Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 of the Private Housing (Tenancies) (Scotland) and Rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules")

Chamber Ref: FTS/HPC/CV/21/0773

Re: Property at C28 Tullideph Road, Dundee, DD2 2DF ("the Property")

Parties:

Mrs Alice Mande Elias Woro, 89 Warren Road, Dartford, DA1 1PS ("the Applicant") per her agents Messrs. Bannatyne, Kirkwood, France & Co., 16, Royal Exchange Square, Glasgow, G1 3AG ("the Applicant's Agents")

Mr Ian Brown, 35 Coupar Street, Dundee, DD2 2QD ("the Respondent"), the Applicant and the Respondent referred to together as "the Parties".

Tribunal Members:

Karen Moore (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision
The Tribunal refuses the Application and makes no Order for Payment.

Background

1. By application received on 25 March 2021 ("the Application"), the Applicant's Agents on behalf of the Applicant made an application to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Chamber") for a payment order for the sum of £6,237.20 plus interest arising from a guarantee between the Parties. The Application comprised an application form, copy private residential tenancy agreement, between the Applicant and Ms. Vikki Brown with covering letter from Your Move and inventory, copy pages from a guarantee between the Parties with covering letter from Your Move, copy rent statement in respect of the private residential tenancy agreement, two copy invoices issued by the Applicant's Agents, copy letter sent to John Brown at the Respondent's address and copy Payment Order reference FTS/HPC/CV/19/3311 for £2,834.88 plus interest with copy Execution of Charge.

2. On 7 April 2021, a legal member of the Chamber with delegated powers of the Chamber President accepted the Application and a Case Management Discussion ("CMD") was fixed for 14 May 2021 at 14.00 by telephone conference call.

Case Management Discussion

3. The CMD took place on 14 May 2021 at 14.00 by telephone conference call. The Applicant did not attend and was represented by Ms. Matheson of the Applicant's Agents. The Respondent did not attend and was not represented. The Tribunal advised Ms. Matheson that it had concerns regarding the sum sought by the Application and the validity of the guarantee as lodged ("the Guarantee"). The outcome of the CMD was that a Hearing was fixed to address the validity of the Guarantee and clarification of the sum claimed.

Direction issued to the Parties

4. The Tribunal issued the following Direction *:-"Parties are required to provide:1. A list of the witnesses, if any, who will give evidence at the Hearing on 22 June 2021 and the Applicant is required to provide: 2. A Note to explain the Applicant's position as to why the guarantee between the Parties is valid and enforceable in respect of the Application and 3.Copies of any authorities referred to and relied on in that Note. The said documentation should be lodged with the Chamber and copied to the other party no later than close of business on 15 June 2021."*

5. The Applicant did not comply with the Direction. The Applicant's Agents lodged a Witness List, List of Authorities, copies of those Authorities, a List of Documents and copies of those Documents with the Tribunal on 16 June 2021 but did not copy these to the Respondent. No Note was lodged.

Hearing

6. The Hearing took place on 22 June 2021 at 10.00 by telephone conference call. The Applicant did not attend and was represented by Ms. Matheson of the Applicant's Agents. The Respondent did not attend and was not represented.

7. The Tribunal asked Ms. Matheson to explain why the Direction had not been complied with. Ms. Matheson explained that the Applicant's letting agents had failed to provide the correct documents until 15 June 2021 and had failed to provide an email contact for the Respondent. Ms. Matheson stated that she had not realised that the Note required by the Direction had not been lodged and offered to lodge it at the Hearing. The Tribunal declined this offer as the Respondent would not be able to be given a copy of the Note.

8. The Tribunal adjourned briefly to consider if it could admit the Documents and Authorities lodged by the Applicant's Agents. The Tribunal took the view that, although the Direction had not been complied with and although the Documents and Authorities had not been lodged timeously in terms of Rule 22 of the Rules, as the Chamber administration had copied these to the Respondent in terms of Rule 23, and as Rule 2 of the Rules obliged the Tribunal to deal with the proceedings justly, the Tribunal should admit Documents and Authorities to the proceedings.

9. Ms. Michelle Keenan, a Team Leader with Your Move, the Applicant's letting agents, gave evidence. Ms. Keenan advised the Tribunal that she had worked with Your Move

for 8 years in all and for 3 years as a team leader in its Property Management Centre based in Bathgate and had a Level 6 professional qualification in residential letting and property management.

