



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

**Property at Nether Balgowan, Campsie Road, Torrance, Glasgow, G64 4EZ (“the Property”)**

**Parties:**

**Mr Costanzo Cacace, Via Palazzo a mare no 12, Marina Grande, Capri, 80073 NA (“the Applicant”)**

**Mr Alan Harty, Nether Balgowan, Campsie Road, Torrance, Glasgow, G64 4EZ (“the Respondent”)**

**Tribunal Members:**

**Josephine Bonnar (Legal Member) and Janine Green (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment should be granted against the Respondent in favour of the Applicant for the sum of £15,155.79. The Tribunal also determined that a Time to Pay Direction should not be granted.**

**Background**

- 1. The Applicant lodged an application seeking an payment order in terms of Section 71 of the 2016 Act. A copy private residential tenancy agreement (PRT), Notice to leave, Section 11 Notice, letter to the Respondent dated 6 April 2022 and rent statement were lodged in support of the application. A related application (EV/22/1753) for an eviction order was also lodged.**
- 2. Copies of the applications were served on the Respondent by Sheriff Officer on 30 June 2022. Both parties were advised that a case management discussion (“CMD”) would take place by telephone conference call on 8 August 2022 at 2pm and that they were required to participate.**
- 3. The CMD took place on 8 August 2022. The application for an eviction order (“the eviction application”) was also discussed The Applicant was represented**

by Mr Gray, solicitor, and Mr McColl, letting agent. The Respondent also participated. Mr Harty told the Tribunal that the eviction application was opposed, and the payment application partially opposed. He stated that he disputed the figure being claimed and wanted to seek time to pay. In response to questions from the Tribunal Mr Harty said that rent payments were missed due to a change in circumstances. However, things had improved, and he anticipated being able to pay the rent and clear the arrears. However, he also stated that the rent calculation provided by the Applicant may not be accurate. Furthermore, he had to pay for essential repair work at the property which should be offset against the arrears. In particular, he had to pay for the septic tank to be drained and a blockage in a drain to be cleared. This had caused sewerage to spill onto the driveway at the property. This was reported to the letting agent, but he told them that he would arrange the repair. Mr Harty confirmed that the last payment was made to the rent account on 26 May 2022 and that he did not pay the instalments due on 30 May, 30 June, and 30 July. He also confirmed that he did not deliberately withhold rent, but that he is entitled to an abatement for the costs incurred in relation to the blocked drain and septic tank. There were other repair issues, but these were addressed by the Landlord when reported to the letting agent. Mr Harty advised that he can submit bank statements to evidence all payments made and vouching for the repair work.

4. In response to questions from the Tribunal, Mr Harty confirmed that the tenancy agreement submitted by the Applicant was the correct agreement. He also confirmed that he received the Notice to leave submitted with the application and the letter of 6 April 2022, which relates to pre action requirements. He told the Tribunal that he opposed the eviction order on the grounds that it would have an adverse impact on his family. He resides at the property with his wife and three children, aged 3, 5 and 7. The family are settled at the property. His youngest child is currently undergoing assessment for autism. Routine and continuity are very important to his wellbeing, and they don't want to move for that reason. He advised that he and his wife work together in marketing and financial services. He said that he is keen to reach an agreement with the Applicant regarding repayment of the arrears.
5. The Applicant's representatives said that the rent statement lodged is accurate and all payments have been included. They confirmed that Mr Harty reported an issue with the drain/septic tank. While it would be usual for the landlord to arrange repairs, Mr Harty insisted that he would attend to it because he already owed rent to the Landlord and did not want him to be further out of pocket. However, no vouching of the cost of any repairs was ever provided. Furthermore, the Landlord was invoiced by Scottish Water for the annual service and the septic tank had been cleaned out a few months before the Respondent moved into the property. The Tribunal was advised that the Applicant resides in Italy. He is retired. His main source of income is the rental income from the property and one other property. The arrears have caused financial problems and he has considered having to move back to Scotland.
6. Following a short adjournment, the Tribunal determined that the applications should proceed to a hearing, to be conducted by telephone conference call.

