



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 Private Housing Tenancies (Scotland) Act (“the 2016 Act”)

Chamber Ref: FTS/HPC/CV/21/1191

Re: Property at Flat 7, 49 Ferniesyde Court, Larbert, FK2 8FW (“the Property”)

Parties:

Ms Karen Simpson, CO Paul Rolfe, 4 The Vennel, Linlithgow, EH49 7EX (“the Applicant”)

Miss Michelle Dawson, Flat 7, 49 Ferniesyde Court, Larbert, FK2 8FW (“the Respondent”)

Tribunal Members:

**Josephine Bonnar (Legal Member)
Ahsan Khan (Ordinary Member)**

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment for the sum of £5250 should be granted against the Respondent.

Background

1. By application dated 18 May 2021, the Applicant seeks an order for payment in relation to unpaid rent. Documents lodged in support of the application include a copy private residential tenancy agreement and rent statement. A copy of the application and supporting documents were served on the Respondent by Sheriff Officer. Both parties were notified that a case management discussion (“CMD”) would take place by video conference on 18 August 2021 at 2pm and that they were required to attend. Prior to the CMD the Respondent made a request for a postponement and submitted medical evidence in support of the request. The Legal Member agreed to the request and parties were advised that a CMD would take place by telephone conference call on 30 September 2021 at 10am. Prior to the CMD the Respondent submitted an updated rent statement. The Respondent lodged written submissions and documents. She also requested a further postponement of the CMD, which was refused. The

CMD took place by telephone conference call on 30 September 2021. The Applicant was represented by Mrs McLaughlin. The Respondent participated.

Summary of Discussion at CMD

2. Ms McLaughlin advised the Legal Member that the Applicant was seeking a payment order for the sum outstanding in terms of the updated rent statement. Ms Dawson confirmed that she had not paid rent for the period shown on the rent statement and was withholding rent for several reasons. She said that she had paid her rent into a separate savings account.
3. From the submissions lodged by the Respondent, and the information provided at the CMD, the Legal Member noted that the Applicant's entitlement to a payment order for the arrears of rent is disputed for the following reasons: -
 - (a) The application is not valid or legal. The Landlord is not a real person, and the tenancy agreement is therefore fraudulent. The Respondent has made numerous requests to be able to deal directly with the Landlord and has been prevented from doing so. She is entitled to direct access and not required to deal with the agents. She was given an address in Africa. She wrote to the address, but the letter was returned as the address was invalid. The Landlord's former address, used when the property was purchased, is also false, as the property is owned by a third party and is located a short distance from the agent's office. The occupant of the property does not know the Landlord. The tenancy started before the application for registration of the property was submitted to the Land Register. The Respondent is not liable for rent and should be re-imbursed for the payments already made because the tenancy is fraudulent and invalid.
 - (b) The rent is not due as the Landlord has failed to carry out repairs to the property. The Respondent does not reside at the property because the ventilation does not work and there is no hot water for the shower or washing machine. In addition, the property is insecure as the front door does not lock and the door entry is left unlocked. The defects were all reported by email at the start of the tenancy but have not been addressed. There is no proper system for regular inspection and maintenance. She has not prevented access for these purposes except for one occasion when someone turned up without prior notice
 - (c) The property is not fit for occupation due to the noise disturbance caused by the ongoing building work at the development. Other occupiers were given the option of delaying their move into the properties by CALA Homes because of the disruption. The Respondent was not made aware of this and has been unable to reside at the property due to the noise. She is unable to sleep there. A play park has been built next to the property which allows people to see into her bedroom. She was misled by the agents about these matters, which is a breach of the Code of Practice. She was also misled by them about the availability of the property in the long term. She was looking for a long-term property but was served with a notice to quit shortly after moving in.
4. Mrs McLaughlin responded to the issues raised by the Respondent as follows;

