him. The Respondent advised that she felt she was ordered to leave the house at Skye Road by her father after she had started a relationship with Stella who had inherited a house in Selkirk and as a result she moved there with Stella. She advised she did not feel she had a choice and that it has taken her a long time to realise she can say no and not be controlled or manipulated. The Respondent then advised that she was with Stella for 6 years but this relationship came to an abusive and violent end and a friend allowed her to stay in her house at Hawick. In 2014 she advised that her Mum, Dad and Uncle came up and advised it would be a good idea to sign the house in Skye Road over to her father and they would get me a house in the Borders. The Respondent advised the Skye Road property had been rented out while she was not there but all the rent money had gone into her father’s account. She advised that she was settled in Hawick and felt physically and emotionally vulnerable and believed they said my uncle would get me a house. “It was my understanding that this would be my house in return for signing this over to my Dad”. The Respondent then advised that after her mother died it helped her realise the reality of her family situation and that after getting some therapy she realised it was okay to say no to things that were not okay.
45. The Respondent does not accept that there was an agreement to pay rent. Her view is that she was being controlled and that was not her understanding of the agreement.
46. In response to questions from Mr Johnstone the Respondent
- a. confirmed that she realised the Applicant is the owner of the Property but denied that was what she agreed to.
 - b. When asked if she ever signed any paperwork for the property or received any letter of engagement from the solicitor Mr Oliver, the

Respondent could only remember signing for the keys, admitting she had telephone calls but did not sign anything.

- c. She denied ever agreeing to pay rent, but did agree she made payments to the Applicant and agreed that sometimes Mr Graham Berry had referred to those payments as “rent” and that she paid it.
 - d. Ms Berry advised on being asked why if she believed she was entitled to live (at 11 Wilton Hill) would she pay money. She advised it was because she was used to paying money to her Dad and used to doing as she was told.
 - e. The Respondent could not remember receiving 2 hand written letters from the Applicant asking for payment or rent.
 - f. The Respondent advised she could not remember receiving the letter from Mr Oliver seeking payment of rent or the one from Harper MacLeod although she did admit to receiving the notice to quit and advised she received legal advice that she did not require to leave until there was an eviction order was issued.
47. When the hearing resumed on the second day, Mr Johnstone took the Respondent through his client’s the bank statements as the Respondent could not confirm that each payment he alleged had been made was in fact made. After the Respondent managed to access her online account Mr Johnstone went through each payment line by line and the Respondent agreed she could see most of the payments were made as set out by the Applicant, apart from one. The last payment being £400 on 29th June 2018 and she agreed nothing was paid thereafter.
48. The Respondent denied however that these regular payments were rent payments but again confirmed that the Applicant had used the word rent when asking for payments. She could not recall when or on what occasions she may have questioned that this was rent. She was not sure if she had ever confronted her uncle and stated that this was not rent.
49. Ms Berry advised that the issue for her is one of control and historical abuse, when asked if she had taken any steps to challenge the ownership of the property she advised she was writing statements with the help of advocacy trying to address the abuse and sense of autonomy. She advised she needed to have everything lodged with the police.
50. The Respondent confirmed she had received the notice to quit and form AT6 and that she had sought advice and been told she did not have to leave by Shelter. The Respondent had written to Harper MacLeod solicitors regarding this but admitted she did not mention not paying rent or denying rent was due. She agreed that during these proceedings are the first time she has denied being due to pay rent.
51. The Respondent in response to questions from the Tribunal gave evidence that she did not remember a specific conversation with Mr Graham Berry about rent and how much it would be. When asked why her uncle would be involved if she felt she was due money from the house at Skye Road, the Respondent advised that was just normal and “Graham had told my cousin that the money from your Auntie was spent on buying me a house”, she thought she had instigated and

