



**Statement of Decision in an application for Recall under Rule 30 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (contained in Schedule Part 1 of the Chamber Procedure Regulations 2017 (SSI No 328), as amended) (“the Procedure Rules”)**

**Chamber Ref: FTS/HPC/CV/20/0439**

**Property at 99 Baird Hill, Murray, East Kilbride, G75 0EG (“the Property”)**

**Parties:**

**Franchville Investments Limited, c/o The Property Bureau, Melville House, 70 Drymen Road, Bearsden, Glasgow, G61 2RH (“the Applicant”)**

**Mr Stephen Hyslop, Ms Michelle Drummond, 153 Leven Road, Coatbridge, ML5 2LW; 99 Baird Hill, Murray, East Kilbride, G75 0EG (“the Respondents”)**

**Tribunal Members:**

**Josephine Bonnar (Legal Member)**

**Decision**

**The Legal Member determines that the application for recall should be refused.**

**Background**

- 1 By application dated 7 February 2020 the Applicant sought an order for payment in relation to unpaid rent. The application (“439”) stated that the Respondents had failed to pay rent since 27 February 2019. On 13 December 2019, a payment order had been granted by the Tribunal for the sum of £6500 in relation to an application under Chamber reference HPC/19/2657. (“2657”). The Applicant was now seeking an order for arrears of rent incurred since that date. A copy of the application and supporting documents were served on the Respondents by Sheriff Officer on 6 March 2020. All parties were advised that a Case Management Discussion (“CMD”) would take place on 7 April 2020 and that they were required to attend. The CMD was postponed because of Government restrictions due to COVID 19. On 16 June 2020, the parties were advised that the CMD would now take place by conference call on 15 July 2020 at 10am. All were provided with a telephone number and passcode. The Respondents were

notified by recorded delivery letter sent to the tenancy subjects.

- 2 The application called for a CMD at 10.10 am on 15 July 2020. The Applicant was represented by Mr Buchanan, solicitor. The Respondents did not participate. Mr Buchanan advised the Legal Member that the Second Respondent ("Ms Drummond") was still in occupation of the property but that she had informed him that the First Respondent ("Mr Hyslop") no longer resided there. The Legal Member noted that the notification letter from the Tribunal had been sent to the property. As a result, Mr Hyslop may not have received it. The CMD was adjourned to allow investigations to be made regarding the Mr Hyslop's address. The Applicant subsequently provided a trace report from a Sheriff Officer confirming a new address. All parties were notified that a further CMD would take place by telephone conference call on 1 September 2020 at 10am and that they were required to participate.
- 3 On 10 and 27 August 2020 Mr Hyslop telephoned the Tribunal. He advised that he had not lived at the property for 2 years and was not liable for the arrears of rent. He further advised that he did not wish to participate in the CMD. On 27 August he sent an email to the Tribunal stating that he "used to be a tenant but have not lived in that property for over 2 years. I initially removed my name from first avenue over the phone. This also included my father who was guarantor, who was also removed. I can assure you that as long as I lived there the rent was paid every month....I take no responsibility for Ms Drummond's actions in regards to the matter and would like to be struck from the case."
- 4 The application called for a CMD by telephone conference call on 1 September 2020. The Applicant was represented by Mr Buchanan, solicitor. The Respondents did not participate and were not represented. Following the CMD the Legal Member granted an order for payment against the Respondents for £5850.
- 5 By emails dated 15, 20 and 21 October 2020 Mr Hyslop applied for a recall of the Tribunal's decision of 1 September 2020 and the related decision under 2657. He confirmed that a copy of the request had been sent to the Applicant's solicitor. On 30 October 2020, the Applicant's solicitor submitted a response stating that the application was opposed. On 5 November 2020, a direction was issued requiring Mr Hyslop to provide further information. No information was provided in response to the direction.
- 6 The parties were notified that both applications for recall would be considered at a CMD which would take place by telephone conference call on 15 December 2020 at 11.30 am. The case called for a CMD on 15 December 2020 at 11.30. The Applicant was represented by Mr Buchanan, solicitor. Mr Hyslop participated. Ms Drummond did not participate. Following discussions, the Legal Member determined that the CMD should be continued to allow Mr Hyslop to make further enquires and to take advice on his position. Mr Buchanan indicated that he would make further enquiries regarding the letting agents records.