- (a) The Landlord is a real person who resides in the UK but works in West Africa. The address provided to the Respondent is her work's address in Africa and is genuine. However, because she works away, she has asked the agents to deal with all matters relating to the tenancy. Proof of the Landlord's ownership of the property was exhibited to Landlord Registration and evidence has also been submitted to the Tribunal.
- (b) The washing machine at the property was replaced by CALA Homes following a complaint. The Respondent made a further complaint but later said that she had made a mistake and the issue was a noise from the washing machine in the property above. Washing machines do not require hot water as they heat the water which is supplied to them. There have been no reports about lack of hot water or ventilation. The agents only became aware of the complaint from the Respondent about the door when the Tribunal sent on to them the copy letter which had apparently been sent to the Landlord. They are trying now to get access to the property, but the Respondent will not communicate with them and will not provide access. She has refused recorded delivery letters sent to her at the property. She has failed to provide access for inspections and for an essential boiler service.
- (c) The property is fit to live in. It is a large housing estate and construction was evidently ongoing when the Respondent moved in. A playpark is standard in modern estates and cannot overlook the bedroom because it is on the upper floor of the property. There is no noise disturbance at night.
5. Following the discussion with the parties, the Legal Member determined that the application should proceed to a hearing. The parties confirmed that they were content for the hearing to be conducted by video conference if this could be arranged. The Legal Member issued a direction for the production of additional information and documents by both parties and noted that the issues for the hearing were -
- (i) Is the tenancy agreement a valid and enforceable tenancy and is the Respondent legally obliged to pay rent in terms of the agreement?
- (ii) If the tenancy is valid and enforceable, is the Respondent entitled to an abatement of rent for the relevant period because of a failure by the Landlord to fulfil their contractual obligations in terms of repairs? Is the property uninhabitable because of a failure to carry out repairs?
- (iii) Is the property uninhabitable because of noise disturbance caused by construction at the development and was the Respondent misled into signing the tenancy agreement by the Landlord in relation to noise disturbance and the term of the tenancy?
- (iv) Is there a legal basis for withholding rent and/or an abatement of rent?
6. The parties were given the opportunity to provide dates to be avoided for the hearing. Thereafter they were notified that the hearing would take place by

video conference on 30 November 2021 at 10am. The Respondent made a request for a postponement, stating that she would be out of the country for work, and could not participate. She was asked to provide evidence of this and failed to do so. The request was refused.

7. In response to the Tribunal's direction, the Applicant's representative lodged a bundle of documents. The Respondent did not do so. She sent a number of emails to the Tribunal. Most of these were not crossed over to the Applicant because the Respondent stipulated that the Tribunal did not have her consent to cross them over. She also stated in several of the emails that she would not participate in the hearing. She refused to take part in the test session arranged by the Tribunal to ensure that the video conference arrangements were working. Prior to the hearing, the Applicant's representative lodged some photographs. The Respondent submitted a request for the Tribunal to "strike out" the application. This was refused as there was no legal basis for the Tribunal to do this. At 5pm on 29 November 2021, the Respondent sent emails and submissions to the Tribunal. She again stipulated that these were not to be crossed over to the Applicant but were for the Tribunal only.
8. The hearing took place by video conference on 30 November 2021 at 10am. The Applicant was represented by Ms McLaughlin and Mr Neary of Paul Rolfe Letting. The Respondent did not participate and was not represented. The Tribunal noted that the Respondent had confirmed at the CMD that she was willing to participate in a hearing by video conference, that she had refused to participate in the test arranged and had stated in several emails that she would not be participating. The Tribunal also noted that as the hearing was taking place remotely, a party did not require to be in the country to take part. The Tribunal determined that the hearing would proceed in her absence.

The Hearing

9. Ms McLaughlin advised the Tribunal that she wished to amend the application to the sum of £5250, the sum currently outstanding in terms of the updated rent statement. The Tribunal granted the request and noted that a payment order is sought for this sum.
10. The Tribunal advised Ms McLaughlin and Mr Neary that the photographs submitted had been lodged late in terms of the Tribunal Procedure Rules and would not be considered. They were also advised that submissions had been lodged by the Respondent on 29 November 2021 at 5pm. As these had also been received late, and as the Tribunal had been instructed not to provide the Applicant with copies of the documents, the Tribunal would not consider these during the hearing. The Tribunal then heard evidence from Ms McLaughlin and Mr Neary about the application and the defence put forward by Ms Dawson in the written submissions which had been crossed over and at the CMD.

Identity of the Applicant and validity/legality of the tenancy

11. Ms McLaughlin referred the Tribunal to documents lodged in response to the direction which include a letter from the solicitor who represented the Applicant when she purchased the property. The solicitor confirmed that her identity had been verified. Redacted copies of the disposition in her favour by CALA Homes and the title sheet showing the pending Land Register application were also lodged, together with a screenshot of the Applicant's landlord registration entry on the register of private landlords, and an email from the relevant section of the Local Authority confirming that the Applicant is registered. Ms McLaughlin advised the Tribunal that she has met the Applicant in person on several occasions as she often visits the letting agent office when she is in the country to discuss the property. As she works abroad, Paul Rolfe Letting provide a full management service for the property. Ms McLaughlin also stated that the Respondent did not challenge the identity of the Applicant until the Notice to leave was served. In response to questions from the Tribunal. Ms McLaughlin advised that the Applicant had originally purchased the property as an investment and intended to let it out in the long term. It was her first experience of being a landlord. However, she found being a landlord very stressful, partly because of the tone and content of the emails which were received from the Respondent and decided that she did not want to continue to be a landlord. As a result, she had to sell the property.

Failure to carry out repairs.