The Tribunal noted that the issues for the hearing to be -

- (a) Did the rent statement lodged by the Applicant accurately show the payments made by the Respondent to the rent account?
  - (b) What is the sum due by the Respondent to the Applicant in unpaid rent?
  - (c) Is the Respondent entitled to an abatement of rent for repair work carried out at the property and paid for by him?
  - (d) If part of the unpaid rent is not due, had the Applicant established that the Respondent has been in arrears over three or more consecutive months?
  - (e) If the ground was established, is it reasonable that an order for eviction be granted?
7. The parties were notified that they should submit a note of any unsuitable dates for the hearing by 5pm on 9 August 2022. The Tribunal suggested that the Respondent may wish to take legal advice or consult a housing advisory service prior to the hearing. The Tribunal also issued a direction to the parties for information and documents to be lodged prior to the hearing
  8. The parties were notified that a hearing would take place on 12 October 2022 at 10am to be conducted by telephone conference call. Prior to the hearing the Applicant lodged submissions and documents in response to the direction. This included an updated rent statement showing a total sum due of £19735. The Applicant also lodged an affidavit in relation to the application and his personal circumstances. It states that the property is his former family home. He has rented it out since moving to Italy when he retired. He relies on the rental income of £2795 per month to supplement his basic state pension. He has another property which he rents out for £1550 per month, although this is currently unoccupied and undergoing repair. He has maintenance costs for the property including a gardener and septic tank maintenance.
  9. The Respondent did not lodge a response to the direction. On 7 October 2022, he lodged an application for a time to pay direction in which he confirmed that he admitted that the rent arrears are due. The application offers to pay the arrears at the rate of £3289.16 per month. This would be paid in addition to the monthly rent. The application also states that the Respondent has a net income of £10,000 per month with outgoings of £2795 for rent, £300 for utilities, £800 for food, £100 for phone and £200 for travel costs. The Respondent also states that he has no assets and no debts and resides at the property with his wife and three young children.
  10. On 11 October 2022 the Respondent submitted a postponement request. He stated, "I have given notice to leave the property within 7 days of today". He also said that evidence of this would be lodged separately. However, it was the Applicant who submitted a copy of his email to the letting agent. The email states, "This is my formal notice to leave Nether Balgowan with immediate

effect". The Respondent said that the hearing should be postponed because he had given notice and mentioned that new legislation was due which could affect the application and he did not have time to get advice on this. The request was opposed by the Applicant. The Tribunal refused the request and parties were advised that the hearing would proceed. Shortly prior to the hearing the Applicant lodged a further rent statement showing two payments made on 11 October 2022 (£170 and £2625), reducing the balance to £16,940.

11. The hearing took place on 12 October 2022 at 10am by telephone conference call. The Applicant was represented by Mr Runciman, solicitor. The Applicant gave evidence and led evidence from Mr McColl, his letting agent and Ms McKendrick. The Respondent also gave evidence.

## **The Hearing**

12. The Tribunal dealt with several preliminary matters.

- (a) It was noted that the Applicant had lodged an affidavit which he wished to rely on, rather than giving oral evidence. Mr Harty advised the Tribunal that he wanted to ask the Applicant a couple of questions to clarify matters. After discussion, it was agreed that the affidavit would form the Applicant's evidence in chief but that he would join the call so that the Tribunal and the Respondent could ask some questions.
- (b) Mr Harty told the Tribunal that, as confirmed in his time to pay application ("TTPA"), he now admitted the debt, subject only to an amendment being made for the last month's rent (30/9/22 to 29/10/22), as the rent for 12 to 29 October was not in arrears. Mr Runciman confirmed that an amendment could be made, and that Mr McColl would provide an amended statement. This was provided later in the hearing and Mr Harty confirmed that he was happy with the amended figure of £15155.79. He confirmed that he did not intend to proceed with his defence to the application, namely that the Applicant had not included some payments which had been made or that he was entitled to an abatement of rent for repairs.
- (c) Mr Runciman told the Tribunal that the TTPA had been lodged late and should not be considered by the Tribunal. He stated that the Respondent had been due to submit the TTPA and various documents in response to the Tribunal's direction no later than 14 days before the hearing. He did not lodge any documents and only submitted the TTPA on 7 October. As he has been sequestrated, there is a substantial risk that his Trustee will object to such a large sum being paid to another creditor each month. He added that the Respondent is a company director of an active company, although a person who is sequestrated is not permitted to be a director. Furthermore, no vouching has been provided regarding his income or outgoings. Mr Harty apologised for the TTPA being late and said that he had been trying to sort things out with the Applicant. He said that he does not anticipate any issue with his Trustee and is due to have a review shortly, as there is a review every 6 months. He stated