instructed the offer and the house would be in her name. With regard to the Property at Skye Road the Respondent advised that her recollection is that she bought it in 2005 with her then partner Kerry Silk, split up with her partner in 2007 after an assault, her partner moved back to base and she stayed in property until 2008/2009. She said that half the property was transferred to Mr Victor Berry. The Respondent advised she was on strong pain medication and a bit foggy at this time. She confirmed the mortgage however was paid between herself and her Dad. She advised the mortgage was originally £72,000. Her evidence was that her father then advised her to take it off the market and he made her to move out when she went to live in the Borders with her new partner Stella but that there was a lot of work needing done to that property and she was paying a lot towards the repairs and running costs. The Respondent then confirms her relationship with Stella broke up and she moved again to her friend's house in Hawick, where eventually she told her mother everything that happened and her mother, father and uncle came to visit and it was suggested that she sign over her house in Skye Road to her father and that "they would be buy me a house in the borders. Gave me a budget of £80,000". After they left Ms Berry confirmed she went to look at a lot of houses, found the one at Wilton Hill and instigated the purchase.

52. The respondent confirmed that she believes the mortgage on Skye Road would have been nearly paid off and that there would be around £80,000 left over. She agreed there was a time around 2009 that she was getting payday loans and when asked "do you recall getting £15,000" the Respondent replied "yes". She advised that she felt there were lots of issues with her Mum and Dad asking for money. She also admitted that at the time of the purchase of the Property at Wilton Hill she had a good relationship with Mr Graham Berry and thought she could trust him. After her Mother died she advised she addressed family dynamics and could see what had been happening to her. That she just didn't have a choice and just did things. She advised she would never normally have allowed her father to take half the house in Skye Rd or sign over the whole house and would not be in this situation. She also advised that she stopped engaging with the Applicant's calls or messages demanding money. She advised he was very confrontational and shouting at her, including saying think of the consequences. The Respondent confirmed she stopped paying anything after June 2018 because she felt she shouldn't have to do what she was told. The Respondent believes Mr Graham Berry has been manipulative and has played us off against each other.
53. Finally the Respondent spoke about the work she has done in the house including throwing carpets out; plastering walls, replacing the fire which had been condemned and a gas cooker that didn't work, buying a dehumidifier; fixing lights and fitting a wood burning stove. Generally the Respondent stated she has done a lot of work to the property including full redecoration and improvements such as putting in a wood burning stove. The Respondent was asked on several occasions for any receipts but could only provide one for the gas fire. The Respondent agreed that Mr Victor Berry did help with some of the

work such as putting in the gas cooker and oven and some fencing. The Respondent agreed that since 2018 she refused to pay for further roof repairs and told her neighbour this was Mr Graham Berry's responsibility.

Facts

54. The Property was purchased by the Applicant on 29th August 2014.
55. The Title is registered in the Applicant's name and he is the beneficial owner.
56. The Respondent chose and liaised with Mr Oliver the Applicant's solicitor re some of the details of the purchase with the approval and consent of the Applicant.
57. The Applicant bought the property as an investment to rent out to the Respondent.
58. The Applicant is registered as a landlord on the register of landlords
59. The parties have not entered into a written lease.
60. The parties verbally agreed to enter into a lease of the Property from 29th August 2014
61. Rent was £220 initially and since August 2016 has been reduced to £200 in return for the Respondent paying the buildings and contents insurance.
62. The Respondent carried out some work to the property and rent has not been collected in compensation for this.
63. No rent has been paid since June 2018. Double rent was paid in May and June 2018.
64. The ish date of the tenancy is 29th August
65. The Tenancy is an assured tenancy.
66. A valid notice to quit was served converting the tenancy to a statutory tenancy.
67. A valid form AT6 has been served relying on grounds 8, 11 and 12 of schedule 5 of 1988 Act.
68. Rent is due and owing in the amount of £7,480 up to and including September 2018.

Reasons

69. The preliminary issue that the Tribunal had to determine is whether or not there was a tenancy in place between the parties.
70. If there is the tenancy has to be an Assured tenancy under the Housing (Scotland) Act 1988 as this applies to tenancies created before December 2017 when the Private Rented Tenancy came into being. S12 of the 1988 Act states that "a tenancy under which a house is let as a separate dwelling is an Assured Tenancy if the tenant occupies it as his or her only or principal home". There was no disagreement that the Respondent was occupying the Property as her only or principal home and has been from 29th August 2014 when she collected the keys from the solicitor.