10. Ms. Keenan stated that she had no direct knowledge of the Applicant, the Respondent or Miss Brown, the tenant, and could only speak to the Your Move procedures.

11. With reference to Document 1, Guarantee Agreement, as lodged on behalf of the Applicant, Ms. Keenan identified this as a document which would have been produced by Your Move's Southampton office. With reference to Document 4, Reference Report for the Applicant, she identified this as an Experian Report. She explained that if a tenant was Grade D on Experian, the tenant would be asked to pay rent up front or find a guarantor and that Miss Brown opted to get a guarantor. Ms Keenan confirmed that she was speaking from her knowledge of Your Move processes and was giving an overview of the process and was not speaking from direct knowledge of this case. She explained further that the guarantor would be given a link to the Experian system for the guarantor to complete. She explained that the Experian system would be pre-populated at the branch with the property address and the rent of £495.00 and the guarantor would complete the rest. Ms. Keenan continued that the guarantor would then meet with a member of staff at the branch and that there would be further correspondence with guarantor to say what the guarantor has to do and what the guarantor has to complete before the lease is signed. Ms. Keenan again confirmed that she was explaining the process and not from knowledge of this case. She explained that the staff member who dealt with the case no longer worked for Your Move. She continued to explain that if a guarantor was unsure about proceeding, Your Move would explain this to the tenant.

12. Ms. Keenan was asked by Ms. Matheson to read the covering letter issued by Your Move to the Respondent which forms part of Document 1. Ms. Keenan identified that the date on which the document was created was 11 May 2018 and that it was sent to the Respondent at 35 Coupar Street, Dundee and referred to a tenancy at the Property address. She explained that two copies and two draft copy of tenancy agreements would have been sent so that the guarantor would have one for his file. She agreed with Ms. Matheson that the draft copy of the lease was sent so that the guarantor was aware of the terms and conditions of the tenancy agreement. With reference to Document 2, Draft PRT Agreement, Ms. Keenan stated that although this did not have the names of the parties, the rental address and the tenancy start date, the Respondent would have been aware of these details.

13. In response to questions from the Tribunal, Ms. Keenan explained that the letting agent service provided to the Applicant was a "fully managed service" and so Your Move would have made the decisions in respect of requiring a guarantor but the Applicant would have been fully informed.

14. With regard to the signing of the guarantee, Ms Keenan stated that page 5 of Document 1 is the signature page. Ms Keenan stated that she did not meet with the Respondent on 28 May 2018. She explained that the procedure would have been that the Respondent would have been invited to the local Your Move office, that Marta

Felkner, the former Your Move employee would have met him on the day and that he would have signed in front of Marta. She stated that Marta would confirm that he had read the guarantee, that he was happy with it and then he would sign and Marta would witness and he would be given a signed copy for his own file.

15. With reference to Document 3, Final PRT Agreement, Ms. Keenan read parts of this and confirmed that it named Vikki Brown of 35 Coupar St., Dundee as tenant, the property detail is C28 Tullideph Rd., the start date is 6 June 2018 and the rent is £495.00. In response to Ms. Matheson's questions, she explained that the date of the lease is after the signing of the deed of guarantee as the guarantee is signed in advance to give the guarantor more time as a buffer.

16. With reference to Document 1, Guarantee Agreement, and the covering letter which forms page 1, in response to Ms. Matheson's questions, Ms. Keenan stated that the wording advised the guarantor to seek legal advice and that this is standard wording which cannot be changed on Your Move letters. With regard to the guarantee at page 2 of Document 1 and referencing to a short assured tenancy agreement, Ms. Keenan stated that this is an admin error and that the draft PRT, Document 2, would have been annexed. At Ms. Matheson's invitation, Ms. Keenan read the four operative clause at the end of page 2 of Document 1.

17. In response to questions from the Tribunal, Ms. Keenan agreed that Page 2 of Document 1 was not signed, that page 5 was not docqueted and that Document 2, the draft PRT was not docqueted.

18. With reference to Document 7, Demand Letters and Enclosures, and page 5 of that document, Ms. Keenan identified the tenant rent account and confirmed that this shows the rent and a rent balance and confirmed that it shows the lease as terminated on 17 March 2020. Ms. Keenan explained the credit control process ahead of termination of leases and afterwards, stating that the Your Move credit control department actively chase the tenant and guarantor if rents is overdue by 10 days and make numerous contacts by telephone, letter and email and continue until the lease is ended. Ms. Keenan explained that if the landlord has a policy with Your Move and if Your Move is unable to collect the rent, Your Move will say to the landlord that the next step is to apply to the First-tier Tribunal and stated that this is what happened in this case. She explained that the Your Move records showed that, as no funds were collected from the tenant or the guarantor, Your Move proceeded with this Application to this Hearing.

