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/19/2767

Re: Property at 74 North Drive, Troon, KA10 7DF ("the Property")

Parties:

Mrs Lesley Harrison, Mr David Meek, Your Home Partners, Ground Floor Suite, PO Box 15496, Broxburn, EH52 6WU ("the Applicants")

Mrs Elizabeth Hilan, Ms Marie Herlihy, 18 Earl Drive, Dundonald, Kilmarnock; 1 Ramsay Court, Troon, KA10 7DF ("the Respondents")

Tribunal Members:

Neil Kinnear (Legal Member) and Ann Moore (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

[1] This is an application for a payment order dated 5th September 2019 and brought in terms of Rule 70 (Application for civil proceedings in relation to an assured tenancy under the 1988 Act) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[2] The Applicant originally sought payment of arrears in rental payments of £6,199.46 together with recovery costs of £700.00 plus VAT, in relation to the Property from the Respondents. She provided with her application copies of the tenancy agreement, a rent arrears statement and various redacted bank statements.

[3] In due course, a Case Management Discussion was held on 9th December 2019 at Russell House, King Street, Ayr. The Applicant did not appear, but was represented

by Mr Harrison, solicitor, who participated by conference call. The Respondents both appeared, and were represented by Mrs McNaught of Ayr Housing Aid Centre.

[4] Mr Harrison indicated that the Applicant sought to increase the sum sought to £7,387.46, and provided an updated rent arrears statement.

[5] Mrs McNaught indicated that the Respondents accepted that only £322.58 of rent arrears were due. She advised that the Second Respondent, Ms Herlihy, had vacated the Property on 30th August 2019 following service on her of a notice to quit and section 33 notice asking her to vacate by 1st September 2019, which she had duly complied with.

[6] The main issue in dispute (though not the only one) was that the Second Respondent stated that her father, who is elderly, made payment of rent in cash into the Applicant's bank account on a number of dates at a bank branch, which payments have not been credited in the rent arrears statement.

[7] A further Case Management Discussion was set by the Tribunal, which issued a direction upon the Applicant to produce final demand letters sent to the Respondents and an updated statement of account, and upon the Respondents to provide confirmation of certain housing benefit payments by South Ayrshire Council and a copy of the notice to quit served on the Second Respondent.

[8] A continued Case Management Discussion was held on 29th January 2020 at Russell House, King Street, Ayr. The Applicant again did not appear, but was again represented by Mr Harrison, solicitor, who participated by conference call. Only the Second Respondent again appeared, the First Respondent having been excused attendance. Both Respondents were again represented by Mrs McNaught of Ayr Housing Aid Centre.

[9] Both parties had complied with the direction, and provided the information requested therein.

[10] The Tribunal had a lengthy and extremely helpful discussion with the parties, which largely focused on the main dispute concerning whether the Second Respondent's father had made payments of rental which had not been credited to her account.

[11] The Second Respondent's father made payments, it was stated in the helpful written submissions provided in advance by Mrs McNaught, into one of two bank accounts, the details of which had been provided to the Second Respondent by the Applicant.

[12] Unfortunately, he kept no receipts for these payments, but the Respondents had provided a schedule in documents lodged with the Tribunal on 17th December 2019 indicating that seven payments of £550.00 were made into a Bank of Scotland account sort code 60-30-20, account number 28130421. There was another bank account for the Applicant with Natwest, but this was not the one the payments were made into.

[13] Mr Harrison advised the Tribunal that these bank details in fact were those of the Natwest account, and he provided the Tribunal by e-mail with copies of the unredacted versions of that account, which confirmed this to be the case.

[14] Mrs McNaught, after accepting that point, realised from her records that she had transposed the bank account details of the two accounts, and that the account into which the Second Respondent's father made payment was sort code 80-22-60, account number 06088676.

[15] Mr Harrison then helpfully e-mailed the Tribunal unredacted copies of information relating to that account. He explained that the Applicant had searched that account for payments under reference to the name of the Second Respondent and the Property address, which revealed none had been received.

[16] Mr Harrison explained that this account was a general account used by the Applicant to receive a large volume of payments in relation to a large volume of rental properties which it operated. For entirely understandable data protection reasons, a full statement of this account had not been produced.

[17] Mrs McNaught noted that after providing receipts for a small number of other payments made, which had not appeared in the original account statement for the Property, the Applicant appeared to have accepted that these were made after tracking them down in the Bank of Scotland account.

[18] As a result, Mrs McNaught's concern was that there might be other payments received in the account which had been missed by the Applicant in respect of the Property, and particularly those made by the Second Respondent's father.

[19] After further discussion, parties agreed with the Tribunal that it might focus matters if Mr Harrison obtained a full statement of every payment made in and out of the Bank of Scotland account. That would be redacted for data protection reasons.

[20] Mrs McNaught could then look through the account with the Respondents and identify any payments which might coincide with those allegedly made by the Second Respondent's father.

