Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/19/2620

Re: Property at Howe, Harry, Orkney, KW17 2JR ("the Property")

Parties:

Mr Graham Henry, Howe Farm, Harray, Orkney ("the Applicant")

Ms Marie-Clair Rackham-Mann, 23 Junction Road, Kirkwall, KW16 1AG ("the Respondent")

George Clark (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be determined without a Hearing and made an Order for Payment by the Respondent to the Applicant of the sum of £8,459.92.

Background

By application, received by the Tribunal on 21 August 2019, the Applicant sought an Order for Payment against the Respondent in respect of unpaid rent and the cost of electricity supply to the Property. The amount sought in respect of unpaid rent was £5,020 and in respect of electricity supply was £2,747.10.

The application was accompanied by a copy of a Tenancy Agreement between the Parties at a monthly rent of £500. The Agreement also provided that the Respondent would have the use of all services relating to the Property, including electricity and that she would pay the Applicant for her electricity "at a unit rate to be agreed". The Applicant also provided the Tribunal with notes detailing the rent arrears and the electricity arrears which the Applicant contended were due by the Respondent, and with copies of bank statements showing payments made by the Respondent and received by the Applicant.

Subsequent to the application, the Applicant provided the Tribunal with final accounts in respect of the rent and electricity, the Respondent having vacated the Property, and

the amount sought was amended to £5,520 in respect of rent and £2,939.92 in respect of electricity.

At a Case Management Discussion on 22 November 2019, the Tribunal continued consideration of the Case to a further Case Management Discussion and issued a Direction requiring the Applicant to provide any evidence from the electricity supplier for the Property which showed or had a tendency to show that there were arrears on the electricity account and when those arrears occurred and a detailed statement of the outstanding electricity for the Property relating to the Respondent's period of occupation and with reference to the unit rate for electricity applicable at the time. The final rent statement had only been sent to the Tribunal on 20 November 2019 and the Tribunal was not minded to grant an Order for the higher amount without fair notice having been given to the Respondent. The Tribunal also sought to understand the amount sought in respect of electricity and how this was calculated and tied in with the "agreed rate". The Applicant subsequently provided evidence from Scottish Power indicating an increase in the unit price from 12.24p per unit with a Standing Charge of 33.9p per day to 14.24p per unit with a daily service charge of 27p, effective from 1 November 2017.

A Case Management Discussion was held at Kirkwall Community Centre, Broad Street, Kirkwall, on the afternoon of 9 January 2020. The Applicant was present and was represented by Ms Serena Sutherland of D and H Law, Kirkwall. The Respondent was not present or represented. The Applicant's representative asked the Tribunal to grant the application without a Hearing.

The Applicant told the Tribunal that there was a single supply of electricity to the Property and the adjoining farm shed. When the Respondent moved into the Property, the Applicant arranged for an electrician to fit a separate meter in the shed which would record only the electricity used by the Property. At the start of the tenancy, the Parties had agreed a unit rate of 13.5p and the Respondent had made a number of payments between September 2016 and November 2017, so must have agreed with the arrangement. She had not questioned the bills or the rate. The rate had included the standing charges and daily rate as well as the cost of electricity consumed. The Applicant would read the meter on a monthly basis and record the usage on a handwritten ledger, which the Respondent signed. A copy of this handwritten ledger had been provided to the Tribunal. The cost of electricity charged by the provider had increased and the Applicant had sought the agreement of the Respondent to increase the cost to her from 13.5p to 14.5p per unit from November 2017. The Applicant accepted, however, that the Respondent had not agreed to this increase and the calculations shown in the Final Electricity Account provided to the Tribunal were, therefore, based on the lower, agreed, rate of 13.5p per unit. The Applicant confirmed that the Respondent had at all times been able to inspect the meter for herself, had she wished to do so.

The Tribunal decided the application without a Hearing, but, later that day, it became apparent to the Tribunal Member that the Respondent had intended to participate in the Case Management Discussion by means of a telephone conference call. Due to an administrative oversight, this facility had not been afforded to the Respondent on the day, so the Tribunal exercised its right under Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017

Regulations") to review at its own instance the Decision it had made and continued the Case Management Discussion to 10 March 2020. The Parties were advised of the Decision to Review.

On 14 January 2020, the Respondent made written representations, confirming that she had attempted unsuccessfully to join the telephone conference call. She contended that the Applicant had been charging her more for electricity than the Applicant had been charged by Scottish Power and she referred the Tribunal to an electricity bill the period from 24 August 2016 to 30 November 2016, where the Applicant had been charged £56.76. Over the period from 5 September 2016 to 19 September 2016, she had been charged £130.74. She also stated that the meter which was measuring her consumption of electricity did not exclusively serve the Property, but also served an outbuilding used a gym by the Applicant's son and his friends. The meter had not been registered with an electricity company.

The Respondent argued that she had agreed to a unit charge of 13p, not 13.5p. She had stopped paying because, a year after having asked for it, she had not seen the Applicant's actual bills from Scottish Power and it now transpired that they were paying less than she was paying them.

The Respondent stated that she had stopped paying rent because the Applicant had refused to carry out repairs to the Property and that her eviction had been illegal as the Applicant had initiated proceedings without first having completed the repairs. The Respondent cited *"Evictions in Scotland" (Stalker)* as providing authority for the proposition that withholding rent was a remedy open to her. She stated that she had complied with each of Mr Stalker's provisions as set out in the paragraph she had cited and also argued that the Tribunal had erred in law at the very inception of the application by failing to ensure that any outstanding repairs had been completed prior to accepting the application for an Eviction Order. She referred to a "Repairing Standard Enforcement Order" issued by the Environmental Health Team of Orkney Islands Council in December 2018. Her view was that the Applicant's failure to comply with that Order justified her in withholding the rent. The Respondent provided the Tribunal with a copy of an undated letter from Orkney Islands Council which referred to their visit to the Property on 14 December 2018 which had identified a number of defects, two of which should be addressed immediately.