19. At this point in the proceedings, Ms. Matheson advised the Tribunal that she was relying on the doctrine of subrogation and stated that she had completed her evidence with Ms. Keenan.

20. The Tribunal then asked questions of Ms. Keenan in clarification of her evidence.

21. In response, Ms. Keenan advised that, from the Your Move system, she could see that there had been contact with Miss Brown, the tenant on 19 March 2020, and that Miss Brown was given a final balance after the lease was terminated and the tenancy check-out was completed. She could see that contacts had been made by the credit control

team to the Miss Brown and the Respondent but had no knowledge of the content of the contacts and had no access to any paper copies of correspondence with the tenant and the Respondent. With regard to the principals of the documents, Ms. Keenan advised that these would have been held in the Dundee office and then stored in the property management centre for 7 years

22. With regard to errors in Document 1, Ms. Keenan stated that she had no role in drafting or issuing any of Document 1 as that was done by the Southampton office. With regard to the Respondent attending at Your Move's Dundee office, Ms. Keenan could not explain why, if the Your Move signing procedure had been followed, the errors in Document 1 were not picked up and rectified as they should have been. Ms. Keenan could not confirm if the signed pages of Document 1 together with Document 2 or if Document 3, the Final PRT Agreement, had been sent to the Respondent after signing. She explained that this was not part of the process and she could only speak to the process and not to what took place in respect of this case.

23. With regard to the making of the Application, Ms. Keenan advised that Your Move instructed this in the name of the Applicant in accordance with the "fully managed service" provided and kept the Applicant up to date on the progress of the proceedings.

24. With regard to the insurance policy referred to by Ms. Keenan in her evidence, she explained that a landlord policy was in place and that claims for unpaid rent had been made and paid out. She explained that the claim was made if rent was unpaid for 30 days and that this payment did not show on the rent account lodged as part of Document 7 as it would show on the landlord's account. Ms. Keenan confirmed that, in total, £4,426.47 was paid by the insurers in increments after every missed rent payment, with the last payment being made on 3 April 2020. With regard to the dilapidations to the Property, £495.00 of that was returned to the Applicant from the tenancy deposit.

25. With reference to the scenario where an Order is granted in the name of the Applicant who has received insurance funds, Ms. Keenan advised that she understood that the landlord and the insurer would discuss repayment of the funds but explained that she had no knowledge of or dealings with landlord insurance policies. She stated that she did not know the terms of the policies and only knew that there was a policy in place from the Your Move record system.

Summing –Up

26. In summing-up, Ms Matheson firstly dealt with the guarantee and stated that the Tribunal had heard the circumstances in which it had been obtained. She stated that the Guarantee consists of a pack of the covering letter of 11 May 2018, the deed of guarantee and the signing page. The covering letter advised the granter to take legal advice and so discharged any obligation in respect of a relationship with him. She stated that the terms of Guarantee are wide and that was what the Respondent agreed to. She stated that the Guarantee is cautionary obligation and the primary agreement which it guaranteed, being the draft tenancy was in the Guarantee and a copy of a draft of it was available to the Respondent at the time of signing the Guarantee. She referred the Tribunal to Waydale Ltd v DHL Holdings (UK) Ltd (no2) 2000 SLT 224 at

page 232 from paragraph 24 and stated that the Tribunal should take into account all of "the factual matrix, and in particular, the transactional concept of the guarantee". Ms. Mathieson referred the Tribunal to Veitch v Murray & Co.(1869) 2M 1098 where the same approach was taken in respect of having regard to the surrounding circumstances of a guarantee.

