



**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/20/2611**

**Re: Property at 5 Maxwell Crescent, Blantyre, G72 0EE ("the Property")**

**Parties:**

**Mr Graham Thomas, 25 Kent Drive, Burnside, G73 5AP ("the Applicant")**

**Ms Ada Pepper, 163 Blairbeth Road, Burnside, G73 5BU ("the Respondent")**

**Tribunal Members:**

**Gillian Buchanan (Legal Member)**

**Decision**

At the Case Management Discussion ("CMD"), which took place by telephone conference on 27 April 2021, the Applicant was represented by Mr Stephen Kiernan, Premier Properties and the Respondent was represented by Ms Chloe Minto, Mellicks, Solicitors, Glasgow. Neither the Applicant nor the Respondent were in attendance.

Prior to the CMD the Tribunal had received additional written representations from the parties' representatives, namely:-

1. An email from Ms Minto dated 20 April 2021 with List of Authorities attached.
2. An email from Mr Kiernan dated 21 April 2021 with (a) blank "Guarantor Referencing Application Form" and (b) "Individual Referencing Application Form" completed by Mr Callum Gordon Pepper ("the Tenant") and dated 1 November 2017 attached.

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

*Background*

A CMD previously took place on 24 March 2021. The Notes of that CMD are referred to and the same definitions are used in this decision. At that CMD the Tribunal noted the factual matters not in dispute between the parties and, having heard the parties' representatives, considered that it should first determine the following matters of law:-

1. Whether the Respondent guaranteed the Tenant's obligations under the Tenancy Agreement;
2. If the Respondent did guarantee the Tenant's obligations under the Tenancy Agreement whether the guarantee ceased to have effect at the end of the initial term of the Tenancy Agreement; and
3. If the Respondent did guarantee the Tenant's obligations under the Tenancy Agreement whether it is necessary for the Applicant to pursue the Tenant for payment of the sums claimed to be due before making a claim against the Respondent.

At the CMD the Tribunal therefore heard submissions from the parties' representatives on issues 1-3 above.

*Representations for the Applicant*

Mr Kiernan referred to his email dated 21 April 2021 and explained that the first page of the "Guarantor Referencing Application Form" completed by the Respondent could not be found on the file. Whilst he appreciated the difficulties the Tribunal might face having regard to that document being incomplete he hoped that the Tribunal could understand what the content of the first page would have been having regard to the blank form provided.

With regard to the "Individual Referencing Application Form" completed by the Tenant, Mr Kiernan accepted that there was no reference to the Respondent acting as Guarantor within that form, simply a reference to her as his next of kin at section 9.

Mr Kiernan explained that he had recommended to the Applicant that legal input or representation be sought for the CMD. He had sent an email to that effect. However, the Applicant had experienced difficulties in finding a solicitor for the CMD despite having spoken to two or three firms which were unable to assist. Explanations given related to the Easter holidays and market climate. The Applicant had therefore been unable to obtain legal representation.

Mr Kiernan indicated that he had nothing to add to the submissions that he made at the previous CMD on 24 March 2021. With regard to the three issues for determination his position was as follows:-

1. That the Respondent guaranteed the Tenant's obligations under the Tenancy Agreement.
2. That if the Respondent did guarantee the Tenant's obligations under the Tenancy Agreement that the guarantee did not cease to have effect at the end of the initial term of the tenancy.
3. If the Respondent did guarantee the Tenant's obligations under the Tenancy Agreement, it was not necessary for the applicant to pursue the Tenant for payment of the sums claimed to be due before pursuing a claim against the Respondent.

Mr Kiernan did not make reference to any legal authorities in support of his position.

*Representations for the Respondent*

Ms Minto referred to and adopted the "Written Submissions on behalf of the Respondent" previously tendered by her for the CMD that took place on 24 March 2021. The Respondent's position, she said, remains as outlined therein namely:-

1. That there is no valid guarantee by the Respondent in terms of the Tenancy Agreement.
2. Even if there is a valid guarantee by the Respondent in terms of the Tenancy Agreement the sums claimed accrued after the Tenancy Agreement had continued by tacit relocation and were not therefore enforceable as a cautionary obligation against the Respondent.
3. That a cautionary obligation, such as a guarantee, is accessory to the principal obligation and therefore it was incumbent upon the Applicant to pursue the Tenant for payment in the first instance.

With regard to the blank "Guarantor Referencing Application Form" produced on behalf of the Applicant, Ms Minto submitted that the Tribunal could not assume the content of the front page of the form completed by the Respondent and therefore the Tribunal could not rely upon that document.