71. The Respondent has submitted that she should be the owner of the house at 11 Wilton Hill and not the tenant, however the Tribunal heard clear evidence from Mr Oliver that he was engaged to act for the Applicant in the purchase of the Property, that the money to purchase the Property came from the Applicant and that he was liaising with the Respondent only on the Applicant's instructions. Mr Oliver advised in clear terms he was instructed to buy the property for Mr Graham Berry, That Mr Berry supplied the money and the title was put in his name. This was supported by the evidence from Mr Graham Berry who spoke in detail of the discussion that led to him buying a property to allow the Respondent to live in. He was quite clear that this was an investment using money he had inherited from his parents and that he was happy to let it to the Respondent for a nominal rent to help her out as she was living in temporary accommodation in Hawick. The Applicant has shown evidence that he applied for and was admitted to be a landlord in August 2014, although he cannot show any other evidence of having supplied safety certificates and also admitted that he did not send the Respondent regular rent statements but the bank statements lodged by him have shown that regular payments of £220 then £200 were made. The Applicant was not clear when asked as to why some months were missing. He did confirm that one payment was waived for roof works that were done on the Property for which the Respondent advised she paid some money. He also confirmed that another month was waived because this was the month the Respondent's mother had passed away and he did not think it fair to ask her for rent for that month. Due to the lack of record keeping and the time that has passed the Applicant was not clear why some other months were missed but did admit other work could have been done by the Applicant and he was clear that the first 10 weeks were not charged to allow her to redecorate and do up the house to her taste..
72. The Applicant has also supplied evidence of seeking payment of rent, namely the two handwritten letters and the letter from G and J Oliver and the letter from Harper McLeod. The Respondent was asked and admitted that the Applicant when asking for money did call it rent and she did not challenge that at the time. Crucially however the Tribunal notes that the regular payments made, although not made every month or on the same day every month, were for a consistent amount and were called rent in the bank statement. This reference appears on each payment and is more likely than not to have been created by the payer. This is significant and led the tribunal to finding that this was identified by both parties as rent.
73. The Respondent has suggested that there was a promise made to her by her uncle and father that they would buy her a house to live in. However this is not in writing and in Scots law there is a presumption against gratuitous alienations.
74. S1 (2) (a) (i) of the Requirements of Writing Scotland Act 1995 provides that a written document subscribed by the parties is necessary to constitute a contract or unilateral obligation for the creation, transfer or extinction of an interest in land". The exception to

this is a lease for less than one year which does not need to be in writing.

75. A contract for the sale of a house however is not formed by the seller and purchaser until there is a written contract of sale usually known as an exchange of missives. In addition a voluntary obligation created by a promise can be enforced if the promiser intended to be legally bound. Again s1 (1) of the 1995 Act requires such obligations to be constituted in writing unless entered into in the course of business. The Respondent has not shown any evidence of writing which confirmed the Applicant promised to buy her the Property. The missives concluded for the purchase were concluded in the Applicant's name and his name is still registered on the title. The Respondent has not shown or even suggested that he benefited in any way from the sale of 24 Skye Road so even if she was entitled to any money from that property (regarding which there are competing views from Mr Victor Berry and the Respondent) there is no reason submitted as to why this would mean Mr Graham Berry would have owed the Respondent any money from a property he had no financial interest in and therefore would have had reason to put the title to the Property at 11 Wilton Hill into the Respondent's name.
76. The Respondent's recollection of the conversation that led to her looking for a property in Hawick does not accord with what subsequently took place. She is basing the reason why the Property should have been bought for her on the ground that she believes she has been misled or forced into signing over the property at 24 Skye Road to her father Mr Victor Berry. The Respondent advised that she believes she should have been given money from that property either when it was signed over or on the sale. However she has not alleged that the Applicant Mr Graham Berry ever had any title or interest in the property at 24 Skye Road, and her issue with the transfer and ultimate sale of that property and any proceeds of sale appear to be with Mr Victor Berry who she transferred her share of the property at 24 Skye Road to.
77. The Respondent has lodged a letter from her cousin Ms Lisa Curran dated 30th September 2021 as support for her view that the Property was bought for herself to be the owner. In this letter Ms Curran confirms that she believes her Uncles Mr Graham Berry and Mr Victor Berry (who she advises were her mother's brothers) had her mother written out of her grandmother's will. She goes on to say her grandmother had 3 children Mr Graham Berry, Mr Victor Berry and her mother but her mother was not left anything from her grandmother and not even mentioned in the will. The two brothers her uncles were left everything. She goes on to say "*When we later questioned Graham about this he said a number of things – he said woman were often not given any money and if was often left only to the males in the household. We told him maybe in years gone by but our Nana and Grandad would never have written their own daughter out of their will. We accused Graham and Victor of changing the will when my grandparents were not fully aware of this. Graham agreed that maybe it was unfair and he could see why we were aggrieved but that the*