27. In response to questions from the Tribunal on the validity of the Guarantee in terms of the Requirements of Writing (Scotland) act 1995 ("the 1995 Act"), Ms. Matheson submitted that the Guarantee complied with this Act as the Guarantee is a "traditional document" in terms of Section 1 of the Act and has been signed and witnessed in accordance with Section 7 of the 1995 Act. Ms Matheson did not accept that the signing page was on a page separate to the operative clauses of the deed. Ms. Matheson submitted that, in any event, Section 1(3) of the 1995 Act provides that where a traditional document is not properly constituted, and, where a party has relied on that document, the other party cannot withdraw from it and the document is not invalid. In this case, Ms. Mathieson submitted that the Applicant had relied on the Guarantee and so it was not invalid. Ms. Matheson added that the effect of Section 2(3) of the 1995 Act is that a document which has not been properly signed can be used in evidence regardless. With regard to Section 8 of the 1995 Act, Ms. Matheson submitted that it was irrelevant that the tenancy agreement referred to in the Guarantee was referred to wrongly and that the tenancy agreement was not docqueted as forming part of the Guarantee. Ms. Matheson's position was that the Guarantee is properly signed and, as the Applicant had relied on it for the tenancy agreement on which the tenant had defaulted, it was not invalid. Ms. Matheson submitted again that the Tribunal should treat the terms and meaning of the Guarantee as a whole and was not precluded from looking at the factual context and circumstances when determining its scope. She submitted that, although not explicitly mentioned in the Guarantee, the Respondent was aware of the guarantee obligations, one of which obligations is a monthly rent at £495.00. She submitted that the Respondent was aware of this obligation as it was stated in the draft tenancy agreement which he was aware of in advance of signing. Ms. Matheson submitted that the Respondent had a copy of Document 4, Reference Report for the Applicant, and there is a presumption that he was aware of the obligations from this. She stated that there was no need for any of the documents referred to be docqueted as obligations in the Guarantee as more than enough information was available in this case to show that the Respondent can be in no doubt as to what he was guaranteeing.

28. Ms. Mathieson referred the Tribunal again to Veitch in respect of the whole circumstances of the Guarantee and to Barr v Dunbar Assets plc (2016) CSOH 44 2016 and Smith v the Governor and Company of the Bank of Scotland (1997) UKHL 26, [1997] 2FLR 862 (12 June 1997) both of which set out that it was for the cautioner to assess the exposure on risk and look after his own risk and interests. She submitted that the terms of the Guarantee are wide, clear and unambiguous and that the scope of the Guarantee was not just obligations under tenancy but other losses or expenses, too. She submitted that the Guarantee's period of caution was during the occupation of the Property, running in tandem with tenancy, and the breach occurred during the Guarantee. In this case, the breach was non-payment of rent and the loss was the arrears. In order to pursue the arrears and recover the losses, the action was raised

19 December 2019. However, further losses have occurred and the Applicant is entitled to demand payment of the additional expenses of enforcing the order and the other costs incurred as these all arise out of the breach. Ms. Matheson submitted that payment by the insurers is irrelevant as any loss recovered from insurance does not extinguish the debt.

29. In response to questions from the Tribunal in respect of what the position was in respect of the policy, was it in Your Move's name or a call-off and did Your Move take the decision to claim on it, Ms. Matheson submitted that this was not relevant as Your Move are the agents of the Applicant.

30. With regard to the doctrine of subrogation, Ms. Matheson submitted that it was standard practise to bring in a third party and raise an action raised in the Applicant's name and the insurer was entitled to do this. Ms. Matheson referred the Tribunal to Waydale at paragraphs 21 and 22 which allowed a third party to benefit from a guarantee. Ms. Matheson likened the third party right to an acquisition of a lease and submitted that it was a similar principle to an assignation. Ms. Matheson submitted that the Applicant had instructed her agents to raise this action for the benefit of the insurers and that they are entitled to take an action in her name. In response, to the Tribunal asking if Ms. Matheson had ascertained exactly how this instruction worked, Ms. Matheson responded that Your Move were agents acting for a disclosed principle.

31. Ms. Matheson summarised the position with regard to the Guarantee submitting that the Tribunal is entitled to look at the facts and conclude that the Respondent was fully aware of the lease and what was in contemplation as the body of the guarantee deed referred to the tenancy agreement. Ms. Matheson referred the Tribunal to Aitken & Co v Pyper (1900) 8 SLT 258 and submitted that there is not a high threshold of what is required when referring to an obligation and submitted that, in this case, the only tenancy is Document 3, the Final PRT Agreement , and so reference to a short assured tenancy is irrelevant as the correct tenancy is the Final PRT Agreement. She submitted that in this case, there is acting in reliance as the Applicant agreed to grant a tenancy on the reliance of the Guarantee including a full indemnity on full costs and is now materially affected due to breach. She submitted that the Tribunal was entitled on the balance of probabilities to imply that the Parties acted on reliance of the Guarantee and that there had been vouched-for rents arrears at the time of the breach. The purpose of the Guarantee was to cover the Applicant's losses arising out of the breach and its scope is wide enough to protect third parties.