- 7 The parties were notified that a further CMD would take place by telephone conference call on 10 February 2021 at 10am. Prior to the CMD Mr Buchanan submitted a copy of the letting agent's property log from August 2016, which relates to enquiries by Ms Drummond to have the tenancy converted to a sole tenancy. The log indicate that this was rejected because she was unable to provide a guarantor.
- 8 The CMD took place on 10 February 2011 at 10am. The Applicant was represented by Mr Buchanan. Mr Hyslop participated. Ms Drummond did not participate.

### **Application for Recall**

- 9 Mr Hyslop states, "I am writing to urgently ask for the attached case to be looked at again to hear my appeal and/or statement in regards to my appeal." "I would like to add that I misplaced the documentation and that is the reason why I am asking for this decision at this time". " I write this note in support of my application to recall made earlier this afternoon and I confirm that I have sent the solicitors acting for the complainant copies of my application and this supporting note. I am making an application to recall the linked payments orders granted on the 1<sup>st</sup> of September 2020 and the 13 of December 2019 arising out of civil proceedings claims taken against me as the alleged joint tenant of 99 Baird Hill, Murray east Kilbride. I did not take part in the proceedings in which the payment order was granted on the 13<sup>th</sup> December 2019 because I was not aware at material time that the proceedings were taking place. Although I was aware of the proceedings in 20/0439 I did not appear at the hearing and was not represented. I contacted the tribunal staff prior to the hearing taking place and on the dates set out in the statement of reasons at paragraph 4. I confirm that when asked, I expressed a desire not to participate in the CMD. This is true. I did not want to do so because I was intimidated by the idea of addressing the tribunal. I would have attended the tribunal or sought representation if I had realised that it was important to do so. I was asked instead to submit a note setting out my defence and requesting that I be struck from the application which I did on the 27 August. My understanding of the conversation was that there was no need for me to attend the hearing because I had provided a written note. I believe my applications are in the interest of justice. I do not believe that I was a joint tenant of my former home at the material time and for the reasons paraphrased by the Legal Member at paragraph 4 of the statement of reasons. My understanding of the decision taken at the CMD is that it relied in part on the affidavit lodged by the applicant from Gareth Steven, a former employee of initial property agents. The tribunal should have been made aware that Mr Steven is the employee that I claim I contacted on the telephone to terminate my and my fathers interest in the tenancy (See paragraph 4 of the statement of reasons) and my own evidence at any future hearing will be that he agreed to do so. I submit that, had I been present at the CMD, I would have requested a full hearing of both complaints and have sought the opportunity to cite Mr Steven as a witness allowing myself and the Tribunal an opportunity to examine the evidence that he has provided.

In the event that it is agreed that the payment order dated 13 December is recalled, I submit that it is necessarily in the interests of justice to recall the payment order of the 1<sup>st</sup> of September (or vice versa) because the complaints share a common factual basis. I accept that these applications are made outwith the relevant time limits. I ask the tribunal to note that I only became aware of the first complaint when I was informed about the second one. There has been a delay after receiving the second decision. I have also been applying for and attending many job interviews in order to further support my fiancé and children, in a busy house of 4 children, 2 of which are autistic so, as you can imagine my hands are very full!" " I did not understand what I need to do to protect my interests and it is only after taking advice from citizens advice bureau on the 15 October and after speaking to more Tribunal staff that I have realised that I need to make an application to recall both payment orders.". On 20 and 21 October 2020, in response to an email from the Tribunal seeking clarification of the request, the First Respondent confirmed that he was seeking to have the decisions recalled or reviewed.