[21] Having identified from the account any payments which from the date made, and the amount received, might be those allegedly made by the Second Respondent's father, Mr Harrison could then check in the unredacted account any such payment details to identify from where they came.

[22] That would allow parties and the Tribunal to identify from the account if any payments had been missed by the Applicant, and not credited to the Second Respondent's rent arrears statement when they should have been.

[23] For that reason, it was agreed that it would be in the interests of both parties to undertake this exercise, and to hold a further Case Management Discussion after doing so, rather than to put parties to the expense of a hearing at this stage.

[24] Depending on the outcome of the exercise, a hearing might still be required. However, if it was, then its scope would likely be much restricted.

[25] Mr Harrison also helpfully confirmed that the Applicant accepts that she gave notice to the Second Respondent requesting she remove by 1st September 2019, but sought payment of rent after that date on the basis that the Second Respondent had not returned the keys nor intimated that she had left.

[26] The Applicant now sought payment of rental up to 20th October 2019, on the basis that South Ayrshire Council sought to charge the Applicant with council tax commencing on 21st October, apparently as a result of its believing that the Second Respondent had left the Property by that date.

[27] Mrs McNaught advised that the Second Respondent had left the Property on 30th August, but did not know what to do with the keys, as the Applicant had no local office to which she could return them, and had shortly after her departure put the keys through the letterbox at the Property.

[28] Mrs McNaught further advised that she had contacted South Ayrshire Council, who had confirmed that there had been an error in the council tax statement, and that they now recognise that the Second Respondent had departed on 30th August to live in temporary accommodation.

[29] Finally, Mr Harrison had intimated an amendment to the application seeking to add David Meek as a co-applicant, and to amend the rent arrears sum sought to £5,857.18 together with legal fees of £2,500 plus VAT.

[30] Mrs McNaught did not oppose the amendments, and the Tribunal accordingly allowed those to be made.

[31] For these reasons, the Tribunal continued the Case Management Discussion to a further date.

[32] Prior to the further continued Case Management Discussion, the Respondent helpfully provided a submission in writing to the Tribunal which indicated that the Respondents accepted after considering the bank statements provided by the Applicants that no monies had been paid into the Applicants' bank accounts by the Second Respondent's father.

[33] The Respondents were making a complaint to the Bank about the money which they asserted was paid, but they accepted that that money was not paid to the Applicants and that therefore there were arrears for which they were liable. The Respondents asserted, however, that the correct arrears figure is £4,172.58.

[34] The Applicants lodged colour photographs of the Property the day before the further continued Case Management Discussion.

[35] A further continued Case Management Discussion was held on 13th March 2020 at Russell House, King Street, Ayr. The Applicant again did not appear, but was

represented by Mr Harrison's colleague, Miss Maguire, solicitor, who participated by conference call. Only the Second Respondent again appeared, the First Respondent having again been excused attendance. Both Respondents were again represented by Mrs McNaught of Ayr Housing Aid Centre.

[36] Miss Maguire confirmed that the Applicants had taken possession of the Property on 11th March 2020, and that the photographs provided to the Tribunal were taken on that day to show the condition of the Property.

[37] Miss Maguire advised that significant cleaning and repair work was required in order to return the Property into the condition it should have been returned in to the Applicants by the Second Respondent. The Applicants were in the process of obtaining quotes and estimates setting out the work required and costings for those, but they estimated these might be approximately £3,500.00 in total.

[38] Once the quotes and estimates were obtained, the Applicants indicated that they intended to seek to amend this application to add a claim for damages for those amounts in terms of Rule 14 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[39] That being so, Miss Maguire invited the Tribunal to continue this matter to a further Case Management Discussion to allow that to happen. She indicated that she anticipated that four weeks would be required to allow the appropriate costings to be obtained, and a written application to amend to be submitted to the Tribunal.

[40] Miss Maguire confirmed that the Applicants were not prepared to accept the sum of £4,172.58 which was being offered by the Respondents.

[41] Mrs McNaught objected to any attempt to amend this application to add a claim for damages. She argued that the Applicants should lodge a separate application if they wished to make such a claim.

[42] In response to an enquiry by the Tribunal, Mrs McNaught conceded, on reflection, that it might not be an efficient use of time and Tribunal procedure for two separate applications which overlapped in terms of the factual background to be dealt with separately.

[43] If the Applicants sought to amend, and the Tribunal allowed that, then Mrs McNaught suggested that the Respondents might wish to argue that they were entitled to withhold or abate some rent otherwise due as a result of the poor condition of the Property during the period of the tenancy.

[44] The Respondents would need time to consider that issue, but could only do so once they had seen the basis and terms of the proposed amendment. Mrs McNaught suggested that a period of four weeks might be required to allow the Respondents to do that, after which a further Case Management Discussion should be set.

[45] The Tribunal agreed with the parties that it would issue a direction requiring the Applicants to amend their application and provide supporting information, if so

advised, by 10th April 2020, and requiring the Respondents to provide a written response to any such amendment by 8th May 2020.

