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/18/3093

Re: Property at 28D Highholm Street, Port Glasgow, PA14 5HL ("the Property")

Parties:

Chesnutt Skeoch Ltd, 30 East Main Street, Darvel, KA17 0HP ("the Applicant")

Ms Skyler Jade June Watt, 0/2, 50 St Lawrence Street, Greenock, PA15 4ST ("the Respondent")

Tribunal Members:

Neil Kinnear (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

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

Background

[1] This was an application for a payment order dated 15th November 2018 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 sought payment of arrears in rental payments and reimbursement of £4,500.00 in relation to the Property from the Respondent, and provided with its application copies of the short assured tenancy agreement, form AT5, invoices and receipts, photographs and rent arrears statement.

[3] The short assured tenancy agreement had been correctly and validly prepared in terms of the provisions of the *Housing (Scotland) Act 1988*, and the procedures set out in that Act had been correctly followed and applied.

[4] This application had a lengthy and unfortunate procedural history. The Tribunal does not repeat that history in this decision and statement of reasons. In summary, however, after Case Management Discussions and a Hearing, the Tribunal granted the order sought. That decision was appealed by the Respondent firstly to the Upper Tribunal, which refused the appeal, and thereafter to the Inner House of the Court of Session, which allowed the appeal, set aside the decision, and remitted the application back to the First-tier Tribunal for reconsideration by a differently constituted First-tier Tribunal.

[5] Two further Case Management Discussions were held on 15th April and 27th May 2021 by Tele-conference. The Applicant was represented by its Director, Mr Kenneth Johnstone. The Respondent was represented by Ms McHugh, solicitor. After hearing submissions form the parties, the Tribunal allowed an amendment by the Respondent introducing a defence to the application that the tenancy agreement between the parties should be reduced *ope exceptionis* as a result of facility and circumvention. In consequence of that amendment, the parties indicated to the Tribunal and agreed that there were only two remaining questions in dispute between them. The first was whether the tenancy agreement should be set aside on the grounds of facility and circumvention. The second was that if the agreement were set aside, was the Respondent under any obligation to make any payment to the applicant in respect of her occupation of the property between November 2017 and February 2018, or in respect of any loss that it suffered as a consequence of the Respondent vacating the Property in February 2018.

[6] The Tribunal set a Hearing restricted to considering the two questions which were still in dispute between the parties, which was to be conducted by video-conference.

The Hearing

[7] A Hearing was held on 20th September 2021 by Video-conference. The Applicant participated represented by its Director, Mr Kenneth Johnstone. The Respondent participated, and was represented by Ms McHugh, solicitor.

[8] The Tribunal heard evidence from the Applicant, from the Respondent, from the Respondent's father, Mr Peter Buchanan, and very briefly from the Respondent's social care worker, Alanah Taylor.

Findings in fact

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

a) That the Respondents entered into a short assured tenancy agreement for the Property with the Applicant on or about August 2017, as co-tenant with her then partner, Chris Wilson. The agreement was for 12 months duration.
b) That the Respondent and Chris Wilson separated on or about the start of November 2017, and Chris Wilson ceased residing at the Property.
c) That the Applicant was contacted in early November 2017 by the Respondent's father, Peter Buchanan, asking if it would agree to the Respondent remaining in the Property in terms of a replacement tenancy agreement where she would be sole tenant. The Applicant agreed to this request.
d) That the Applicant always lets all of its letting portfolio for a period of 12 months.
e) That the Respondent, the Applicant, Peter Buchanan, and Peter Buchanan's partner Anne-Marie, met on 18th November 2017 at which meeting the Respondent signed as sole tenant a short assured tenancy agreement for the Property with a date of entry of 18th November 2017, an *ish* date of 17th November 2018, and a monthly rent of £350.00.
f) That the Respondent wished to enter as sole tenant into a short assured tenancy agreement for the Property with a date of entry of 18th November 2017 for the purpose of securing accommodation whilst she sought local authority housing, and to enable her to claim housing benefit in respect of the Property as sole tenant as opposed to only a half share of it as co-tenant.
g) That the Applicant went through the key terms of the lease with the Respondent, including its duration of 12 months, before she signed it.
h) That the Respondent a vulnerable person with a learning disability, is vulnerable to harm and exploitation, and is provided with support to carry out a range of daily activities including shopping and budgeting. Her comprehension is relatively poor and she benefits from clear simple language. She struggles with a lot of information at one time. She requires support with making decisions. Her overall cognitive functioning is in the extremely low range when compared to her same age peers and is within the range of individuals with mild learning disabilities.
i) That as at 18th November 2017, the Applicant suspected that the Respondent suffered some learning difficulties, but was unaware of the nature and extent of those difficulties.
j) That the Applicant did not apply any improper or unacceptable pressure to the Respondent to execute the tenancy agreement on 18th November 2017.
k) That the Respondent abandoned the Property in February 2018 without giving the Applicant any notice.
l) That the Applicant sought to relet the Property after the Respondent departed, and found new tenants with effect from 19 February 2019.