- 10 In the response, the Applicant states that the applications for recall are opposed. They stated that in the application under reference number 19/2657 Mr Hyslop's address was stated to be the address of the property. At a CMD in October 2019 Ms Drummond said that he had moved out a year previously. The Applicant referred to the CMD which took place on 1 September 2020, and stated "Mr Hyslop emailed on the 27 August 2020 stating that he had not lived at the property for over 2 years and had telephoned the Landlords agents to remove his name from the lease. He failed to appear on 1 September 2020. The decision to find him liable for payment of arrears of rent was made on 2 September 2020. He now seeks recall of both decisions. Looking at the latest decision the period for recall of the decision ended on 16 September 2020. The application for recall now is dated 15 October 2020. He is well out of time. We consider that the application is not in the interests of justice. Both parties' rights have to be taken into account. Mr Hyslop's position is that he telephoned the landlords agent over 2 years ago. He states he initially removed his name. He appears to have phoned the agents to advise them he is no longer living there and no longer wanted to be liable in terms of the lease. Mr Hyslop had entered into a lease with Miss Drummond. They both were responsible for payment of the rent. The lease provided for termination by the tenant in terms of clauses 1 and 20.3 by giving 2 months notice in writing to the landlord. Had Mr Hyslop wanted to terminate the lease he was able to do so given the lease ran on a month to month basis. On Mr Hyslop's submission it seems that his relationship with Miss Drummond came to an end. It is plain that he wanted his obligations under the lease to come to an end. To do that he required to take formal steps and involve Miss Drummond and the landlord. He chose to do neither."

## The CMDs

- 11 At the CMD on 15 December 2020, the Legal Member noted that the applications for recall are both outwith the 14-day specified in Rule 30(4). Mr Hyslop advised the Legal Member that he had been unaware of application 2657 when it was before the Tribunal. He was also unaware that a decision had been made against him until this was referred to in the paperwork for application 439 which was served on him in August 2020, prior to the CMD for that application. He contacted the Tribunal by telephone and was made aware of the previous decision and order. He further advised that he had not lived at the property from July 2018 onwards and had received no correspondence from the Tribunal in relation to 2657. After receiving a copy of the application for 439 he contacted the Tribunal by telephone to say that he opposed the application but did not want to participate in the CMD. He said that he was told he could submit written representations instead. He thought that if the Tribunal required more information, he would receive a telephone call. He was attending a lot of job interviews and started work at the beginning of September 2020. He received the decision in relation to application 439 in early September 2020. Due to work commitments and caring responsibilities, he did not take advice until mid-October. The CAB assisted him with his application for recall at that time. Mr Buchanan confirmed that there has been no contact with Mr Hyslop since the decision and order for 2657 were issued. He advised that he accepted that some “cause” had been shown for the late applications. The Legal Member concluded that Mr Hyslop had provided a reasonable explanation for the late applications and determined that the Tribunal would therefore consider them.
- 12 In response to questions regarding the reasons for his non attendance at the CMDs for the applications, Mr Hyslop advised that he was unaware of the proceedings under Chamber reference 2657 and therefore did not have the opportunity to attend. The Legal Member noted that all correspondence from the Tribunal was issued to the property address. If he had moved out in July 2018, he would not have received this correspondence. Mr Buchanan confirmed that it was his understanding (from information provided by Ms Drummond) that Mr Hyslop had been away from the property for some time prior to the CMD on 13 December 2019. In relation to the CMD on 1 September 2020, Mr Hyslop’s argument is less compelling since he had received notification of the date and time of the CMD. He advised the Legal Member that he had contacted the Tribunal to find out if he “needed” to attend the CMD. He was advised that Tribunal staff could not provide him with legal advice. The confirmed that he did not “need” to attend. However, he did not appreciate that he “should” attend. He was also advised that he could submit a statement in writing. He took this to mean that his attendance was not necessary and thought he would be contacted if further information were required.
- 13 The Legal Member proceeded to discuss whether Mr Hyslop has a stateable defence to the applications, as it may not be in the interests of justice to