[46] Thereafter, the Tribunal set a further continued Case Management Discussion for a date after 18th May 2020, at which the Tribunal and parties could consider this matter further and determine the extent of the issues in dispute in order to progress this matter, most likely by setting a Hearing.

[47] The Tribunal considered the parties' submission to be reasonable in the circumstances, and consistent with the overriding objective of the Tribunal to deal with proceedings justly and in a manner which is proportionate to the complexity of the issues and the resources of the parties in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[48] Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal discretion on an application by a party to adjourn a hearing on cause shown.

[49] The Tribunal considered that the parties had shown there was good reason why an adjournment was necessary, and the Tribunal accordingly exercised its discretion to adjourn the Case Management Discussion to a date, time and venue to be confirmed to the Parties' representatives by the Tribunal in writing.

[50] In response to the Tribunal's direction, the Applicants provided an amendment to their application, which revised their claim to include rent arrears of £5,857.18, repair and redecoration work of £2,804.00, recovery charges of £200.00 plus VAT, and legal costs of £5,000.00 plus VAT.

[51] The Respondents, in turn, provided their detailed response to the Applicant's amended claim, together with supporting documentation.

[52] As a result of the coronavirus pandemic, and the lockdown imposed in the United Kingdom as a consequence thereof, the setting of the further continued Case Management Discussion was substantially delayed. The Parties' representatives were subsequently notified with the details of a Tele-Conference and provided with dial-in details.

[53] A further continued Case Management Discussion was held at 14.00 on 21st July 2020 by Tele-Conference. The Applicants did not appear, but were again represented by Mr Harrison, solicitor. The Respondents did not appear, but were represented by Mr Mulholland, of Ayr Housing Aid Centre.

[54] The Tribunal again had a helpful discussion with the Parties' representatives, in which both accepted that a Hearing would be required. There are clear disputes on the facts in this matter, and also legal arguments to be made in light of whatever facts the Tribunal ultimately finds established.

Hearing

[55] A Hearing was held over three days, being 24th September, 10th November and 11th December 2020 by Tele-Conference. The Applicants' Mrs Harrison appeared, and the Applicants were again represented by Mr Harrison, solicitor. The Respondents both appeared, and were represented by Mr Mulholland, of Ayr Housing Aid Centre.

[56] The Respondents confirmed that they accepted arrears of rent of up to an including 30th August 2019, which is the date Ms Herlihy states she quit the Property. The Respondents do not accept the penalty charges which the Applicants seek to impose in respect of those arrears.

[57] The Applicants seek the sum of £5,857.18 in respect of rent arrears. That figure is based upon rent accruing until 20th October 2019, which is the date when they were advised by the local authority that Ms Helihy's liability for council tax on the Property ceased, together with late payment charges.

[58] The Applicants also seeks damages totalling £8,044.00 in this application, which are comprised of the following heads of claim:

1) £250.00 in respect of the cost of removing and disposing of rubbish including removal of carpets, a tall fridge freezer, an under counter fridge and a tumble dryer.
2) £1,200.00 in respect of the cost of restoring the décor back to magnolia walls, white ceilings, and glossing all woodwork and repairs.
3) £75.00 in respect of the cost of supplying and fitting a replacement UPVC internal windowsill.
4) £144.00 in respect of the cost of replacing the oven (under deduction of 20% in respect of wear and tear).
5) £750.00 in respect of the cost of replacing carpets and kitchen lino (under deduction of 20% in respect of wear and tear).
6) £140.00 in respect of the cost of replacing a damaged under sink cupboard in the kitchen.
7) £150.00 in respect of the cost of replacing two damaged mains-wired smoke detectors.
8) £95.00 in respect of the cost of cleaning all kitchen cupboards and the bathroom.
9) £200 plus Vat in respect of pre-application legal fees.
10) £5,000.00 in respect of the cost of legal fees incurred in pursuing this application (restricted from actual fees incurred to the date of the final day of the Hearing of £9,420.00).

[59] The Tribunal heard evidence from the Applicants' Mr Meek and Mrs Harrison, and from both Respondents.

Findings in fact

[60] After hearing all the evidence led by both parties on the issues in dispute between them and upon which the Tribunal requires to reach a decision, the Tribunal found in fact:

1) That the Respondent was tenant at the Property for a period commencing 1st October 2015 until she left between 30th August and 20th September 2019.
2) That arrears of rental of £5,857.18 are due by the Respondent to the Applicants.
3) That the Respondent is contractually liable for late payment charges in relation to the rent arrears.
4) That the Respondent left personal possessions including various white goods which the Applicants required to remove.
5) That the Respondent is responsible for damage to décor above that which might be classified as fair wear and tear, including to painted walls, carpets, lino flooring and a UPVC windowsill in the kitchen, which the Applicants required to repair or reinstate .
6) That the Respondent is responsible for damage to two mains-wired smoke detectors which required to be replaced by the Applicants.
7) That the Respondent left the Property in a condition of cleanliness which was not of a sufficient or acceptable standard to meet their obligations under the lease, and that the Applicants required to arrange further cleaning to be carried out.
8) That the Respondent is contractually liable for the Applicants' legal fees in respect of this application of £5,000.00 plus pre-application legal fees of £200 plus Vat.