m) That the Applicant incurred costs for redecoration, cleaning, repairs and materials following the Respondent's departure and for which she was liable in terms of the tenancy agreement.
n) That the Respondent is liable for the Applicant's costs and for rental due for the term of the short assured tenancy agreement under deduction of money received from the Department of Work and Pensions, which in total come to £3,915.00.

Findings in fact and law

[10] The Tribunal found in fact and law:

a) That the Applicant did not circumvent the will of the Applicant and did not apply any improper or unacceptable pressure to the Respondent to execute the tenancy agreement on 18th November 2017.
b) That the Applicant did not mislead the Applicant regarding the terms of the lease agreement which she was entering into.
c) That any misunderstanding on the part of the Respondent as to the duration of the lease was not due to any misrepresentation or the application of improper, unfair or unacceptable pressure by the Applicant.
d) That the legal test for reduction of the short assured tenancy agreement are not met with respect to an absence of circumvention.
e) That in any event, the Respondent has not offered *restitutio in integrum* or at least substantial restitution of the subject of the impugned contract or deed. In the event that reduction was granted, the Applicant would be entitled to payment of monthly rental of the same amount as the reduced contract from the Respondent until August 2018 in terms of the previous tenancy in order to achieve *restitutio in integrum*.

The Evidence

[11] The Tribunal heard evidence from the Respondent. She was initially accompanied by her social care worker, Alanah Taylor, but latterly participated unaccompanied.

[12] The Respondent explained that she and her ex-partner, Chris Wilson, had been co-tenants of the Property. That lease commenced on 7th August 2017. He left when their son was 7 months old. Mr Johnstone had suggested in consequence that the tenancy be changed to her sole name as tenant, and he did not give her time to think about it.

[13] The Respondent said that she tried to get a tenancy agreement for a 6 month period while her social worker was trying to get her social accommodation.

[14] When Mr Johnstone came to the Property for her to sign the new lease agreement, he ran through its terms very quickly and the Respondent then signed. The Respondent said she did not have a chance to read it before she signed, and thought she was signing a tenancy agreement with a 6 month duration. She would not have signed the tenancy agreement if she had realised it was for 12 months duration. The Respondent was not in good mental health at that time, and suffered depression and anxiety. She felt pressure to sign the agreement. That pressure was due to the agreement being a big document, and not because Mr Johnstone pressured her in any way.

[15] Her then social worker, Fiona Watt, typed up a document for the Respondent giving four weeks' notice. The Respondent gave it to Mr Johnstone, but he would not accept it. That notice was in relation to the original tenancy of the Property with her then partner. She entered the new sole tenancy agreement to gain time while her social worker got her social housing. She then left to go to her new property on 21st February 2018. In cross-examination, The Respondent stated that the notice was in relation to her sole tenancy and was given in February 2018, but that Fiona Watt explained after Mr Johnstone did not accept it that the lease was for 12 months and that no notice could be served until 10 months had elapsed.

[16] The Respondent stated that she has a learning disability. That doesn't affect her dealings with people much, but it does affect her ability to organise her finances. She is given documents in an "easy read" format, however she stated that Mr Johnstone would not have been aware of this at that time.

[17] The Respondent said that her relationship with her dad was now not as good as before, and she described it as "arms length". They are not close. She had been removed from her parents' care as a child. She initially stated that her father and her step-mum were not present when the lease was signed, but later in cross-examination clarified that she did not remember her dad and step-mum being present but that they might have been. The Respondent said she did not discuss the new lease with her dad before signing.

[18] In cross-examination, the Respondent accepted that the gas bill for the Property was very high due to it being heated to a very warm temperature, but that the bill was in the name of Chris Wilson and not her. She denied the suggestion put to her that she had borrowed money from her father.