that his offer to pay is linked to him continuing to live in his current house as it is based on his current rental payments. In response to questions from the Tribunal he confirmed that his offer to pay was not conditional on being allowed to reside there and that he understood that he was not entitled to impose such a condition. After a short adjournment the Tribunal advised the parties that the TTPA would be considered, and that the Tribunal would hear evidence and submissions on the application before making a decision.

- (d) Mr Runciman asked the Tribunal to consider the eviction application without having the hearing in terms of Rule 18 of the Procedure Rules. He referred to Mr Harty's postponement request in which he notified both the Applicant and the Tribunal that he was vacating the property. Mr Runciman said that, given this statement. It was not necessary for the Tribunal to hear evidence to establish that it was reasonable to grant an order for eviction. Mr Harty said that he was desperate to avoid an eviction order and that was why he had said that he would move out. He confirmed that the eviction application is opposed. Following the adjournment, the parties were notified that the hearing would proceed, and that the Tribunal was satisfied that it had to hear evidence before making decision on reasonableness.
- (e) The Tribunal noted that the only remaining issues for the hearing was whether to grant the TTPA in connection with the payment application and whether it would be reasonable for the Tribunal to grant an eviction order.

### **The Applicant's evidence**

- 13.** In response to questions from Mr Harty, Mr Cacace said that his daily living expenses were in the region of 50 – 55 euros but that he had not anticipated the increasing costs of gas and electricity. He said that, aside from his state pension, his only income is the rent from two properties. The only property he owns in Italy is the house where he resides. He has maintenance costs for the property at Nether Gowan – the gardener, insurance, and the septic tank. He is not sure how much these cost. He also had to purchase a new boiler at a cost of £3500. Mr Cacace said that he had owned a small restaurant which he gave to his daughter when he retired. She had worked for him in the restaurant since the age of 14, for 36 years, and deserved it.
- 14.** In response to questions from the Tribunal Mr Cacace said that the rent arrears have caused a great deal of stress and the cost of living in Italy is too high. He is thinking about returning to live in the property for part of each year so that he can help his daughter with the restaurant and spend time with family. His other property is currently vacant as it needed a lot of work after the previous tenant left. He intends to re-let it as he needs the income. He does not have a private pension and he put all his money into property. His wife is also retired. She does not have a pension of her own.