Turning to her List of Authorities, Ms Minto referred to the paragraph of her "Written Submissions" headed "No Valid Guarantee" and to the first authority within her List of Authorities being an extract from the text of Gloag & Irvine on "The Law of Scotland" at chapter 16, paragraph 16.18 thereof which, in the first sentence, states:-

*"In a question with the creditor, the extent of the cautioner's liability is wholly regulated by the terms of the guarantee which he has given."*

Ms Minto's submitted there is no guarantee agreement by the Respondent. There is no separate guarantee. The Applicant has produced only a partially completed form which contains no reference to any obligations on the Respondent and no liabilities are defined. Notwithstanding the references in the Tenancy Agreement to the Respondent being "Guarantor/Indemnifier" on page 1 and "Guarantor" where she has signed on page 10 no liability arises and something more is needed. There are no other references to the Respondent having any liabilities within the Tenancy Agreement.

With regard to her secondary position on tacit relocation, Ms Minto referred to the authorities numbered 2 and 3 in her List of Authorities. By reference to Gerber, Kenneth on "Commercial Leases in Scotland, a Practitioner's Guide" she referred to in chapter 19, paragraph 19 – 03 which states:-

*"A guarantor's liability is not extended by tacit relocation unless the guarantee expressly provides for this."*

If the Tribunal determined there to be a guarantee under the Tenancy Agreement, Ms Minto stated that there is nothing contained within the Tenancy Agreement to provide for an extension of that guarantee beyond the initial term which ended on 12 May 2018. She also made passing reference to the case of NG Napier Ltd v Crosbie 1964 S.C. 129 in support of

the same proposition. In her submission, after 12 May 2018 the Respondent would be free of any obligations.

With regard to the third issue for consideration by the Tribunal, Ms Minto had no additional submissions to make and no authorities on which to rely and was content to rest upon the Written Submissions previously made.

Ms Minto's final point was in response to the Applicant's lack of legal representation at the CMD. She submitted that the Respondent's position had been the same as that which had been stated to Mr Kiernan by email on 2 April 2019 (an email that is not before the Tribunal) and therefore the arguments put forward in the Written Submissions are not new and had in any event been lodged with the Tribunal prior to the previous hearing on 24th of March.

*Response for the Applicant to Submissions for the Respondent*

Following the conclusion of the submissions by Ms Minto, Mr Kiernan indicated that he had nothing further to add.

**Reasons for Decision**

Whether the Respondent guaranteed the obligations of the Tenant turns upon the terms of the Tenancy Agreement dated 13 November 2017.

There was no dispute between the parties that within the Tenancy Agreement the only references to the Respondent were on page 1 where the Respondent's name and address appeared followed beneath by the wording "*Hereinafter called the Guarantor/Indemnifier*", and on the signature page where, against the Respondent's signature, the word "*Guarantor*" appears.

However, nowhere within the Tenancy Agreement is there any wording which describes the extent of the obligation or obligations imposed upon and accepted by the Respondent. In the absence of express terms to that effect, no submissions were made to the Tribunal that such terms should be implied.

In the absence of any wording that describes the obligations said to be undertaken by the Respondent then her name and address along with the wording "*Hereinafter called the Guarantor/Indemnifier*" where it appears on page 1 of the Tenancy Agreement is meaningless and her signature of the Tenancy Agreement against the word "*Guarantor*" is similarly without import.

In the absence of any properly expressed obligation upon the Respondent within the Tenancy Agreement, the Applicant's claim must fail.

For completeness the Tribunal considered the incomplete "Guarantor Referencing Application Form" in the name of the Respondent lodged with the Tribunal but missing what appears to be the first page. Firstly, in the absence of the complete document the Tribunal cannot make assumptions as to the terms likely terms of the missing page. Secondly, in section 7 of the "Guarantor Referencing Application Form" it is stated:-

*"By completing this form, you have agreed to act as guarantor for the tenant named within this form."*

In the absence of the page 1 of the Form, no such tenant is named and the Tribunal cannot therefore know that the Guarantor Referencing Application Form refers to the Tenant.

The Tribunal also considered whether or not, in general terms, the obligations of a guarantor named in a tenancy agreement subsist beyond the initial term where the tenancy agreement continues by tacit relocation. In the absence of express terms to the contrary, the legal position is clear namely that the obligations of the guarantor do not continue beyond the expiry of the initial term. Liabilities of the tenant accrued after the expiry of the initial term cannot, in these circumstances, be enforceable against the guarantor.

In light of the conclusions of the Tribunal as outlined above, it was not necessary for the Tribunal to come to any view on the third issue identified namely whether or not it was incumbent upon the Applicant to pursue the Tenant for payment in the first instance prior to pursuing the Respondent.

### **Decision**

Having carefully considered the parties' submissions, the Tribunal dismissed the application.

### **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.**

**Gillian Buchanan**

**Gillian Buchanan**  
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Legal Member/Chair

**27 April 2021**  
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Date