[19] Mr Johnstone gave evidence that he first met the Respondent after a telephone call with Rich and Susan Wilson. Susan Wilson is Chris Wilson's sister. They asked

about renting a flat for the Respondent and Chris Wilson as the Respondent was pregnant. On 7th August 2017 the Respondent and Chris Wilson signed a lease for the Property in the presence of Mr Johnstone, the Respondent's father, Peter Buchanan and his wife, Anne-Marie, Rich and Susan Wilson, and Mark Grant, who was a former tenant of the Applicant. The lease was a short assured tenancy with a duration of 12 months, and Mr Johnstone explained the core terms to the Respondent and Chris Wilson before they signed.

[20] Thereafter, the rent was paid by Chris Wilson until he left the Property. Mr Johnstone was called by Peter Buchanan in early November 2017 to tell him that Chris Wilson had left to return to Bradford, where he and other family members originally came from. Mr Buchanan had been a tenant of the Applicant for some time, and Mr Johnstone got on well with him. Mr Buchanan wanted the Respondent to remain in the area, and asked Mr Johnstone to take the Respondent as sole tenant of the Property. The Applicant was not keen on that idea, as it had concerns about the Respondent's ability to afford household bills and the rent by herself, especially as she kept the Property at a very warm temperature which would have been expensive. However, Chris Wilson's sister told Mr Johnstone that he wanted out of the lease, and he reluctantly agreed to make the Respondent sole tenant as requested.

[21] Mr Johnstone met at the Property on 18th November 2017 with the Respondent to sign the new lease making her sole tenant. The Respondent's father and step-mum were also present, albeit that the Respondent's step-mum did not stay for the whole meeting. The new lease agreement was a short assured tenancy in exactly the same terms as the previous tenancy agreement with the Respondent and Chris Wilson, except that the Respondent was sole tenant and the commencement date of the 12 month duration was the date of signature (18th November 2017).

[22] Mr Buchanan was a former soldier, who was working as a carer at the time the new lease agreement was signed, as was his wife. They helped people with various difficulties. Mr Buchanan had not been in the Respondent's life for a long time before she moved to the area to reconnect with him.

[23] Thereafter, rent was paid in dribs and drabs. Mr Buchanan told Mr Johnstone that the Respondent had borrowed some money from him, which she had repaid leaving her short of money for rent. The Respondent also told Mr Johnstone that she was having difficulty claiming housing benefit from the local authority.

[24] Mr Johnstone received a telephone call from Fiona Watt advising that the Respondent had managed to obtain a social let, and asking what her current lease provided. Mr Johnstone advised her it was a 12 month lease with 2 month notice period required to end it. Fiona Watt later advised him that the Respondent required help managing her finances.

[25] The Respondent left the Property in February 2018 without giving any notice and leaving the Property in a mess. Her relationship with her father appeared to have deteriorated. Mr Johnstone traced the Respondent at her new address and went there to speak with her, but was asked to leave and did so.

[26] Mr Johnstone explained that it was the Applicant's policy to let all its properties for a 12 month duration, in order to avoid regular changes in tenant which would be less economic with the rent levels charged, and to allow adequate time for any benefits applications to be lodged and processed.

[27] Mr Buchanan had told Mr Johnstone that putting the lease of the Property in the Respondent's sole name would help her financially, as she would receive money towards the whole rental from Universal Credit as opposed to only half.

[28] In cross-examination, Mr Johnstone stated that Mr Buchanan discussed the new lease agreement with him, and told him that he had discussed it with the Respondent.

[29] At the meeting where the Respondent signed the new lease agreement in her sole name, Mr Johnstone explained its key terms, particularly its duration, the rent due, and the period of notice required to terminate it. It was Mr Johnstone's practice to do this on every occasion with a tenant before they signed the lease agreement. The Respondent seemed very happy to sign the agreement and he had no cause to think otherwise. He did not apply any pressure for the Respondent to enter the agreement. It was rather the reverse, that she was keen to take the lease and Mr Johnstone had reservations.

[30] Mr Johnstone explained that he suspected that the Respondent might have some difficulties, but that he was reassured that her father and step-mum were present, who both worked as carers as well as being members of the Respondent's family.