## **Mr McColl's evidence**

- 15.** Prior to Mr McColl giving his evidence a further rent statement was lodged showing a new balance of £15155.79. Mr McColl stated that he had recalculated the rent due for the period 30 September to 12 October 2022 and made an appropriate adjustment. Mr Harty advised the Tribunal that he accepted this new figure as the sum currently outstanding on the rent account.
- 16.** Mr McColl told the Tribunal that he is a director of the letting agency that manages the property. In response to questions from Mr Runciman he said that he has not charged the Applicant any management fees for several months because of the rent arrears and is not sure what will be charged when the property is recovered. He stated that Mr Harty has made several arrangements to repay the arrears. His offers have been discussed with the landlord and then arranged. However, Mr Harty has not adhered to the arrangements. Mr McColl was referred to an email (Production 9/1). He said that it is an email that he sent to Mr Harty with details of various promises to pay which were not fulfilled. He was also referred to Production 5/1 and confirmed that this was a letter sent to the Respondent to comply with pre action requirements on 6 April 2022. This led to a further offer of payment and payments totalling £10000 were made on 9 May 2022, reducing the arrears to £ 5760. No further payments were made until 11 October 2022. Mr McColl was referred to Production 16, a letter from a debt collection agency in relation to an unpaid utility bill. He said that Mr Harty is responsible for utility bills, so he sent the agency details of the tenancy. The landlord has also provided him with information about other debts owed by Mr Harty in relation to previous tenancies. These include about £40000 of rent arrears and a business debt of £7000.
- 17.** Mr McColl told the Tribunal that he had a conversation with Mr Harty who said that he had secured alternative accommodation and would be moving out. He wanted to know what would happen to eviction application. He was told to put it in writing and did so, saying that he would return the keys in 7 days. He stated that he has acted for the landlord for 7 or 8 years. They had decided to retire and move abroad but are now suffering from stress and anxiety which is having an impact on their health and wellbeing.
- 18.** In response to questions from Mr Harty, Mr McColl confirmed that the Respondent had paid a substantial sum in rent since the start of the tenancy but that the agreement requires his to pay his full rent every month. He was asked whether he had told Mr Harty that one of the consequences of non-payment was that information might be provided to journalists. Mr McColl said that he did not recall making that statement but had told Mr Harty that there could be consequences for non-payment. When asked whether he accepted that Mr Harty had the means to pay his rent, he said that they had been hopeful that the arrears would be paid but that Mr Harty had let them down. They had delayed initiating the eviction process for longer than usual. When asked about the utility bill, he said that he had only advised the company of the tenancy and didn't know what happened after that. In response to a question from Mr Runciman he said that debt collection agencies often carry out checks to see who has registered the property and then contact the agent about payment.

## **Ms McKendrick's evidence**

19. Ms McKendrick told the Tribunal that she is an accounts supervisor for Tay Letting. Mr Harty was a tenant of Tay Letting in 2020. They applied for an eviction and payment order against Mr Harty when he incurred rent arrears of £38,000. This also led to sequestration proceedings. The rent arrears have not been recovered.

## **The Respondent's evidence**

20. While giving his evidence Mr Harty said that he had lodged some documents prior to the hearing. The Tribunal had not received these documents and the Applicant had not had the opportunity to review them. Mr Harty was unable to provide evidence that these had already been submitted to the Tribunal and stated that he did not believe that he had lodged them in accordance with the time limit specified in the Tribunal's direction. In the circumstances the Tribunal determined that it could not consider the documents as the Applicant had not had fair notice of them.
21. Mr Harty told the Tribunal that he lives at the property with his wife and three children who are aged 3, 5 and 7. The children all attend the Milngavie campus of Glasgow Academy, a fee-paying school which is three miles from home. He later conceded that it is 5 or 6 miles from home. The school and nursery fees are paid by the children's grandparents. His wife is a director of a company which provides marketing and finance services. He is self-employed, working with his wife's company. When asked about the income specified in the TTPA, Mr Harty said that the figure specified is his net income. His wife has an income which is separate from this and is a mixture of monthly PAYE salary and quarterly dividends. He was unable to provide the Tribunal with any details of this. Mr Harty said that his youngest child is undergoing assessment for autism. This process is ongoing, and it has been established that he has exhibited behaviour which suggests that he is on the spectrum. He pays for private therapy sessions. These cost £60 per month and are not listed on the TTPA. He is concerned about the impact of having to move as any change can have an effect, even small changes to routine such as taking a different route to school.
22. Mr Harty advised the Tribunal that the property is a four bedroom single storey property with a large garden. There is a living room, kitchen, and dining area. In addition to the family bathroom there is an ensuite bathroom. In response to questions about the previous property he confirmed that a payment order was granted against him and that this led to his sequestration. In response to questions about his income he said that £10000 was average. It is made up of a fixed amount of £7000 which is a consultancy fee. The balance can vary and can be less or more than £3000. He said that the last three months income had been £10,984, £9065, and £8500.
23. Mr Harty said that the rent arrears were due to him having a very difficult three years. Although his income is high there are always many demands on it. When