The Evidence

[61] The Tribunal heard from both Applicants in evidence. Both were clear and measured in explaining their position. The Tribunal found both to be credible and reliable in their evidence concerning the issues in dispute in this application.

[62] The Applicants gave evidence in relation to the heads of claim summarised at paragraph [57] and [58]. They did so with reference to extensive photographs and a video lodged by them showing the Property's condition when they resumed possession of the Property on 11th March 2020, and a small number of undated photographs said to show the condition of the Property at the commencement of the tenancy. Their representative, Mr Harrison also briefly gave evidence.

Mr Meek

[63] Mr Meek had helpfully provided an affidavit in advance of his evidence, which he largely spoke to when giving his evidence. Mr Meek gave evidence that the Applicants manage around eighty properties around the United Kingdom. Mr Meek explained that he dealt with maintenance and handovers of property, and most of the face to face dealings with tenants. Mrs Harrison dealt with the office side of things in administering the lettings.

[64] Mr Meek was aware that a notice to quit had been served on the Respondent asking her to leave by 30th August 2019. However, the Respondent did not return the keys to the Applicants nor did she contact them to say she was quitting the Property and in order to arrange the final handover inspection required under clause 38 of the lease agreement upon a tenant quitting the lease. In those circumstances, and being aware that a tenant is legally entitled to remain in a let property until the landlord obtains an order from the Tribunal, he believed that the Respondent was continuing to reside in the Property.

[65] He did eventually attend the Property on 11th March 2020, and finding the Property empty, resumed possession. It was on that date that he took the photographs and video produced to the Tribunal showing the condition of the Property at that time. He noted that there were no keys left within the Property, and that in his view it had been left in a terrible condition and the worst he had experienced. The power was switched off in the Property, and rotting food had been left in white goods abandoned by the Respondent within the Property. There were burn marks to a kitchen windowsill and the kitchen lino had been torn. Other furniture had been left abandoned by the Respondent in the Property, which had been let unfurnished. There were stains and marks to the livingroom carpet which were sufficiently bad that the carpet required to be replaced and could not be cleaned. There were numerous marks, dents and small holes in the internal walls, and the Property required remedial work and redecoration. Mains-wired smoke detectors had been damaged, apparently by being removed from the ceilings by force.

[66] Mr Meek explained that the Applicants had spent about £15,000 refurbishing the Property when they acquired it, and it had been in his view in excellent condition at the start of the tenancy.

[67] Mr Meek stated that he believed that the Respondent was co-tenant with her partner, a Steve Hillan, albeit that the Respondent was the lead tenant in terms of the agreement. He believed that The Respondent and Mr Hillan had subsequently split up and that Mr Hillan thereafter no longer resided at the Property. Mr Hillan had been very aggressive in telephone calls to Mr Meek, stating that Mr Meek was harassing the Respondent and threatening to kill Mr Meek. After that communications between Mr Meek and the Respondent largely ceased.

[68] Mr Meek stated that he did arrange repairs to the Property on the occasions that the Respondent reported that any were required. In particular, the Baxi back boiler burst in the livingroom, and he required to arrange for its repair. A semi-circular area of approximately two to three feet was wet, but this was treated by the use of a dehumidifier overnight after a Vax carpet cleaner had been used to clean the area. A Vax caused by fresh water and would dry out naturally. Mr Meek rejected the allegation that the Property suffered from a damp problem. No such problems were present when the Respondent took entry, and no such problems were present after she left.

[69] Mr Meek accepted that neither Respondent was specifically notified of rent arrears until around March or April 2019. This was because the Respondent received housing benefit, and he assumed that matters would be resolved in that respect until that time. He contacted the First Respondent, Mrs Hillan, who he understood to be Steve Hillan's

mother around March or April 2019 as a last resort to seek payment from her as guarantor under the lease agreement. She told him rent arrears were nothing to do with her and hung up the phone as the conversation became heated. After that she refused to answer any calls Mr Meek made to her.

[70] In response to questions from the Tribunal, Mr Meek explained that the Applicants were very busy dealing with all their properties, and that visiting this one to check on it after the expiry of the period in the notice to quit was a low priority for them. That was the reason that he only attended the Property in March 2020, and only confirmed at that time that the Respondent had left it. Subsequently, the Applicants had received a council tax notice indicating that they resumed liability for payment of council tax from the respondent with effect from 21st October 2019. The Applicants had not provided the council with any information about this, so they assumed that the council had been informed by the Respondent that she had left on 20th October 2019.