[31] Mr Buchanan gave evidence that his daughter, the Respondent, and her partner had come to stay with him and his wife. They lived in a one bedroom flat rented from the Applicant which was not big enough for the four of them, and he asked Mr Johnstone if the Applicant had a suitable flat for his daughter and her partner to rent.

[32] The Respondent and Chris Wilson signed a lease of the Property on 7th August 2017. Mr Buchanan was present with his wife and another, Rich Cowan, and Mr Buchanan read the lease before it was signed. He told the Respondent it was a standard short-term lease.

[33] Chris Wilson left the Respondent, and Mr Buchanan asked Mr Johnstone if the Respondent could take a lease of the Property in her sole name. Mr Johnstone

expressed concerns about that, but Mr Buchanan reassured him that he and his wife would assist the Respondent.

[34] On 18th November 2017, Mr Buchanan was present with his wife at the metting between Mr Johnstone and the Respondent where she signed the new lease in her sole name. Mr Buchanan explained that the new lease was in the same terms as the old one save that it was in her sole name.

[35] In December 2017, there was a falling out between Mr Buchanan and his daughter. Historically, they had not always been close. The Respondent had been removed from his and her mother's care as a child.

[36] Mr Buchanan stated that in the meeting to sign the new lease, Mr Johnstone told the Respondent that the lease was for an initial period of 12 months. Mr Johnstone explained the key terms of the lease to the Respondent before she signed the agreement.

[37] Mr Buchanan and Mr Johnstone were aware that the Respondent had some learning difficulties, but neither of them were aware that she needed time to understand information.

[38] The Respondent was afraid that she would have to leave the Property after her partner left. Mr Buchanan tried to make sure that did not happen and to make sure she was OK.

[39] From his previous tenancies with the Applicant, Mr Buchanan confirmed that they were all in similar terms. He told the Respondent that it was a 12 month agreement which she would need to see out, and she did not tell him that she intended to leave in less than 12 months. He did not know at the time that the Respondent's social worker was looking for other accommodation for her.

[40] The Tribunal heard brief evidence from the Respondent's social worker, Alanah Taylor, who briefly confirmed that the Respondent required social work assistance to manage finances, and was currently being assessed with regard to whether she might need other forms of assistance.

Submission on behalf of the Respondent

[41] Ms McHugh referred the Tribunal to a letter from Alanah Taylor, and to a report from a clinical psychologist, Dr Clare Clarke, both of which had been lodged with the Tribunal.

[42] Ms McHugh submitted that there was a high degree of facility in respect of trhe Respondent. She required support for daily living, and social workers had already taken over control of her finances.

[43] Ms McHugh submitted there was circumvention present in the circumstances, but candidly conceded that she was unaware prior to the leading of evidence of Mr Buchanan's involvement in the signing of the lease.

[44] Ms McHugh referred the Tribunal to the full written submissions previously lodged with the Tribunal, the terms of which she adopted. She invited the Tribunal to reduce the earlier lease agreement between the Applicant, the Respondent and Chris Wilson, but accepted that this defence was being raised for the first time, after evidence had been led and concluded, and at the stage of submissions.

Submission on behalf of the Applicant

[45] Mr Johnstone submitted that he had done nothing wrong. The Applicant had not exerted any pressure on the Respondent to sign the new agreement, and he had been careful to explain its key terms including its duration of 12 months. The Respondent seemed very happy to sign it, and it appeared to be in her interests to do so.

[46] In any event, had she not entered the new agreement, she would have been liable for all of the rent on the earlier agreement jointly and severally with Chris Wilson. That agreement provided for the same rent, which would have been due until August 2018, only 3 months before the end date of the new agreement.

[47] The Applicant submitted that no case had been made out to reduce the agreement *ope exceptionis*, and that the Tribunal should grant an order for the sum sought against the Respondent.

Statement of Reasons

[48] 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."

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

[50] The only question for the Tribunal to decide in this application was whether to order that the tenancy agreement between the parties be set aside *ope exceptionis*, and if so, whether any payment was due by the Respondent to the Applicant.

Facility and circumvention

[51] A contract obtained through facility and circumvention is voidable, not void. It is valid until it is rescinded. To succeed in a plea of facility and circumvention it is necessary to prove (i) weakness and facility; (ii) circumvention; and (iii) lesion. These three factors are all interrelated. The strength of the case in one matter may compensate for a relative weakness in another. The question is whether the total effect is to suggest an invalidity in consent to the deed in question. (see *McBryde – The Law of Contract in Scotland (3rd Ed.)* at paragraph 16-12).