money had been spent on buying our cousin Dawn Eva Berry a house in Hawick. He said "what do want me to do throw Dawn out of the house" This was in approximately 2014 and so no money was ever given to our Mum. The Respondent alleges this supports her claim the house was bought for her to own but there is another interpretation of the words set out in this letter which is that the Applicant bought the house for the Respondent to stay in only, but that he would be the owner and rent it to her. This is the Applicant's version of the conversation. He stated in evidence that he had discussed her situation and had agreed to let the Respondent choose a house which he would buy as an investment with his inheritance and she would rent it from him. This letter does confirm there was an inheritance that both the Applicant and Mr Victor Berry received from their parents, which the Respondent has also confirmed. The quote that the Applicant said "what do you want me to do thrown Dawn out of the house indicates it is his house otherwise he could not "throw her out"; that he did not consider it was bought for the Respondent to own or to be held in trust for her as equally in either of those case he would not have the control of the house in order to contemplate throwing her out.

78. The Respondent also submitted a copy e-mail from herself to Harper Macleod dated 15th July 2020 which states "I have been advised that I am entitled to remain in the Property as an eviction order has not been granted by the Housing and Property Chamber." She does not in this e-mail challenge the rent claimed.
79. The Respondent notes in her closing written statement that she was told by Graham Berry "*Make sure you pick a house that's a good investment for you - in case you want to sell it and move somewhere else in future*" "*Maybe you should check to see if you'd be likely to get planning permission to build yourself a drive or garage at this place*". However these statements were not confirmed in her oral evidence which was more vague and imprecise about what exactly was said. The Tribunal has not had a chance to put these statements to the Applicant to see what his response is. The Tribunal did not find that these statements were credible.
80. The Respondent spoke candidly about feeling manipulated and is talking to support agencies and the police about certain issues that have affected her. She spoke also of working through unresolved issues in her past and having to do this before she can proceed with potential claims. She has lodged 3 letters from support organisations that confirm she is receiving support and help for alleged trauma and abuse. The Tribunal accepts she is receiving support for this.
81. The Respondent has not raised any action for damages or payment of money that the Tribunal is aware of to date against Mr Victor Berry or Mr Graham Berry. In the absence of that, the Tribunal felt it had to proceed in terms of the overriding objective to consider the evidence before it in this application. Given the evidence that the Applicant has bought the Property, has apparently paid from it with money he inherited from his parents, that he applied and was admitted to the register of landlords by Scottish Border Council and asked for and received regular payments of mostly £220 and then £200 from the

Respondent, the Tribunal finds on balance that is more likely than not that this was a lease.