asked why he had made no payments toward his rent account for several months he said that he thought that he had to go through the Tribunal process to establish what he had to pay. When asked about payments to his Trustee from his income, as none are disclosed on the TTPA, he said that he is not currently required to make payments but is due to have a review with his Trustee and expects to start making payments after this. He wants to repay all the sums he owes. The last few years have been very difficult. He had good standing in the community and was an employer. The payment order and sequestration have impacted on his reputation and caused stress for his family when they were reported. The Tribunal noted that the TTPA does not include any car costs. Mr Harty said that he has the use of a car owned by a family member, so only has to pay for petrol which is included in the TTPA under travel costs. The Tribunal also noted that the TTPA does not have any information about Council Tax. Mr Harty said that this had been paid in advance for the whole year by a family member, because non payment can result in action being taken very quickly to arrest bank accounts. He stated that his offer in the TTPA is based entirely on his ability to pay. In relation to the unpaid utility bill, he said that he has been in touch with the collection agency and accurate meter readings have now been taken. He said that he had thought that the utilities were included in the rent.

- 24.** In relation to the statement in the postponement request that he was moving out, Mr Harty said that he was told by Mr McColl that if he gave notice that he was moving out the eviction application would fall. He stated that he has the opportunity of alternative rented property but does not think this will be available for his if an eviction order is granted. That is why he is opposing the order. However, his preference would be to remain in the property but will move out if he must. He wants to avoid the disruption that this will cause. Mr Harty advised the Tribunal that if his finances had not improved, he would have considered moving to a more affordable property, but the nature of his work is such that the current economic climate means that it is a very buoyant time. He expects his income to remain at the level indicated in the TTPA. His work involves helping people in financial difficulties through debt consolidation, debt arrangement schemes and trust deeds.
- 25.** In response to further questions Mr Harty said that his son has been assessed several times, both by the NHS and privately. Because of his age he is at an early stage in terms of diagnosis. Although he is showing signs, there is a reluctance to label children. They noticed after their move to the property that his vocabulary had shrunk. They assumed this was related to lockdown. However, in November/December last year they became more concerned.
- 26.** In response to questions from Mr Runciman, Mr Harty denied that he was only opposing the eviction order because it would be made public. He also denied that he was just trying to protect his business. He said that his family was the first concern but that salacious news reports could damage his ability to provide for his family. When it was put to him that the solution to this was to pay his rent, Mr Harty said that he had paid a substantial sum, that he had offered to pay the arrears and that he was now better placed to pay off the arrears. When asked about his notification about moving out of the property, Mr Harty said that



he was trying to avoid an eviction order. It was put to Mr Harty that his children's school was 5 or 6 miles away, which he accepted. He confirmed that he has not been in receipt of state benefits. It was also put to him, that he could have sought help from family since they already have provided funds for school fees, council tax and the car. Mr Harty said that it is his responsibility to resolve the rent arrears. When referred to clause 27 of the tenancy agreement, liability for utilities, Mr Harty said that (like most people) he does not read terms and conditions. He denied that he had been living beyond his means and insisted his is now able to pay the arrears so that they can remain in the property. He said that moving from the property would be an absolute last resort. He also said that he could not locate any evidence of payments made for repairs, so he had decided to abandon his defence to the payment application. When asked about Production 9/1 Mr Harty said that at the time of that exchange with Mr McColl, he did not expect the Landlord to pay for something that he could deal with because of the arrears.