Mrs Harrison

[71] Mrs Harrison had helpfully provided an affidavit in advance of her evidence, which she largely spoke to when giving her evidence. Mrs Harrison confirmed that she was mainly involved in the administration side of the letting business. Mrs Harrison spoke to the lease agreement. Her recollection was that the original agreement had the Respondent and Steve Hillan as co-tenants, but that after Steve Hillan quit the Property the lease agreement was amended to leave the Respondent as sole tenant.

[72] After an adjournment for Mrs Harrison to obtain a copy of the original agreement, she confirmed that her recollection was incorrect, and that the copy lease agreement provided was the only version and had the Respondent as sole tenant.

[73] Mrs Harrison explained that she discusses with any tenant who they might use as guarantor under the lease, and did so with Ms Herlihy. Ms Herlihy put Mrs Harrison in touch with Mrs Hillan. Mrs Hillan independently supplied her details including those of her employment and earnings to Mrs Harrison, who then carried out appropriate credit checks. Mrs Harrison lodged the paperwork from Experian, a credit check service, and Experian contacted Mrs Hillan directly to obtain the details it needed to complete the check.

[74] As the credit check result was positive, the parties then entered into the lease agreement. All the parties were provided with copies of the agreement in advance of signing, and the agreement tells the guarantor that she is entering into a legally binding contract and recommended she take independent legal advice if she did not fully understand her obligations. Further, there is an eleven day “cooling off” period for parties to raise any issues or questions.

[75] Mrs Harrison explained that she only commenced formally writing to Ms Herlihy and Mrs Hillan about the rent arrears in March 2019, as although arrears had been accumulating for some time before then, Ms Herlihy had asserted that her father had been paying the rent into the Applicant’s account at their local bank branch, but that the amounts had not been credited due to a banking error. Mrs Harrison had accepted that explanation and thought matters would be resolved by the bank. It was only when

it became apparent that matters were not going to be resolved by the bank that Mrs Harrison commenced writing formally to both Respondents regarding the arrears.

Mr Harrison

[76] Mr Harrison briefly gave evidence to speak to the account of expenses for legal costs incurred by the Applicants in relation to recovery of rent arrears and their damages claim. He confirmed that his firm acted on behalf of the Applicants in this matter, and spoke to the letter of engagement of his firm by the Applicants and the account of legal costs incurred to 3rd November 2020 of £9,420.00 which had been produced to the Tribunal, together with pre-application legal fees of £200 plus Vat.

[77] Mr Harrison explained that considerable time had been expended on this matter, as detailed in the account. A large amount of time had been expended in investigating and responding to the Respondents' assertions that Ms Herlihy's father had made payments into his local bank branch of the rental. The Applicants recognised the level of costs incurred, and took a pragmatic and reasonable approach of limiting the amount which they sought to recover to £5,000.00.

Ms Herlihy

[78] In response, Ms Herlihy gave evidence in relation to the heads of claim summarised at paragraph [57] and [58]. The Tribunal found her to be generally credible, in that she appeared to genuinely believe the accuracy of what she stated. However, the Tribunal found her evidence to be unreliable in many respects. She appeared, despite being faced with clear photographic evidence to the contrary, to maintain her position that the Property had been left in very good decorative order and condition, aside from the food debris and rubbish left in the bin and white goods, which she stated she was embarrassed about.

[79] Ms Herlihy was insistent that she had entered into a joint tenancy with her partner, Steve Hillan, with whom she remained in a relationship. Initially, her relationship with Mr Meek was good, but that as she complained about more and more issues which required attention, he came to regard her as a nuisance to the point where she had to report him to the local authority, whom she stated had asked Mr Meek to cease harassing her.

[80] Mr Meek only came once to inspect the Property, when he attended to arrange the boiler repair. He had never raised any issues about the condition of the Property prior to this application. She and her partner had fully decorated the Property except for one room used as a child's bedroom and it was otherwise in very good decorative order.

[81] Ms Herlihy explained that most of the rubbish in the garden was not hers, except for part of a child's slide. She accepted that a mattress and a set of shelves left in the Property were hers. She denied that the mains-wired smoke alarms were damaged when she left, but was unable to explain how the damage shown in the photographs was caused. She stated that the carpet had been damaged by the boiler flood, and that a toaster fire had caused the damage to the UPVC windowsill.

[82] Ms Herlihy stated that the kitchen was not as shown in the undated photographs provided by the Applicants and said to show its condition just prior to her taking entry. She stated that both the oven and the flooring were different to that shown in the photographs.

[83] Ms Herlihy was adamant that her father had made payment of the rental into the bank branch, but accepted that the money had not been paid to the Applicants and was outstanding. However, she only accepted that rent was due to 30th August 2019, which is the date she left the Property. She put the keys through the letterbox when she left, and could not explain why they were not found by Mr Meek in March 2020. She was unable to explain where the local authority had obtained the date of her departure from the Property in respect of her council tax liability of 20th October 2019.