82. The absence of a written lease does not need to be crucial to the fact there is a lease. S1(7) of the 1995 Act states “ a real right in land means any real right in or over land but does not include a tenancy, if the tenancy or right it not granted for more than one year.” The case of Gray v University of Edinburgh (1962 SC p162-163) sets out 3 cardinal elements for there to be a lease, namely the parties, the subjects and the rent. The parties are clearly the owner of the Property, the Applicant and the Respondent who has lived in the Property since August 2014. Money has regularly been paid from October 2014 to June 2018 when the Respondent stopped paying. In return for the payments the Respondent has had the benefited of living in the Property. The sums originally paid were £220 and were then reduced to £200 after the Respondent took over payment of the buildings insurance. The Respondent herself agrees she is paying this and provided evidence of this but it is noted the evidence appears is from 2017 which supports the Applicant’s submission that this was changed some time after the date of entry. The Respondent denies the payments she has made are rent but could not explain why it was called that in the transfer details on the bank statements. Given the evidence before it, including the regular nature of the payment, the description on the bank statements and the fact the payments were mostly for the same amounts, the Tribunal found that this regular payment was more likely to be rent than anything else.
83. The Tribunal therefore finds for the reasons stated above that the arrangement whereby the Respondent stayed in the Property which is owned by the Applicant was a lease arrangement with rent being due latterly in the sum of £200 per month.
84. Having concluded that this arrangement is a lease of the Property by the Respondent from the Applicant at a monthly rent of £200 the lease must as previously stated be an assured tenancy as it started on 29th August 2014.
85. It is undisputed that the Respondent has paid no money/rent to the Applicant since July 2018. The Respondent has advised that she carried out various items of work to the property. She claims that she spent a lot of money on the basis she believed the house was hers and has produced a list of the work done and an estimate of the costs. The Tribunal asked on a few occasions if there was any receipts or vouching for this work but the Respondent has been unable to provide any other than an invoice for a replacement fire. The Applicant was not clear in his evidence as to what work the Respondent had done, but was clear that the first 10 weeks of rent had been waived to allow the Respondent to decorate and furnish the property to her taste. He did not dispute that she has done other work. The Tribunal has noted that from the statement of rent paid provided by the Applicant it is clear 13 payments of rent do not appear to have been made after 10 weeks from 29th August 2014 and July 2018 and no payments have been made since. The Tribunal has assumed that rent would therefore be due from 15th of November (10 weeks after the purchase). Given the

lack of any vouching from the Respondent which would allow the Tribunal to see exactly what had been incurred and what would be classed as repairs and what was decoration to Respondents taste, but taking account that the Applicant has not kept any records of what was done, and has conceded that the first 10 weeks and then at least two of the months that were not paid or had reduced payments, have been to allow for work done, the Tribunal considers it more likely than not that any months between the commencement of the lease and July 2018, after which rent was not paid, was waived by the Applicant to cover essential repairs carried out by the Respondent or for other personal reasons and does not find that rent is due for those months where rent was not paid.

86. The Applicant initially sought payment of £6,800, and then intimated a request to increase this to £10,300 in September 2021 as per the rent statement lodged and intimated to the Tribunal and Respondent. The rent statement shows an alleged total rent due of £17,280 but includes rent charged for May 2016 when the Applicant agreed the rent for that Month would be waived in respect of the bereavement following the death of the Respondent's mother. After deduction of that month the alleged rent due would be £17,060. However as the Tribunal is not satisfied that the Applicant has proven on balance that the missing rent due in the months between 2014 to July 2018 are due to non- payment rather than a waiving or reduction due to repairs carried out, then another £2,600 is deducted from the total possible leaving a sum of £14,460 due up to and including September 2018. The Applicant has paid £6,980 leaving a balance due and currently claimed of £7,480. The Applicant has in his written final submissions asked if this case could be continued to allow him to apply to increase the sum sought. The Tribunal does not consider this to be a fair or reasonable request. The Applicant has had ample opportunity to request a further increase between October 2021 and the date of the hearing and has not done so. The Tribunal is making its decision on the application before it at the date of the hearing.

Decision

The Tribunal determined that an order for payment in the sum of £7,480 be granted

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.

Jan Todd

16th June 2022

Legal Member/Chair

Date