- 27.** In relation to the TTPA Mr Harty confirmed that he is an undischarged bankrupt and that his debts were not listed because they were in the hands of the Trustee. He stated that he had not notified the Trustee about the TTPA. He conceded that the trustee controlled his assets and could require a monthly payment which might affect his ability to pay an instalment payment order. In relation to his status as a director of Hillcrest Protection Ltd he said that the company is not trading and will be struck off at the end of October. Meantime he could not resign as it is not possible to remove all directors from a company. Mr Harty denied that he had thrown the TTPA together to avoid an eviction order. He denied that he was familiar with TTP orders, and the Debtors (Scotland) Act 1987 as only deals with trust deeds and IBAs.
- 28.** Mr Harty denied that he had a habit of moving into high rent properties and then not paying rent. He said that he hoped the Tribunal would look beyond how it might initially appear. He hoped that they would see that he was trying to find a way to resolve the arrears and look after his family. Mr Runciman referred Mr Harty to an article from the Sun which said that he had business debts of £200000. Mr Harty said that the Sun was not evidence and although he admitted that there were business debts, he could not confirm the figure. It was suggested that he knows how to go about protecting himself from creditors. He denied this, stating that the work he does has to be for the benefit of both debtors and creditors. He confirmed that if he had a client who owed rent arrears of £15000, that he might recommend that they move to a more affordable property. It was put to him that, having been through the tribunal process before, he knew that he had to continue to pay his rent. He responded saying that he thought the process was about deciding what he was to pay. In relation to his offer to move out of the property on 11 October 2022, he said that he could move out if he had to. However, his primary objective was to stay in the house.
- 29.** In response to further questions from the Tribunal Mr Harty denied that he had been telling a lie when he said that he was moving out. He would lose the other property if an eviction order was granted. He confirmed that he has not claimed any state benefits during the period of the arrears.

## The Applicant's submissions

- 30.** The TPA is opposed. The Respondent had lodged it in the mistaken belief that the eviction action would not proceed. The application was also late (in terms of the Tribunal direction). The Respondent is a registered bankrupt and there are concerns that this affects his ability to offer to pay if the Trustee requires his disposable income to be used for the benefit of his creditors. The Respondent is also the director of an active company. No vouching has been provided to support his income and outgoings and there is clearly missing information in the form. The application lacks candour and credibility. The evidence shows that he has a track record of making payment arrangements which he does not keep. He also has a history of business debts and substantial rent arrears. The Respondent is living beyond his means. No evidence has been provided regarding his child's autism. No rent was paid between May and October 2022. The TTPA should be refused. If the Tribunal was minded to grant a TTP direction, the instalments should be higher, based on the income and outgoings specified in the application.
- 31.** The Applicant seeks an eviction order on ground 12 of schedule 3. The Respondent has been in arrears for over three consecutive months. There is no evidence that a delay in the payment of benefits has been a factor and pre action requirements have been met. It would be reasonable to grant the eviction order for several reasons: -
- (a) Failure to adhere to previous payment arrangements.
  - (b) History of non payment.
  - (c) Arrears started in November 2021.
  - (d) Arrears are substantial – equivalent to 6 months rent.
  - (e) Failure to pay utility bills.
  - (f) Landlord has no pension, depends upon his rental income and is re-considering his retirement plans.
  - (g) Arears have caused the Landlord stress and anxiety.
  - (h) Respondent is a registered bankrupt and remains a company director.
  - (i) Respondent stated that he has a property to move to and would move immediately.
  - (j) City of Glasgow Council v Erhaiganoma ( 1993 SCLR at page 594) - once a prima facie case for reasonableness is made out, it is for the tenant to show why the order should not be granted.
  - (k) Respondent failed to comply with the Tribunal's direction and did not provide a report on his son from a medical professional.
- 32.** In response to a question from the Tribunal, Mr Runciman said that the Tribunal should not consider a delay in enforcement in terms of Rule 16A, since the Respondent said that he could move from the property within 7 days. He also asked for expenses in terms of Rule 40. He referred to the terms of the postponement request and stated that this conduct justified an award of expenses.

## **The Respondent's submissions.**

33. The TTPA application was thoroughly thought through before it was submitted. It offers a substantial sum each month in addition to the rent. It is disputed that he is a serial non payer. He has been trying to resolve matters. It would have been easier just to leave and not pay the arrears.
34. The Respondent and his family are more likely to suffer if the eviction order is granted than the Applicant will do if it is refused. Based on what the Applicant said in his evidence he only requires £1500 per month for living costs. The Respondent's youngest son will be seriously impacted if an order is granted. He did not provide medical evidence as he did not want to put personal information in the public domain. No account has been taken of the substantial sums already paid. If an eviction order is granted, he won't be able to move to the alternative property. He disagrees with how he has been characterised. If the order is to be granted, additional time would be beneficial, particularly to give his son time to adjust. The request for expenses is opposed.