[52] The Tribunal noted that it was referred to a report by a clinical psychologist, Dr Clare Clarke, but that no witness spoke to this report and Dr Clarke was not called to give evidence. However, standing the evidence from the Respondent's social worker, Alanah Taylor, the Tribunal was satisfied that the Respondent is a vulnerable person with a learning disability, is vulnerable to harm and exploitation, and is provided with support to carry out a range of daily activities including shopping and budgeting. Her comprehension is relatively poor and she benefits from clear simple language. She struggles with a lot of information at one time. She requires support with making decisions. Her overall cognitive functioning is in the extremely low range when compared to her same age peers and is within the range of individuals with mild learning disabilities. That being so, the Tribunal was satisfied that a degree of facility has been proved in respect of the Respondent, and that weakness and facility has been established.

[53] However, to succeed with her defence, the Respondent must also establish circumvention. Facility and lesion on their own are not enough in the absence of any circumvention by the Applicant (see, for example, *Stair Memorial Encyclopedia Volume 11 "Fraud"* at paragraph 736).

[54] Circumvention is a species of deceit or fraud, the essence of which is that a person practises on the debility of another whose individuality is impaired by infirmity or age, and moulds the inclinations of the latter, to his own profit. There must be some relation between the facility and the acts employed against the granter (see *Walker – Civil Remedies* at page 154).

[55] In the case of *Gibson's Executor v Anderson* 1925 SC 774 at page 788, Lord Blackburn stated the following:
"The meaning of fraud and circumvention was very clearly explained by Lord Kyllachy in a charge to a jury in the case of Parnie v. MacLean. The case is unreported, but the charge was printed and I have had an opportunity of reading it. His Lordship said:— "Fraud and circumvention are really shades of the same thing, but as used in this issue it is assumed to be fraudulent to take advantage of anybody, even by way of pressure or importunity or anything of that kind, who is not in a normal state of mind, and whose will is not normally strong. Things that might be right to do with a strong-minded person become wrong when done for your own benefit towards a person who is, as I have said, facile; and therefore, in law, fraud and circumvention are two shades of the same thing, the meaning of the issue being that you have the question put to you whether, facility existing, there had been either distinct machinations, tricks, importunities, solicitations, even suggestions, towards the testator while the testator's facility was such that she was not in a position to resist—not likely to be in a position to resist. It is not necessary that there should be deceit. It is enough that there should be solicitation, pressure, importunity, even in some cases, suggestion. The degree of circumvention would depend on the degree of facility." I charged the jury that it would be enough if the defender had "got round" the granter by means which they regarded as dishonest. In my opinion the facts and circumstances proved amply justified the jury in inferring that there had been solicitation, pressure, importunity, and suggestion, or dishonest motives of that kind. I thought the verdict was right, and I concur in thinking that the attack on it fails and that the rule should be discharged.".

[56] In the more recent case of *Smyth v Rafferty, Henderson and MacDonald (Romanes's Executors)* [2014] CSOH 150, Lord Glennie defined circumvention as follows:
"Circumvention is the name given to improper pressure applied to such a person by another in such circumstances. That pressure may, at one extreme, be direct, forceful and overpowering or, at the other, be more subtle or insidious, working by solicitation or importuning. Fraud is one example of the way in which a facile mind maybe subverted but it is not an essential part of the principle. Bullying or browbeating may equally amount to circumvention. A robust individual will usually be able to resist pressure, or at least decide whether or not he wants to resist it. A facile person may not. But facility is a spectrum; it comes in degrees. A deed will only be at risk of being reduced (or set aside) if the pressure applied is unacceptable having regard to the

extent to which the person on whom it is exerted is facile. If a person with a weak and pliable mind – whether that condition is permanent or temporary and whether caused by age, infirmity, pain, grief or something else altogether – is pushed or led by fraud, force or solicitation to do what he would, or might, otherwise have resisted doing had his mind been stronger, then his act can be reduced by the court.".

[57] The question for the Tribunal was accordingly to decide on the evidence whether the Applicant took advantage of the Respondent's facility by solicitation, pressure, importunity and suggestion or other dishonest motives. Did the Applicant apply improper and unacceptable pressure to the Respondent having regard to the extent to which she was facile.