[84] Ms Herlihy did not accept that she should have to pay any late payment charges, nor any legal fees incurred by the Applicants. Ms Herlihy accepted that she should have removed her white goods and rubbish, but argued that £50 would be sufficient to cover the Applicants' costs in that respect. She did not accept that she was liable for any of the other damages sought.

Mrs Hillan

[85] Mrs Hillan gave evidence that she completed the credit checks to act as guarantor, and was aware of what she was doing. She did not accept that she had any liability as guarantor on the basis that the non-payment of rent was the bank's error, and that the Property had been kept and left clean and tidy. Mr Meek had only told her of any rent arrears in around May or June 2019.

Submissions on behalf of the Respondents

[86] Mr Mulholland made a number of submissions relating to the application, and helpfully provided written submissions to the Tribunal in advance. These submissions can be briefly summarised as follows.

[87] First, he submitted that the Applicants were in breach of Rule 70(a)(ii) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended as this rule required them to include Mr Steve Hillan, who was co-tenant, in the process.

[88] Second, the tenancy was a joint tenancy. No notice to quit and section 33 notice had been served on Steve Hillan, which is a fundamental flaw in the process, so the application should be dismissed.

[89] Third, Ms Herlihy had complied with the notice to quit served on her and vacated the Property on 30th August 2019. Any rent charged beyond the end of the notice to quit and her departure are not lawfully due.

[90] Fourth, Ms Herlihy accepts that rent arrears of £4,172.58 are owed by her to the Applicants, and Mr Mulholland argued that the delay in the Applicants advising her of the accrual of arrears impacted on the Respondents.

[91] Fifth, the Applicants had failed to serve a certificate of arrears on the Respondents, as they were required to in terms of clauses 26 and 30 of the lease agreement. The absence of such a notice meant that the Tribunal should not include payment of interest or late payment charges otherwise chargeable in terms of the agreement.

[92] Sixth, the Property had been left empty for a period of either five or seven months (depending on what date of departure the Tribunal accepts). In either event, it was left vacant by the Applicants for a substantial period of time after Ms Herlihy's departure. A tenant is under no obligation to advise their former landlord that they have moved out.

[93] Seventh, with regard to the damages claim, the Respondents do not accept the need for removal of floor coverings, carpets, and garden rubbish. That claim is excessive. The décor of the Property was improved by the tenant, so no redecoration was required. The UPVC windowsill was damaged by an electrical fault causing a fire in the toaster, and accordingly this was not the tenant's responsibility. The oven did not require to be replaced, and nor did the under sink cupboard. The carpet replaced was over 5 years old and the Respondents should not be liable for the cost of a new one. The lino was damaged due to the need to take out the washing machine to access the plug behind, and was therefore not caused by fault of the tenant. Finally, it was not reasonable to charge for the cleaning of the kitchen and bathroom. The damages claim should be dismissed.

[94] Eighth, the claim for legal expenses is ill-founded. The award of these is made under Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended. There had been no unreasonable conduct by the Respondents in the conduct of these proceedings putting the other party to unnecessary or unreasonable expense, and therefore the claim should be refused.

[95] Ninth, the Tribunal has no jurisdiction in relation to the claim against Mrs Hillan as guarantor. As guarantor, she had a separate contract with the Applicants as creditor and debtor, and the claim against Mrs Hillan should be dismissed. If the Tribunal concludes that it does have jurisdiction, then the Applicants required to put the guarantor on enquiry that arrears were accruing and to act in good faith. They had not done so, which should void any liability of the guarantor. In any event, there is no completed guarantee contract within the lease agreement as the landlord had not signed at clause 50.1.

Submissions on behalf of the Applicants

[96] Mr Harrison made a number of submissions relating to the application, and he also helpfully provided written submissions to the Tribunal in advance. These submissions can be briefly summarised as follows.

[97] First, the Tribunal has jurisdiction in relation to Mrs Hillan as guarantor. The Upper Tribunal decision in *Anderson v First-tier Tribunal for Scotland Housing and Property Chamber* [2019] UT 48 is binding, in point, and determinative of this argument. The Applicants had acted in good faith, and the various authorities which Mr Mulholland relied upon were not relevant to the situation in this application, mainly relating to the granting of securities in favour of financial institutions and where the granter had been misled or not informed of the consequences of what he or she was doing.

[98] Second, the Applicants had proved the rent arrears accrued, and were entitled to recover their costs in terms of clause 5.45 of the lease agreement.

[99] Third, the Applicants had proved that Ms Herlihy had not returned the Property at the end of the tenancy in the same state and condition as she received it, and they were therefore entitled to the damages which they had proved and quantified.

[100] Fourth, there is no requirement to issue a certificate in terms of clause 26 and 30 of the lease agreement in the circumstances of this application. Similarly, there is no requirement in terms of Rule 70(a)(ii) for Mr Steve Hillan to be named as a aprty even if he was a co-tenant (which the Applicants do not accept he was).