## **Findings in Fact**

35. The Applicant is the owner and landlord of the property.
36. The Respondent is the tenant of the property in terms of a private residential tenancy agreement.
37. The Respondent is due to pay rent at the rate of £2795 per month.
38. The Respondent has been in arrears of rent since 30 October 2022
39. The Respondent owes the sum of £15,155.79 in unpaid rent to the Applicant.
40. The Applicant has suffered financial hardship because of the rent arrears.
41. The Respondent had made a number of repayment arrangements but has not adhered to these arrangements.
42. The Respondent is sequestrated.
43. The Respondent attempted to mislead the Tribunal and the Applicant by stating that he intended to vacate the property when he did not intend to do so.

## **Reasons for Decision**

44. The Tribunal is satisfied that the Respondent currently owes the sum of £15155.79 in unpaid rent. This is accepted by the Respondent. The Respondent has been in arrears since 30 October 2021.

45. The Tribunal found the Applicant and his witnesses to be credible and reliable. Their evidence was consistent and supported by the documents which had been lodged. The Tribunal did not find the Respondent to be credible or reliable for the following reasons: -

- (a) The Respondent sent an email to the Tribunal on 11 October 2022, the day before the hearing, requesting a postponement. In the email he stated that he had given notice to leave the property within 7 days. He also sent an email to the letting agent, although this stated that he was vacating the property immediately. At the hearing, the Respondent acknowledged that he had sent these emails but denied that he had intended to mislead either the Tribunal or the Applicant. He claimed that he had intended to vacate the property when he sent the emails, but only if the hearing in relation to the eviction order did not proceed. He told the Tribunal that he had an alternative property lined up but that this would not be available if an eviction order was granted. He also stated that leaving the property was a last resort and that he opposed the application because he wanted to continue to live there with his family. The Respondent denied that his emails conflicted with the evidence he gave at the hearing. The Tribunal is satisfied that the Respondent intended to mislead both the Applicant and the Tribunal when he claimed that he was leaving the property.
- (b) The Respondent told the Tribunal at the CMD that the sum being claimed by the Applicant was not accurate because it did not take account of payments made and repairs carried out which he paid for. This defence was withdrawn prior to the hearing and appears to have been a further attempt to mislead the Tribunal.
- (c) The information contained within the TTPA was not consistent with the oral evidence given by the Respondent in relation to his finances. Firstly, the application states that his net income is £10,000. In his evidence the Respondent stated that his net income varies. The only guaranteed element is the sum of £7000. When asked about his net pay over the preceding three months, two of the three were significantly less than £10,000. The application also fails to disclose his substantial debts. Although these are covered by an award of sequestration, the Respondent was being less than candid when he stated in the form that he had no debts. The TTPA asks about Council Tax. The Respondent failed to disclose in the form that this had been paid in full for the whole year and therefore no payments are due. His explanation for this is at odds with his claim that he is genuinely trying to address his debts and pay off his arrears. The Council tax for the property will have been substantial. It was clearly prioritised over his rent payments because the Local Authority has the power to carry out diligence and recover sums which are owed more quickly than his landlord. The Council Tax was allegedly paid by a family member, but it does not appear to have occurred to the Respondent that his rent account was in arrears and the Council Tax did not have to be paid in a lump sum at the start of the financial year.

(d) The Respondent was evasive in relation to his outgoings and his evidence was inconsistent. On one hand he stated that the outgoings listed in the TTPA were accurate. He later stated that there were many claims on his income which was why he had failed to pay the rent. He also stated that he thought that he did not have to pay his arrears until the Tribunal made a decision on the application. This was not a credible claim. The Respondent signed a model PRT. It specifically states that rent is due monthly in advance. He admitted at the CMD and hearing that he owed rent. Furthermore, this is not the Respondent's first experience of the Tribunal process. The Tribunal also noted that the Respondent made a payment to the rent account the day before the hearing.

