



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

Chamber Ref: FTS/HPC/CV/21/0546

Re: Property at 5 (2f1) Links Gardens, Leith, Edinburgh, EH6 7JH (“the Property”)

Parties:

Dr Jane Burns, 39 Eskside West, Musselburgh, EH21 6PR (“the Applicant”)

Mr Iain MacFadyen, 5 (2f1) Links Gardens, Leith, Edinburgh, EH6 7JH (“the Respondent”)

Tribunal Members:

Richard Mill (Legal Member) and Tony Cain (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an Order for Payment be made against the Respondent in the sum of FOUR THOUSAND SIX HUNDRED AND SEVENTY FOUR POUNDS (£4,674).

Introduction

This is an application under Rule 111 and Section 71 of the Private Housing (Tenancies) (Scotland) Act 2016.

The applicant seeks a Payment Order in respect of all rent arrears and late payment charges arising under the terms of the lease between the parties.

An initial Case Management Discussion (CMD) took place on 24 May 2021. Reference is made to the note on that CMD which was issued by the Tribunal thereafter. The Tribunal continued consideration of the application to this fresh CMD for the following purposes:

- To allow the applicant to amend the sum sought to reflect additional arrears of rent and to make an application to amend in terms of Rule 14A.
- To allow the applicant to lodge a copy of the documentation evidencing the increase in rent which took effect on 1 June 2019.
- To allow the applicant to lodge written submissions as to the reasonableness of the late payment charges which are sought to be recovered.
- To allow the respondent the opportunity to take advice and to submit a time to pay application if so advised.

A further CMD took place on 30 June 2021 at 10.00 am by teleconference. The respondent failed to join that hearing. A further application for eviction was noted to have been submitted to the Tribunal under reference FTS/HPC/EV/21/1452. This was still in the process of being considered by administration with no hearing date fixed. The Respondent had not received formal intimation of the Rule 14A amendment process to seek to increase the sums sought then to a total of £6,975.00. The Rules must be followed to provide him with fair notice. Evidence of the former rent increase, applicable from 1 June 2019 had been evidenced. 50% of the late payment charges had been credited to the Respondent's account and the late payment charges now sought appeared proportionate and reflect the increased work undertaken by and on behalf of the applicant. It was agreed that this application required to be continued again to a further CMD to allow for formal intimation of the Rule 14A amendment, when it was hoped that the eviction application could be heard also.

A further CMD took place on 26 August 2021 at 10.00 am by teleconference. The applicant was again represented by Mr Derek Rowland of Braemore Sales and Lettings. It was identified early in the hearing that the Rule 14A amendment had still not been intimated as had been expected. It was accepted by and on behalf of the applicant that it would be disproportionate to seek a further continuation, especially in light of the fact that the prospects of recovery of any sums from the respondent were likely poor in any event. In the circumstances, it was submitted on behalf of the applicant that a restricted amount in accordance with the originally sought sums in the initial intimated application should be sought, subject to a restriction to the late payment charges which were originally sought.

Findings and Reasons

The property is 5 (2F1) Links Gardens, Leith, Edinburgh EH6 7JH.

The applicant is Dr Alison Jane Burns. She is the landlord. The respondent is Mr Iain MacFadyen. He is the tenant.

The parties entered into a private residential tenancy in respect of the property which commenced on 7 December 2017. The rent was stipulated at a rate of £695 per month. With effect from 1 June 2019 the rent was increased to £735 per month.

The respondent has failed to make required payments of rent under and in terms of the lease between the parties. As at 15 June 2021, the level of arrears amounted to £4,410. This is evidenced in terms of the formal rent statement which discloses the payments as they have fallen due, payments received and the balance outstanding.

Late payment charges are also sought to be recovered. At the first CMD discussion took place regarding the enforceability of the late payment charges. In terms of Clause 9.2 of the lease, these are specified as being a late fee of £24 inclusive of VAT on the date which the payment fell due, and a further late fee of £48 inclusive of VAT on the tenth day after the payment fell due. Under the Consumer Rights Act 2015, a contract term is potentially unfair if it creates an imbalance on the rights and responsibilities of the landlord and tenant to the extent that the tenant is adversely affected. The private residential tenancy entered into between the parties is not reflective of the model tenancy agreement prepared by the Scottish Government. Guidance exists from the Office of Fair Trading which in short makes it clear that late payment charges amount to penalties which should be reasonable and not excessive. A term may be unfair if it has the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation. In terms of the lease when the respondent pays his rent late by more than 10 days he is required to pay an additional sum of £72 which equates to a 10% surcharge. This is excessive and there is no evidence that those fees accurately reflect or are commensurate with the actual losses sustained by the applicant or reflect the additional administrative charges as a consequence of the non-payment of the rental payments.

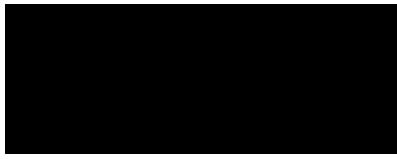
It was accepted on behalf of the applicant that the late payment charges set out in terms of the lease between the parties were excessive and in the circumstances only 50% of the late payment charges were to be sought. The tribunal found that such restricted charges were reflective of additional work undertaken for the applicant and commensurate with her losses. At the time of the originating intimated application, late payment charges in the sum of £528 were sought and these were accordingly restricted to £264. Added together with the arrears of rent which was outstanding as at the time the application was initiated and intimated, being £4,410 the total which was sought to be recovered by the applicant is a total of £4,674.

The applicant is entitled to recover the rent lawfully due under and in terms of the lease, together with the late payment charges provided for in terms of the lease to the extent that these were fair and reflected additional expenditure by or on behalf of the applicant.

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.



26 August 2021

Legal Member/Chair

Date