recall the decisions if he would have had no prospect of success at the CMDs, had he attended. Mr Hyslop explained that he did not have any liability for the rent at the property because he had ceased to be a tenant. He said that he contacted the letting agent by telephone to have his name (and his father's name as guarantor) removed from the lease. He was told that this would be arranged. He heard nothing further from the letting agents, regarding the lease or the rent. He thinks this call was made in 2016, when there was a relationship breakdown with Ms Drummond. However, he continued to spend some of his time at the property until 2018. He confirmed that he had been party to the tenancy and had signed the lease. He said that he had copy of the document.

- 14 Mr Buchanan advised the Legal Member that there is a reference to a phone call from Mr Hyslop in the letting agents' records, saying he had moved out. There also appears to have been contact with Ms Drummond about getting her own guarantor, which might be connected to that call. However, it does not appear that the tenancy to which Mr Hyslop is a party was ever terminated. This being the case, he remained liable for the rent. Mr Buchanan indicated that he could make enquires with the letting agents with a view to establishing whether their records provide any further information about the lease and whether there were any steps taken to change it to a sole tenancy.
- 15 At the second CMD Mr Buchanan confirmed that the letting agents had been able to find the records which he has now lodged. These indicate that Ms Drummond notified the agents in August 2016 that Mr Hyslop had moved out. She asked for the lease to be converted to a sole tenancy. The records indicate that there had been no contact with Mr Hyslop regarding the matter. They also indicate that the request was refused because she could not provide a guarantor. Mr Buchanan also confirmed that the records were updated to reflect the fact that Mr Hyslop had moved out and that Ms Drummond was now the lead tenant. Contrary to the information previously provided, Mr Buchanan advised that the letting agent could not locate a record of a call from Mr Hyslop saying that he had moved out. He confirmed that the applications for recall remain opposed.
- 16 Mr Hyslop said that he had nothing to add to his previous statement. He had no additional information to provide to the Tribunal and would not be able to provide any additional evidence in support of his defence. He confirmed that he had been sent a copy of all the documents relating to the application. He does not dispute that the lease and related notices are correct. He confirmed that this was the first and only lease. At the time he moved out he had mental health issues. He phoned the letting agent about the lease as this seemed the quickest way. He thought that was the matter settled. He did not provide a forwarding address, as he was not asked for one. He is annoyed that the letting agents did not take steps to find him and let him know that the rent was not being paid. He is annoyed that the situation had been ongoing for such a long time before it was brought to his attention. He was not aware of what was required of him to end the lease and liability for rent.

## Rule 30 of the Procedure Rules

- 17 Rule 30 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 provides: -

*“30.—(1) In relation to applications mentioned in Chapters 4, 6, 8, 11 and 12 of Part 3 of these Rules, a party may apply to the First-tier Tribunal to have a decision recalled where the First-tier Tribunal made the decision in absence because that party did not take part in the proceedings, or failed to appear or be represented at a hearing following which the decision was made.*

*(2) An application by a party to have a decision recalled must be made in writing to the First-tier Tribunal and must state why it would be in the interests of justice for the decision to be recalled.*

*(3) An application for recall may not be made unless a copy of the application has been sent to the other parties at the same time.*

*(4) Subject to paragraph (5), an application for recall must be made by a party and received by the First-tier Tribunal within 14 days of the decision.*

*(5) The First-tier Tribunal may, on cause shown, extend the period of 14 days mentioned in paragraph (4).*

*(6) A party may apply for recall in the same proceedings on one occasion only.*

*(7) An application for recall will have the effect of preventing any further action being taken by any other party to enforce the decision for which recall is sought until the application is determined under paragraph (9).*

*(8) A party may oppose recall of a decision by—*

*(a)lodging with the First-tier Tribunal a statement of objection within 10 days of receiving the copy as required under paragraph (3); and*