46. Section 1 of the Debtors (Scotland) Act states that the Tribunal, " on granting decree for payment of any principal sum of money shall, if satisfied that it is reasonable in all the circumstances to do so, and having regard in particular to the matters mentioned in subsection 1A below, direct that any sum decerned for in the decree.....shall be paid – (a) by such instalments, commencing at such time after the date of intimation by the creditor to the debtor of an extract of the decree containing the direction, payable at such intervals, or (b) as a lump sum at the end of such period following intimation..." as the Tribunal may specify in the direction. The factors that the Tribunal must "have regard in particular to" are " (a) the nature and reasons for the debt in relation to which decree is granted; (b) any action taken by the creditor to assist the debtor in paying that debt; (c) the debtor's financial position;(d) the reasonableness of any proposal by the debtor to pay that debt; and (e ) the reasonableness of any refusal by the creditor of, or any objection by the creditor to, any proposal by the debtor to pay the debt."

47. **The nature and reason for the debt.** The Tribunal is not satisfied that the arrears of rent are due to the Respondent having insufficient income to pay his rent. He claims to have a substantial income and has chosen to prioritise other liabilities, such as Council tax, which does not require to be paid in advance for the whole year. The Respondent has access to family support. Private school fees, Council tax and a car are provided, at no cost to himself. He has no other debts to service, as he has been sequestrated. Aside from essentials such as food and utilities, rent ought to have been the first claim on his income. Having regard to the nature and reasons for the debt, the Tribunal is not satisfied that a time to pay direction is reasonable.

48. **Action taken by the creditor to assist the debtor.** The Applicant resides in Italy and his letting agent provides a full management service. The letting agent communicated regularly with the Respondent about the debt and, with the consent of the Applicant, made various repayment arrangements. The Respondent failed to adhere to these arrangements. Although the arrears started in October 2021, the Applicant did not initiate proceedings to recover the arrears until 30 March 2022. The Tribunal is satisfied that the Applicant took steps to assist the Respondent to pay the debt.

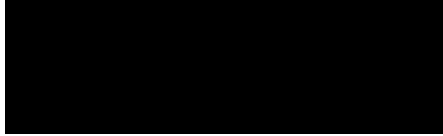
49. **The financial position of the debtor and the reasonableness of the proposal.** In the absence of vouching of income and outgoings, and as the Tribunal did not find the Respondent to be credible when he gave evidence, his true financial position is unknown. His TTPA states that his average net income is £10000 per month. During his evidence he stated that it could be as low as £7000. However, if the Respondent has been earning £7000 to £10,000 per month, and his wife also has a regular income and dividends from company, the failure to pay anything to the rent account for five months is unexplained. There is also the uncertainty of the impact of the sequestration. The Respondent also stated that there are always demands on his income. He did not specify what these might be, and they were not listed in the TTPA. In the circumstances, the proposal to pay over £3000 per month to the arrears, in addition to the monthly rent, when he has not paid the rent itself for several months does not seem to be realistic or reasonable.
50. **The reasonableness of the refusal/objection by the creditor.** The Applicant is 72 years of age and retired. He is dependant on the rental income as he does not have a pension. He has previously agreed to repayment proposals which have not been met. It is entirely reasonable that he should not have to wait for the substantial arrears of rent to be repaid.
51. Having regard to the criteria set out in the 1987 Act, and all the relevant circumstances, the Tribunal is satisfied that it would not be reasonable to grant the application for a time to pay direction.
52. The Tribunal is satisfied that the Applicant is not entitled to an award of expenses. Rule 40 stipulates that an award can be made if the other party “through unreasonable behaviour in the conduct of the case has put the other party to unnecessary expense”. The Respondent did attempt to mislead the Tribunal when seeking a postponement of the hearing. However, the request was refused, and no delay occurred. Although he also provided misleading information at the CMD, a hearing was required in any event to address the issue of reasonableness in the eviction application and the TTPA. The Tribunal is not persuaded that “unnecessary expense” has been established. The Applicant elected to instruct a solicitor but did not require to do so. The request for an award of expenses is refused.

## **Decision**

53. The Tribunal determines that a payment order should be granted and the application for a time to pay direction should be refused.

### **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.**



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**Josephine Bonnar, Legal Member**

**20 October 2022**