32. With regard to the sum sought in the Order for Payment, Ms. Matheson submitted that the series of invoices and the demand letter lodged are all within the scope of the Guarantee as they arise out of breach of tenancy agreement. The sum sought is total sum of rent arrears and invoices of £660.00, £24.00 and £516.05 totalling 6,237.20 plus interest on the earlier payment order of 108.00. Ms. Matheson revised this to £5,627.52 as an invoice was amiss from those lodged.

Findings in Fact.

33. The Tribunal had regard to all of the written representations and documents lodged to evidence of Ms. Keenan and the submissions made at the Hearing, whether

referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.

34. The Tribunal found the following facts established:
    i) The Parties are as designed in the Application;
    ii) Your Move act as letting agents for the Applicant;
    iii) Your Move have standard procedures when acting as agents for landlords;
    iv) Your Move have standard documentation which they issue on behalf of landlords;
    v) A tenancy agreement, the Final PRT Agreement, was entered into between the Applicant and Vikki Brown for the Property, which tenancy agreement gave Vikki Brown's address as 35 Coupar Street, Dundee being the same as the Respondent;
    vi) A guarantee was required to underwrite the Final PRT Agreement;
    vii) The Respondent agreed to act as guarantor;
    viii) An Experian Report was obtained by Your Move on the Respondent;
    ix) The Respondent signed a document at Your Move's office in Dundee which was witnessed by Marta Felkner, an employee of Your Move;
    x) Rent arrears were accrued by Vikki Brown;
    xi) An insurance policy was in place to underwrite unpaid rent for Vikki Brown's tenancy;
    xii) Successful claims were made on the insurance policy;
    xiii) An Order for Payment of was granted by the First-tier Tribunal under reference number FTS/HPC/CV/19/3311 for the sum of £2,834.88 plus interest;
    xiv) Diligence was carried out in respect of that Order for Payment.

Issues for Tribunal

35. The issues for the Tribunal are, from the material before it and the Findings in Fact, was a valid and enforceable guarantee entered into between the Parties, if so, does the doctrine of subrogation apply and, if so, what sum is the Applicant entitled to in an Order for Payment. Core to these issues is the competence of the Guarantee. Therefore, the Tribunal addresses this point first.

36. Ms. Matheson submitted that the Guarantee comprises Document 1, being a six-page document, none of which pages are docqueted to identify them as a single deed, constituted as follows:
    a) Page 1 - the covering letter dated 11 May 2018 which Ms. Keenan spoke to in her evidence,
    b) Page 2 - a document headed "Deed of Guarantee" and stating "This Guarantee is made on the Eleventh day of May Two Thousand and Eighteen between Mrs Alice Mande Elias Woro of 31A, North Bridge Street, Bathgate, West Lothian, Scotland, EH48 4PJ ("the Landlord") and Ian Brown ("the Guarantor"). The body of this document refers to obligations arising from a "Tenancy Agreement" which is defined as "the proposed Short Assured Tenancy Agreement" annexed but there is no annexure;

c) Page 3- A further copy of the document headed “Deed of Guarantee” again without annexure;
d) Page 4- A page of Your Move headed note paper with “page 1 of 2” printed at the top of it, but otherwise blank;
e) Page 5- A page of Your Move headed note paper with “page 2 of 2” printed at the bottom of it and marked out for signature by four guarantors. This page is signed at the top by “I. Brown” with the address of 35 Coupar Street, Dundee written below the signature. The bottom of this page is marked out for a witness and is signed by “M Felkner” with the date of witnessing given as 28 May 2018 and the details of the witness as “Marta Felkner, 22 Whitehill Crescent, DD1 4AV, sales consultant” and
f) Page 6 - A blank page

37. Ms. Matheson submitted that a guarantee is a traditional document in terms of Section 1(2) of the 1995 Act. The Tribunal agrees with this assessment.