[101] Fifth, the Applicants' claim for costs is contractual based upon clause 5.45 of the lease agreement. The arguments concerning Rule 40 are simply irrelevant for that reason, as these costs are not sought in terms of that rule.

[102] Sixth, there is no part of clause 48 of the lease agreement which requires the landlord to sign to bind the guarantor, and neither does clause 50.1 require that. By signing as guarantor, Mrs Hillan bound herself and agreed to act as guarantor.

Statement of Reasons

[103] Section 16 of the *Housing (Scotland) Act 2014* provides as follows:

"16. Regulated and assured tenancies etc.
(1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal -

(a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),

(b) a Part VII contract (within the meaning of section 63 of that Act),

(c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).

(2)But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

(3)Part 1 of schedule 1 makes minor and consequential amendments."

[104] Accordingly, the Tribunal now has jurisdiction in relation to claims by a landlord (such as the Applicants) for payment of unpaid rental and damages against a tenant (such as the Respondent) under a short assured tenancy such as this.

[105] The Tribunal found both Applicants in all material respects to be credible and reliable witnesses in relation to the facts in dispute between the parties in this application, for the reasons earlier explained. In these circumstances, the Tribunal accepted their evidence regarding the areas of dispute between the parties.

[106] The Tribunal found both Respondents to be generally credible, but unreliable in relation to the facts in dispute between the parties in this application for the reasons earlier explained, and accordingly did not accept their evidence regarding the disputed matters and preferred the evidence of the Applicants.

[107] The evidence of the Applicants regarding the condition of the Property at the end of the tenancy was clearly confirmed by the photographs they produced and referred to. By contrast, the evidence on behalf of the Respondents asserting that the Property was left in very good order was clearly contradicted by the photographs.

[108] The Tribunal concluded that the Respondent had not taken reasonable care of the Property and had not disposed of rubbish in an appropriate manner, and are liable for the cost of removal of rubbish, repair and replacement of items damaged, and reinstatement of the Property required as a result of them not taking reasonable care of it.

[109] The Tribunal carefully considered Mr Mulholland submissions, and determined those as follows.

[110] Rule 70(a)(ii) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended does not impose any requirement on a party to name any other party beyond the party which the Applicant brings the claim against.

[111] The presence or absence of service of a notice to quit and section 33 notice is entirely irrelevant to an application brought under Rule 70. Such notices are only relevant to proceedings seeking to remove a tenant from a tenanted property.

[112] What rent remains lawfully due and unpaid is determined by the Tribunal's decision about when the tenancy ended. The service of a notice to quit ends a contractual tenancy on the date specified in the notice. However, if the tenant does not leave, then the tenancy becomes a statutory tenancy in terms of section 16 of the *Housing (Scotland Act) 1988*.

[113] The Tribunal accepts the evidence of the Applicants that Ms Herlihy did not inform them of her departure from the Property. Indeed, Ms Herlihy accepts that she did not so inform them. In those circumstances, the Tribunal accepted the evidence from the local authority notice stating that Ms Herlihy's liability for council tax ended on 20th October 2019 as being a reasonable indication to the Applicants of the date of her departure from the Property. That date was not provided to the local authority by

the Applicants, and the Tribunal concludes that the local authority must have proceeded upon some information as a basis for determining that date as it did.

[113] Any delay in advising the Respondents of rent arrears does not have any effect legally on whether or not they are due. Clauses 26 and 30 of the lease agreement relate to a procedure for the landlord to issue a certificate to ascertain and constitute the amounts due to the landlord at the date of the certificate, in which event the tenant is bound to accept the certificate as sufficient. There is no obligation upon the landlord to issue such a certificate. The provision is permissive, and not prescriptive.

[114] The tenant is under no obligation to inform their landlord that they have moved out of a rented property. However, their liabilities in terms of the lease continue unless and until they bring the tenancy to an end. Clearly, if a tenant does not inform the landlord that they have left the Property, their obligations under the lease continue until they do and thereby bring the lease to an end. A tenant is entitled to remain after the tenancy agreement is ended under a statutory tenancy and is liable for rental in terms thereof.

[115] Mr Mulholland's submission in relation to Rule 40 is of no assistance to the Respondents, as the Applicants do not seek an award of expenses under that rule. Rather, they seek contractual expenses in terms of clause 5.45 of the lease agreement. That clause provides that "All charges, including but not restricted to legal and court fees, incurred in but not restricted to arrears recovery, termination of the tenancy due to tenant breach, eviction due to tenant breach and property neglect/damage by the tenant, shall be borne by the tenant". This application relates to recovery of rent arrears and damages as a result of neglect/damage by the tenant, and accordingly the Applicants are entitled in principle to recover these costs. The Tribunal is satisfied that the charges appear reasonable standing the history of this application and the work involved, and have been restricted to £5,000 plus pre-application legal fees of £200 plus Vat.