[58] The Tribunal concluded from the evidence that the Applicant did not take advantage of the Respondent's facility. The Tribunal attached weight to the Respondent's evidence that her learning disability did not affect her dealings with people much, but it did affect her ability to organise her finances. She is given documents in an "easy read" format, however she stated that Mr Johnstone would not have been aware of this at the time she signed the lease agreement. The Respondent said that she tried to get a tenancy agreement for a 6 month period while her social worker was trying to get her social accommodation. She entered the new sole tenancy agreement to gain time while her social worker got her social housing. Her only misunderstanding was as to the duration of the new lease. She stated that she believed it was for 6 months, and was happy with that arrangement. Her comprehension of what she was doing displayed a good understanding of the arrangement she was agreeing to and the reasons for that. Her only lack of comprehension, according to her evidence, was on the single issue of the duration of the agreement.

[59] The Tribunal found Mr Johnstone to be a credible and reliable witness, who gave a straight forward account of what had occurred from his perspective. The Tribunal accepted his evidence that he clearly explained both before the Respondent entered the lease agreement, and before she entered the earlier lease agreement with Chris Wilson, the key terms of the lease including its 12 month duration. Mr Johnstone's evidence in that regard was supported by that of Mr Buchanan. Mr Johnstone was not aware of the extent of the Respondent's learning disability at the time when the agreement was signed.

[60] The Tribunal accepted the evidence on behalf of the Applicant that it applied no improper or unacceptable pressure to circumvent the Respondent's will for its own benefit or for dishonest motives. The Tribunal accordingly did not accept that the Applicant had circumvented the Respondent's will, and accordingly the Respondent's defence that the agreement should be reduced *ope exceptionis* must fail.

[61] The Tribunal observed that it is a condition of reduction that the other party be restored to the position in which he was in before the contract was made. He is entitled to *restitutio in integrum,* and if in the circumstances that is impossible, reduction is precluded (see, for example, *McBryde – The Law of Contract in Scotland (3rd Ed.)* at paragraph 16-36, *Stair Memorial Encyclopedia – The Laws of Scotland, Reissue "Fraud"* at paragraphs 714 and 737, *Gloag & Henderson - The Law of Scotland (14th Ed.)* at para 7.04, and *Gloag – The Law of Contract (2nd Ed.) at page 539*). The condition for reduction of the contract is the restoration of the defender to the pre-contract position, not the restoration of the party seeking reduction.

[62] That being so, the Applicant as a condition of reduction would require to be put in the position it was before the contract was made. In this case, had the contract not been made, the Applicant would have had a claim for damages and for the rent of the Property until August 2018 under the previous tenancy agreement which it could have enforced against the Respondent as a joint and several obligant to the agreement. That would have resulted in a claim for the same amount as this application less three months' rent at £350.00 per month. As the Respondent has not offered *restitutio in integrum*, her defence must fail on that basis also.

[63] Finally, the Tribunal was invited by Ms McHugh to reduce the earlier lease agreement between the Applicant, the Respondent and Chris Wilson. Ms McHugh raised this issue for the first time at the stage of submissions, and after evidence had been led and concluded. The Tribunal was not invited to allow the Respondent to amend her application to introduce this new matter, but had it been so invited, it would have refused an application to amend. Such an amendment would clearly be one that raised a new issue, and would accordingly fall under Rule 14 (Amendment raising new issues) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended. That Rule requires the consent of the Tribunal to the making of the amendment. If the Tribunal does consent, Rule 14 requires any other party to be given an opportunity to make written representations in response to the amendment or to request the opportunity to make oral representations by a date specified by the Tribunal which is not less than 14 days from the date on which the amendment was made orally during the hearing. The Tribunal considered that had it been asked to allow such an amendment, it would not have been in the interests of justice to allow that at the end of the Hearing and after evidence had been concluded.

[64] Accordingly, for these reasons, the Tribunal was not satisfied by the evidence that the defence of facility and circumvention has been established by the Respondent, and accordingly refused to reduce the lease agreement *ope exceptionis*. Having reached that conclusion, the Tribunal was satisfied that it should grant the order sought by the Applicant.

Decision

[65] For the above reasons, the Tribunal refused the application for reduction of the lease agreement, and made an order for payment by the Respondent to the Applicant of the sum of £3,915.00.

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_____ **_____12 November 2021_____**
Legal Member/Chair **Date**