38. The Guarantee, therefore, falls to be signed in accordance with the 1995 Act. Section 2 (1) of the 1995 Act states *“No traditional document required by section 1(2) of this Act shall be valid in respect of the formalities of execution unless it is subscribed by the granter of it or, if there is more than one granter, by each granter, but nothing apart from such subscription shall be required for the document to be valid as aforesaid.”* Section 7 (1) of 1995 Act states *“Except where an enactment expressly provides otherwise, a traditional document is subscribed by a granter of it if it is signed by him at the end of the last page (excluding any annexation, whether or not incorporated in the document as provided for in section 8 of this Act).”*

39. In this case, there are two parties to the Guarantee but only one, the Respondent, has signed and has signed at the top of page 5 of a document comprising six pages, two of which are blank.

40. It is well established that the clause for signing deeds is called the “testing clause” and that the testing clause does not form part of the operative deed but is the narration of how the deed has been signed in order for the deed to be self-proving. The 1995 Act codified this principle. Therefore, it is the Tribunal’s view that the last page of the Guarantee for the purpose of signing is the second of the pages containing the document headed “Deed of Guarantee” and on which there is no signature.

41. Even if the page 6 of the Guarantee was lodged in error, the signature on page 5 still does not comply with the 1995 Act. Halliday’s Conveyancing Law and Practice 2nd edition at paragraph 3-138, confirms that subscription on a page separate to the body of the deed does not amount to subscription under the requirements of section 7(1) of the 1995 Act. The Tribunal is aware from its own professional knowledge that English law permits separate signing pages and, given that Ms. Keenan’s evidence is that the Guarantee was produced in Southampton, considers it likely that those producing the documentation were unaware of Scots Law requirements.

42. The only pages of the Guarantee which are linked in any way are pages 4 and 5 which are identified as “page 1of 2” and “page 2 of 2”, respectively. Page 4 is a blank page and page 5, on the balance of probabilities, bears the Respondent’s signature. At best, the Respondent has signed a blank document with no terms, conditions or obligations.

43. The subscription of the Guarantee as lodged does not comply with Section 7 of the 1995 Act and so the Guarantee is not a valid traditional document in terms of Section 1 of the 1995 Act.

44. Ms. Matheson submitted that Section 1(3) of the 1995 Act which states *“Where a contract, obligation or trust mentioned in subsection (2)(a) above is not constituted in a document complying with section 2 …, but one of the parties to the contract, a creditor in the obligation or a beneficiary under the trust (“the first person”) has acted or refrained from acting in reliance on the contract, obligation or trust with the knowledge and acquiescence of the other party to the contract, the debtor in the obligation or the truster (“the second person”) (a)the second person shall not be entitled to withdraw from the contract, obligation or trust; and (b)the contract, obligation or trust shall not be regarded as invalid on the ground that it is not so constituted, if the condition set out in subsection (4) below is satisfied*.” Section 1(4) of the 1995 Act sets out that condition as *“the position of the first person (a) as a result of acting or refraining from acting as mentioned in that subsection has been affected to a material extent; and (b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent.”* In this case, Ms Matheson submitted that the Applicant being “*the first person”* had relied on the Guarantee to enter into the Final PRT Agreement, and, as a result has been materially affected as she had suffered loss of rent and related costs. Therefore, the Guarantee was not invalid. The evidence which supports the reliance on the Guarantee is the evidence given by Ms. Keenan who was careful and persistent in advising the Tribunal that she had no direct knowledge of the Application and the events which led up to it. She could only speak to the procedures which ought to have been followed and could not speak to what took place. Ms. Keenan’s evidence does not assist the Tribunal with respect to what was relied on by the Applicant. Although, Ms. Keenan gave evidence that Your Move’s agency with the Applicant was “fully managed”, no evidence was led to explain what is meant by “fully managed” and what the agent’s authority extends to and so the Tribunal has no evidence before it to imply that Your Move was entitled to, or, did rely on the Guarantee to enter into the Final PRT Agreement. In any event, it is the Tribunal’s view is that the Respondent has not “*withdrawn”* from the Guarantee: it is the Tribunal which is questioning its competence and validity. It is the Tribunal’s view that the purpose of Sections 1(3) and (4) of the 1995 Act is to thwart a party reneging on a contract obligation on a signing technicality where the other party has acted on it to his detriment. In this case, the Respondent has not entered the proceedings and has not indicated that he is not bound by the Guarantee. Therefore, it is the Tribunal’s view that Section 1(3) of the 1995 Act does not apply and the Guarantee is not made valid by it.