*(b)sending a copy of the statement to any other party,  
at the same time.*

*(9) After considering the application to recall and any statement of objection, the First-tier Tribunal may—*

*(a)grant the application and recall the decision;*

*(b)refuse the application; or*

*(c)order the parties to appear at a case management discussion where the First-tier Tribunal will consider whether to recall the decision.”*

### Reasons for decision

- 18 Rule 30 of the Procedural Rules states that the Tribunal “may” recall a decision, when requested to do so by a party who failed to appear or be represented when the decision was made. In this case, Mr Hyslop was not

present at the Case Management Discussion on 1 September 2020. Rule 30 further provides that an application for recall must be made within fourteen days of the decision. However, the Tribunal can extend this period on cause shown. The Legal Member determined at the CMD on 15 December 2020 that it would extend the time for submission of the application and would consider the merits of the application.

- 19 The Legal Member considered whether it would be in the interests of justice to grant the application and noted the following; -
- (i) Mr Hyslop does not dispute that the style short assured tenancy document submitted by the Applicant is the same as the lease signed by him and Ms Drummond at the start of the tenancy. Clause 20.3 states that the tenancy may be ended by “the tenant giving the landlord two months notice in writing to terminate the tenancy at its termination date”. The agreement also states, at the beginning of the document, that “where there are two or more persons included in the expression “the tenant” the obligations and conditions incumbent upon and expressed to be made by “the tenant”, including payment of the rent shall be held to bind all such persons jointly and severally.” This appears to establish that a notice to terminate the tenancy by “the tenant” must be given in writing by both joint tenants.
  - (ii) Even if the tenancy agreement lodged had been challenged, and no signed tenancy agreement could be produced, it is not in dispute that Mr Hyslop and Ms Drummond became the tenants of the property in 2015 and resided there together. Mr Hyslop states that he first moved out in 2016, and this appears to be supported by the letting agent’s property log. However, he also stated that he was back and forward to the property until 2018. If the provisions relating to termination of tenancy in the lease cannot be relied upon, the relevant statutory provisions relating to a tenant giving notice to quit would apply. Section 112 of the Rent (Scotland) Act 1984 states that **“No notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of this Act) as a dwellinghouse shall be valid unless it is in writing** and contains such information and may be prescribed and is given not less than four weeks before the date on which it is to take effect.” Furthermore, as the tenancy started in 2015, and was occupied by the Respondents as their principal home, the tenancy would be an assured tenancy in terms of the Housing (Scotland) Act 1988 (“ the 1988 Act”). Section 55(3) of the Act states that “where two or more persons jointly constitute either the landlord or the tenant in relation to a tenancy then, except where otherwise provided, any reference in this Part of the Act to the landlord or to the tenant is a reference to all the persons who jointly constitute the landlord or the tenant, as the case may require.” Therefore, if the parties could not rely on the tenancy contract, a notice to quit would still only be valid if it were in writing and given by or on behalf of both tenants.
- 20 The Legal Member is satisfied that Mr Hyslop is unable to establish that his interest in the tenancy was terminated. To do so he would have had to put his notice to the landlord in writing. He has confirmed that he did not do this



and that the only action taken by him was to telephone the letting agent, say that he had moved out and ask to be removed from the lease. In addition, the notice would have had to be by both tenants. This was not the case. As this is the only defence to the action which he has put forward, and as he has stated categorically that he has no other information to evidence to provide in support of his position, the Legal Member is satisfied that he would have no prospects of success at a hearing or CMD on the application and that his attendance or participation at the CMD on 1 September 2020 would have had no effect. The Legal Member also notes that Mr Hyslop had the opportunity to attend the CMD and chose not to do so.

- 21 Having considered the application for recall, and the information provided by both parties at the CMDs, the Legal Member determines that it is not in the interests of justice that the decision to grant the payment order be recalled. The application for recall is refused.

### **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.**

A black rectangular redaction box covering the signature of the Legal Member.

**Josephine Bonnar, Legal Member**

**10 February 2021**