[116] The Tribunal rejects the submission that it does not have jurisdiction to deal with the application in relation to Mrs Hillan for the reasons summarised above given by Mr Harrison. The Upper Tribunal decision in *Anderson v First-tier Tribunal for Scotland Housing and Property Chamber* [2019] UT 48 is binding, in point, and determinative of this issue. Similarly, the Tribunal agrees with Mr Harrison's submission that there is no part of clause 48 of the lease agreement which requires the landlord to sign to bind the guarantor, and neither does clause 50.1 require that. By signing as guarantor, Mrs Hillan bound herself and agreed to act as guarantor.

[117] The Applicants are entitled to charge interest upon rent arrears in terms of clause 5.42 of the lease agreement, which provides "All payments (including payments of rent pursuant to clause 5.2 but without prejudice to the generality) due to the Landlord under or by virtue of this Agreement and which are more than 14 days overdue, shall bear interest at the rate of eight per cent per annum from the respective dates on which they become lawfully due until the date of receipt of payment in full by the Landlord, whether before or after decree, such interest to be calculated on a daily basis on the balance then outstanding". The Tribunal accepts that is what the Applicant's calculation has done, and that they are entitled in terms of the contract to do so.

[118] That leaves the question of quantification of the claim for damages in respect of reinstatement and remedial work carried out to the Property by the Applicants in terms of clause 5.45 of the lease agreement. The Tribunal accepts the evidence that the Applicants required to remove and dispose of rubbish and white goods left by Ms Herlihy in the house. Due to the long delay in resuming possession, the Tribunal cannot, however, be satisfied that all the items left outside in the garden were Ms Herlihy's. She gave evidence that much of this was not hers. In those circumstances, the Tribunal will allow £200.00 of this element of claim.

[119] In respect of restoring décor and repairs, the Tribunal accepts from the evidence that the condition of décor of the Property has deteriorated beyond what might be considered to be fair wear and tear. However, account should be taken of the fact that Ms Herlihy, her partner and two young children resided there for approximately four years. After such a period of time, a landlord would need to refresh the paintwork before re-letting the Property to new tenants.

[120] Further, the Applicants chose not to visit the Property to check on it for a period of a little over 6 months after the date given in the notice to quit. That appears to the Tribunal to be an unusually long delay. During that period over the winter months, the Property was unheated and unoccupied, which might well have caused some further deterioration in its condition. For that reason, and adopting a broad-brush approach, the Tribunal will allow £500.00 of this element of claim.

[121] In respect of replacing the UPVC windowsill, the Tribunal will accept that £75.00 is reasonable. The Tribunal was not convinced by the explanation given by Ms Herlihy regarding how the damage was caused, and concludes that however it was caused, she bears responsibility for it.

[122] The Tribunal accepted from the photographs that the oven was very dirty, and required cleaning. There was no evidence that it was broken, however, and therefore no reason it could not have been professionally cleaned. That being so, the Tribunal will award £100.00 toward reinstatement of the oven.

[123] The Tribunal accepted that the lino in the kitchen and the carpet in the lounge required to be replaced. The remainder of the flooring, from the evidence produced, appeared to need cleaning. In those circumstances, the sum sought of £750.00 appears to the Tribunal excessive, and it will award £200.00 in respect of this claim.

[124] Any damage to the under sink cupboard was not shown in the photographs or video produced by the Applicants, and they gave no detail as to what the damage was. In those circumstances, the Tribunal was not satisfied in that regard, and will make no award in respect of this claim.

[125] The evidence clearly indicated that the mains-wired smoke alarms had been broken, and the Tribunal can only conclude from the evidence that this damage was caused during the tenancy. For that reason, the Tribunal will make an award of the £150.00 replacement cost sought.

[126] Finally, the photographs and video clearly showed that the Property needed cleaning, and the Tribunal accepts that the sum sough in that regard of £95.00 is reasonable.

[127] For the above reasons, the Tribunal will award the sum of £1,320 in respect of damages relating to repair and reinstatement. It will also accept the Applicants' claims for rent arrears including interest charges of £5,857.18, and legal costs of £5,000 plus pre-application legal fees of £240.00, producing a total sum of £12,417.18.

[128] The Respondents are jointly and severally liable for that sum as tenant and guarantor in terms of their respective obligations under the lease agreement which they both signed. Mrs Hillan is liable for performance of the contract on a joint and several basis with the tenant, Ms Herlihy, in terms of clause 48 of the agreement.

[129] It makes no difference whether Steve Hillan was a co-tenant with Ms Herlihy or not. The Tribunal was not satisfied that he was a co-tenant, but even if he was, Ms Herlihy would be jointly and severally liable to perform the obligations under the agreement in terms of clause 52.4 of the tenancy agreement in any event. That being so, the Applicants are entitled to raise this application against just Ms Herlihy and Mrs Hillan if they so choose.

Decision

[130] For the above reasons, the Tribunal will make an order for payment by the Respondents jointly and severally to the Applicants of the sum of £12,417.18.

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.

Neil Kinnear

29/12/2020

Legal Member/Chair **Date**