



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/23/0827

Re: Property at 15 Carrick Knowe Drive, Carrick Knowe, Edinburgh, EH12 7EB (“the Property”)

Parties:

Mr Lendrick Gillies, Flat 1, 58 Palmerston Place, Edinburgh, EH12 5AY (“the Applicant”)

Mr Christopher Fraser, 15 Carrick Knowe Drive, Carrick Knowe, Edinburgh, EH12 7EB (“the Respondent”)

Tribunal Members:

Nicola Irvine (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) granted an Order for Payment against the Respondent in favour of the Applicant in the sum of £1,450 with interest at the rate of 8% from the date on which each payment of rent fell due, until payment; and granted an order for payment for an additional sum of £300. Further, the Tribunal made a time to pay direction in terms of section 1(1) of the Debtors (Scotland) Act 1987. The sums awarded are payable by the Respondent by instalments of £80 per month commencing within 28 days of intimation of the Order.

Background

1. The Applicant submitted an application under Rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”). The Applicant sought an order for payment in the sum of £5,400 in respect of arrears said to have been incurred by the Respondent, together with interest and reasonable costs to be vouched.

2. By decision dated 29 March 2023, a Convenor of the Housing and Property Chamber, having delegated power for the purpose, referred the application under Rule 9 of the Rules to a case management discussion (“CMD”).
3. The Notice of Acceptance was intimated to the Applicant’s representative on 4 April 2023. Letters were issued on 18 April 2023 informing both parties that a CMD had been assigned for 23 May 2023, which was to take place by conference call. In that letter, the parties were also told that they required to take part in the discussion and were informed that the Tribunal could make a decision today on the application if the Tribunal has sufficient information and considers the procedure to have been fair. The Respondent was invited to make written representations by 9 May 2023.
4. On 10 May 2023, the Tribunal received an email from the Applicant’s representative, seeking to amend the sum sought to £4,800, which sum was made up of rent arrears of £4,500 and legal costs incurred of £300. The amendment application was intimated to the Respondent.
5. On 18 May 2023, the Tribunal received an email request from the Respondent’s representative, seeking to postpone the CMD assigned for 23 May 2023. That request was granted and a new CMD was assigned for 10 July 2023.
6. On 5 July 2023, the Tribunal received an email request from the Respondent’s representative, seeking to postpone the CMD assigned for 10 July 2023. That request was granted, unopposed, and a new CMD was assigned for 5 September 2023.
7. On 5 September 2023, the Tribunal received emails from both parties’ representatives, with details of authorities they intended to refer to.

The case management discussion

8. The CMD took place by conference call. The Applicant was represented by Mr David Gray and the Respondent by Ms Lynne Cunningham. This case called alongside a related case which proceeds under chamber reference FTS/HPC/EV/23/1130. The Applicant’s representative explained that level of rent arrears had reduced to £1,450 and that the Respondent had offered payment at the rate of £80 per month. Given the developments in this case, the Applicant withdrew the related case. The Respondent’s representative explained that there was no opposition to an order being granted in the sum of £1,450 with interest at 8% per annum, subject to a time to pay application in which the Respondent offered payment at the rate of £80 per month. The issue between the parties related to the Applicant’s claim for £300 for legal costs incurred by the Applicant.
9. In making submissions, both parties’ representatives made reference to the overriding objective of the Tribunal which is set out in Rule 2 as follows:

(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.

(2) Dealing with the proceedings justly includes—

(a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;

(b) seeking informality and flexibility in proceedings;

(c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;

(d) using the special expertise of the First-tier Tribunal effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the issues.

10. The submissions made on behalf of the Applicant were to the effect that the Applicant has incurred considerable costs to reach this stage in the procedure. The Applicant has incurred approximately £1,500 in legal costs as a result of the Respondent's failure to pay contractual rent. The Applicant made 2 applications to the Tribunal. Although the rent arrears have reduced significantly, there have been 2 CMDs postponed at the request of the Respondent. The Applicant is seeking to recover a proportion of his legal costs from the Respondent. The Applicant's claim has a contractual rather than statutory basis. The Applicant is not seeking an order for expenses in terms of Rule 40; rather the Applicant relies upon the terms of clause 8 of the tenancy agreement which provides:-

The rent is £900 per calendar month payable in advance.

The first payment will be paid in cleared funds on or before Saturday 1 October 2022 and will be for the sum of £900 in respect of the period Saturday 1 October 2022 to Monday 31 October 2022 (the maximum amount of rent which can be paid in advance is 6 months' rent).