45. Ms. Matheson submitted that the effect of Section 2(3) of the 1995 Act is that a document which has not been properly signed can be used in evidence. The Tribunal

agrees with this assessment and has accepted the Guarantee in evidence. The Tribunal's view is that the effect of this Section is to allow non-compliant deeds to be used in evidence but has no effect on the validity of those deeds.

46. The Tribunal disagrees with Ms. Matheson's submission that it is irrelevant that Section 8 of the 1995 Act was not complied with in respect of the documents referred to in Guarantee. Section 8(1) of the 1995 Act states "*Subject to subsection (2) below and except where an enactment expressly otherwise provides, any annexation to a traditional document shall be regarded as incorporated in the document if it is (a)referred to in the document; and (b)identified on its face as being the annexation referred to in the document, without the annexation having to be signed or subscribed."* Subsection (2) refers to dealings in land and is not relevant to this case. Section 8 is wholly relevant where the deed is a cautionary deed imposing obligations set out in another contract. It is well established law that a contract requires *consensus in idem*, the consensus of both parties to the terms and conditions or the contract can be reduced or set aside. It is also well established contract law that all of the terms, conditions and obligation should be within the four corners of the deed so that any person reading it knows exactly what it intends. The 1995 Act codified this principle.
In this case, where the primary evidence is given by a person with no direct knowledge of the facts of the case in respect of the contract, the Tribunal cannot be certain of that consensus. It would have been of assistance to the Tribunal had Marta Felkner, the Your Move employee who appears to have direct involvement in the constitution of the Guarantee, been called as a witness.

47. The Tribunal had regard to Ms. Matheson's submissions that the Respondent ought to have been aware of what he was signing by reference to the facts and circumstances of the tenancy agreement and that this awareness overcame the deficiencies in the Guarantee in respect of the erroneous reference to a short assured tenancy agreement and non-compliance with Section 8 of the 1995 Act in respect of Document 2, the Draft PRT Agreement. Ms. Matheson referred the Tribunal to several authoritative cases in support of her submission that the Tribunal should take the wider facts and circumstances of the interaction between Your Move and the Respondent into account. The evidence which supports this submission is again the evidence given by Ms. Keenan who could only speak to the procedures which ought to have been followed and could not speak to what took place. Ms. Matheson submitted that, when signing the Guarantee, the Respondent had Document 2, the Draft PRT Agreement, before him and had knowledge of the Experian Report, being Document 4, Reference Report for the Applicant. However, this was not Ms. Keenan's evidence: Ms. Keenan stated that she was not present when the Respondent met with Marta Felkner, that she had no direct knowledge of what took place and gave evidence that she could not explain why, if the Your Move signing procedure had been followed, the errors in Document 1 were not picked up and rectified at that meeting. Ms. Keenan's evidence in that respect casts serious doubt on Marta Felkner's competence in following Your Move procedures and so cannot be relied upon to prove that the procedures were, in fact, followed. Further, Ms. Keenan could not confirm if the signed version of Document 1, Document 2,or the signed version of Document 3,, had been sent to the Respondent after signing and so could not confirm if the Respondent had had the benefit of the

"buffer" cooling –off period to which she referred in her evidence. The Tribunal takes no issue with the relevance of the case law referred to by Ms. Matheson. However, the evidence before the Tribunal is insufficient to allow the Tribunal to determine, on the balance of probabilities, that the Guarantee is clear and unequivocal in respect of the obligations which it sought to impose on the Respondent.

48. Accordingly, the Tribunal determines the Guarantee is not an enforceable contract.

Subrogation

49. Having determined that the Guarantee is not a valid traditional document in terms of the 1995 Act and is not an enforceable contract, the Tribunal is not required to consider the doctrine of subrogation in any detail. However, the Tribunal notes that the only evidence before it in respect of an insurance policy is that there was a policy on which successful claims were made. As there was no evidence in respect of the parties to the policy, to its terms and conditions or the extent of its cover, and, as there was no evidence in respect of the extent of Your Move's authority, the Tribunal would have been unlikely to reach a view that subrogation was competent.

Decision of the Tribunal and Reasons for the Decision

50. Having determined for the reasons set out in the foregoing paragraphs that the Guarantee is not a valid traditional document in terms of the 1995 Act and having determined that the Guarantee is not an enforceable contract in respect of the scope of its obligations, the Tribunal refuses the Application and makes no Order for Payment of any sums.

51. The decision is unanimous.

Appeal

In terms of section 46 of the Tribunals (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

Karen Moore

Chairperson Date: 06/07/2021