On 29 February 2020, the Respondent made further written representations to the Tribunal, which were identical in content to those she had made on 14 January 2020, apart from a comment about the venue for the Case Management Discussion having been changed after she had indicated her wish to participate by way of telephone conference call.

Case Management Discussion

A Case Management Conference was held by way of a telephone conference call on the morning of 10 March 2020. The Applicant was represented by Ms Sutherland. The Respondent did not participate in the conference call. The Tribunal, conscious of the administrative oversight that had prevented the Respondent from taking part in the Case Management Discussion on 9 January 2020, attempted unsuccessfully to call the Respondent on the only number it had for her and, at 10.31am, e-mailed her to ask if she had encountered a problem in trying to join the conference call. No reply

was received by 11am and the Tribunal then decided to proceed with the Case Management Discussion in absence of the Respondent, as there was no doubting that she had been aware of the date and time, as she had made written submissions on 29 February.

The Applicant's representative reaffirmed the evidence she had given at the Case Management Discussion on 9 January 2020 and told the Tribunal that the Applicant denied that any repairs issues there had been would have justified the Respondent in withholding rent and also denied that the Respondent had ever warned him that she intended to do so. She had simply stopped paying. Ms Sutherland also stated that the Respondent had not provided any evidence that she had kept the unpaid rent in a separate account.

Reasons for Decision

Rule 17 of the 2017 Regulations provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required and that it would determine the application without a Hearing.

The Tribunal considered the Respondent's contention that she as entitled to withhold rent. She had referred to *Stalker (Evictions in Scotland)* in which the author expresses the view that withholding rent is a remedy open to a defender if a landlord is in breach of its repairing obligations. He goes on to say, however, that "there are two important prerequisites to the exercise of this right. First, as the purpose of the exercising this remedy is to prompt the landlord to carry out the repairs, the tenant must warn the landlord that he is about to cease paying the rent, unless the necessary repairs are effected. Secondly, withholding rent entails that the tenant puts it to one side." The Respondent had not provided any evidence to the Tribunal that she had warned the Applicant of her intention to withhold rent pending the Applicant effecting repairs and the Applicant had denied receiving any such intimation. The Respondent had also not provided any evidence that she had set aside the unpaid rent in a separate account. Accordingly, the Tribunal's view was that the Respondent had no legal right to withhold rent.

The Respondent had referred to a "Repairing Standard Enforcement Order" issued by Orkney Islands Council. Only the First-tier Tribunal can issue a Repairing Standard Enforcement Order and the undated letter from Orkney Islands Council was, therefore, irrelevant to the Tribunal's Decision. The Tribunal noted that it had considered on 9 December 2019, an application by the Respondent for a Repairing Standard Enforcement Order in respect of the Property, but had decided not to make an Order (HPC/FTS/RP/19/2087). The Tribunal had not erred in law in accepting the present application for determination.

The Tribunal noted from the Final Rent Account that only one payment (£200) had been made since December 2018 (when £400 was paid). This accounted for £4,300 of the sum sought by way of arrears. The balance was represented by a shortfall in the December 2018 payment (£100), the May 2018 payment which covered April and May but was £220 short, a £100 underpayment in March 2018 and non-payment in September and November 2017. Offset against that was an apparent overpayment of £100 made in June 2018. This produced arrears of £5,520. The Tribunal was satisfied

that the Respondent had now had notice of the increase in the sum sought from £5,020 to £5,520. The Respondent had not produced any evidence to indicate to the Tribunal that she was disputing these figures. Accordingly, the Tribunal held that the sum of £5,520 that had become lawfully due by the Respondent by way of rent was owed by the Respondent to the Applicant.

In relation to the electricity supply and billing, the Tribunal accepted that the Parties had agreed the rate at 13.5p per unit. This was evidenced by the fact that the Respondent had regularly signed the handwritten ledger which recorded the meter readings on a monthly basis. She had not signed it after November 2017, so the Tribunal held that the rate agreed remained at 13.5p per unit. The Respondent had made no payments since November 2017 and the Tribunal was satisfied, on the balance of probabilities, that the amount sought was lawfully due by the Respondent, as it was calculated at the 13.5 per unit rate.

The Tribunal noted the Respondent's claim that she was being charged more for electricity than was being charged by Scottish Power to the Applicant. This had been denied by the Applicant. The Tribunal noted that the bill to which she had referred in her written application had been based on an estimated initial reading, so could not be taken as providing an accurate reflection of the electricity consumed during that period. The Tribunal accepted the evidence of the Applicant that a separate meter had been fitted to allow electricity consumption at the Property to be accurately recorded and that the Respondent had paid the sums calculated from the readings on that meter until the Applicant had sought an increase in the price per unit. At that point, instead of continuing to pay at the originally agreed rate, she had stopped paying altogether. The Tribunal also accepted that it was reasonable, when calculating the unit cost which had been agreed, to add to the cost of the electricity the standing charges and daily rate.

Decision

The Tribunal determined that the application should be determined without a Hearing and made an Order for Payment by the Respondent to the Applicant of the sum of £8,459.92.

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.

George Clark

Legal Member/Chair **Date: 10 March 2020**