Thereafter payments of £900 must be received on or before Tuesday 1 November 2022 and then subsequently on or before the same date each calendar month thereafter until termination of this tenancy agreement.

.....

Interest on late payment of rent may be charged by the Landlord at eight per cent per year from the date on which the rent is due until payment is made.

The Tenant shall be held liable for any further reasonable costs incurred by the Landlord through the Tenant's failure to pay rent on time including, but not limited to, any administrative charges or late fees made by the Landlord's bank, any expenses incurred by the Landlord in pursuing the Tenant for payment of said unpaid rent, legal or otherwise."

11. It was submitted that the Respondent knew what the terms of the contract were. The Applicant's representative argued that £300 which is around 20% of the legal expenses incurred, was reasonable. The Applicant's representative invited the Tribunal to consider 2 cases which had been decided by the First-tier Tribunal, copies of which had been submitted. In those cases, there was contractual provision entitling the landlord to recover reasonable costs incurred by the landlord from the tenant. In the 2 cases referred to, the First-tier Tribunal made awards in favour of the landlord.
12. The submissions made on behalf of the Respondent were to the effect that the final paragraph of clause 8 is void because it is contrary to public policy and that it is an unfair contract term in terms of the Consumer Rights Act 2015. It was submitted that the intention of the proceedings before the Housing and Property Chamber is for it to be a cost free system to parties. It was argued that clause 8 runs contrary to Rule 40 which provides:-

(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.

(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made.

13. The Respondent's representative explained that the Respondent is in receipt of legal aid and observed that the Tribunal has no power to modify any award of expenses in the way that a Court could (in terms of section 18(2) of the Legal Aid (Scotland) Act 1986).
14. It was further argued for the Respondent that clause 8 is an unfair contract term and is not binding on the Respondent. It causes a significant imbalance to the parties' rights. The clause is unfairly weighted against the Respondent and the Applicant has an advantage. The Applicant is taking advantage of the Respondent because the terms of clause 8 are not in the standard model tenancy agreement. It is a disproportionately high sum sought in compensation. The Respondent's representative invited the Tribunal to consider 2 cases decided by the First-tier Tribunal. In both cases, there was a contractual

provision entitling the landlord to recover additional costs from the tenant. In one case the application was withdrawn and in the other case, the Tribunal refused to grant the order. The Respondent's representative observed that none of the decisions of the First-tier Tribunal were binding on this Tribunal.

Findings in Fact

15. The parties entered into a private residential tenancy which commenced 1 October 2022.
16. The Respondent owes rent arrears of £1,450.
17. The Applicant incurred legal costs associated with submitting two applications to the Tribunal.

Reason for Decision

18. It was a matter of agreement between the parties that the Applicant was entitled to an order for payment in the sum of £1,450 plus interest at 8% per year. The only issue to be determined was whether the Applicant was entitled to an additional sum of £300 in respect of legal expenses incurred.
19. There is contractual provision for the Respondent to be found liable for "further reasonable costs" incurred by the Applicant which arise out of the Respondent's failure to pay rent on time.
20. It was incongruous that the Respondent accepted liability to pay interest on the sum due, on the basis that there is a contractual provision in the tenancy agreement, but opposed the claim for claim for costs incurred by the Applicant despite the contractual provision.
21. The Tribunal was not persuaded by the Respondent's argument that the terms of clause 8 were contrary to public policy. The general principles relating to contracts which are contrary to public policy are such that either the making or the performance of a contract may be viewed as illegal or immoral. The Respondent's representative did not specify which of these general principles was relied upon. The Tribunal was of the view that clause 8 of the tenancy agreement does not expressly or impliedly contravene the terms of Rule 40.
22. The Tribunal had regard to paragraph 6 of schedule 2 of the Consumer Rights Act 2015 which provides:-

"A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation"
23. The terms of clause 8 of the tenancy agreement do not specify a sum in compensation, but rather provide that the Respondent is liable for reasonable

costs incurred by the Applicant. In these circumstances, it was not clear to the Tribunal on what basis it could be said that the term itself required a disproportionately high sum to be paid.

24. The Applicant had instructed agents to prepare and submit 2 applications to the Tribunal, both arising from the Respondent's admitted failure to pay rent on time. The applications were submitted in March 2023 and the Applicant's representative prepared for 3 case management discussions, albeit only one of those discussions proceeded. The information before the Tribunal was that the Applicant had incurred legal expenses of approximately £1,500 but was seeking to recover £300 from the Respondent. The Tribunal's view was that the sum sought is reasonable and not disproportionately high.

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.

Nicola Irvine

Legal Member/Chair

5 September 2023

Date