12. Ms McLaughlin advised the Tribunal that Ms Dawson sent many emails to the letting agents after she became the tenant of the property, but none of these included any complaints about the ventilation, hot water, or door. She said that she has recently reviewed all the emails received and none include any complaints about these matters. She did not become aware of these alleged issues until shortly before the CMD when the Tribunal sent them a copy of Ms Dawson's letter dated 19 July 2021, addressed to the Applicant. Ms Dawson had submitted this with a letter which appears to be from Royal Mail, and which indicates that it had not been delivered because the address did not exist. Ms Dawson's letter includes a paragraph about the ventilation, hot water, and door. Ms McLaughlin said that she had contacted Ms Dawson after the CMD about getting access to the property to investigate these complaints. An email had bounced back, with a message that the email address was no longer in use. A subsequent email to the same address had been delivered, but no access agreed. In correspondence, particularly a letter dated 19 October 2021, Ms Dawson indicated that she was not willing to provide access. Access had already been an issue. In July 2021 Ms Dawson refused to provide access for the boiler to be serviced. Had she done so, any issues with the hot water could have been addressed by the gas engineer. All contact with Ms Dawson has been by letter or email, she does not contact the letting agents by phone and has not verbally reported any repair issues.

13. Ms McLaughlin referred the Tribunal to an email from Ms Dawson dated 30 April 2021. This email responded to an email sent to her which stated that the

Landlord was selling the property and enclosed the Notice to leave. In this email Ms Dawson challenges the decision to serve the notice to leave and states “I will also reserve my right to withdraw payment in the property due to the conduct of the landlord”.

14. In response to questions from the Tribunal, Ms McLaughlin confirmed that the property is a new build and is still at the stage where any defects will be rectified by the builder, at no cost to the Applicant. She advised that Ms Dawson had been in contact with CALA after moving in regarding one or two matters. In particular, there was an issue with the washing machine, which they replaced. A second complaint about noise from the washing machine was also investigated by CALA. However, CALA were in regular contact with Ms McLaughlin and made her aware of any complaints received so that she could arrange access. They also expressed concern about Ms Dawson’s language and attitude to CALA staff. Had they received complaints about the matters referred to in the July letter, she believes that the letting agent would have been informed. In any event, the Applicant made it clear that she was happy to arrange and pay for any necessary repairs.

**Property uninhabitable due to noise and other issues at the site
Respondent misled about the property being available as a long term let**

15. Ms McLaughlin advised the Tribunal that the Applicant had intended to let the property out long term but had changed her mind very quickly because of the stress of being a landlord. The correspondence from the Respondent was frequently unpleasant and this caused her distress. She decided that it was not for her and that she would sell the property. In response to questions from the Tribunal she confirmed that the Respondent had been selected over other applicants for the property, because it was thought that she was most likely to stay at the property long term. A company had been instructed to carry out the pre tenancy checks on her. They failed to identify an issue with the information she provided about her previous tenancy. She provided a tenancy agreement which is dated 2015, as evidence of her previous tenancy. However, they did not notice that the tenancy appears to be a private residential tenancy, which did not exist until 2017, and contains a COVID 19 clause which would only be included in tenancies which started after March 2020.
16. Ms McLaughlin confirmed that it is not in dispute that the property is located on a building site and that construction is ongoing. Ms Dawson viewed the property before she agreed to rent it and would have been aware of this. She had been pleased that the property was brand new. There was no attempt by the Applicant to disguise the fact that there would be noise from the construction and related traffic. Ms Dawson made complaints to CALA about the noise. Ms McLaughlin advised the Tribunal that the property might not be currently suitable for a tenant with young children, because of the noise and ongoing construction. However, for a single person, it was an acceptable property. Ms Dawson had indicated that its location was convenient for her to travel to work. In response to questions from the Tribunal, Ms McLaughlin says that she believes most of the block of flats are currently occupied. She has driven past

at night, to see whether it is noisy. She found it to be very quiet and noticed lights on in most of the flats.

17. Ms Mclaughlin concluded her evidence by saying that the Respondent only stopped paying rent following service of the Notice to leave. She had not reported the repair issues mentioned at the CMD, despite sending numerous emails about other matters. She has failed to provide access both before and since the CMD, for inspection and investigation of any repair issues which may exist.

Findings in fact

18. The Applicant is the owner and landlord of the property.

19. The Respondent is the tenant of the property in terms of a private residential tenancy agreement.

20. In terms of the tenancy agreement, the Respondent is due to pay rent of £750 per month.

21. The Respondent has incurred rent arrears of £5250

Reasons for Decision

22. The parties are agreed that the Respondent is the tenant of the property in terms of a private residential tenancy agreement dated 22 February 2021. The tenancy started on 26 February 2021 and the contractual rent is £750 per month. At the CMD, the Respondent confirmed that the sum of £3000 (shown on the rent statement) was unpaid. She said that the rent is not due and confirmed that she was withholding payment. The Respondent did not participate in the hearing or provide the Tribunal with any information to suggest that any payments have been made by her since the CMD. The Applicant lodged an updated rent statement in advance of the CMD which states that the sum of £5250 is currently unpaid. The Applicant's representative confirmed to the Tribunal that this sum is currently outstanding. The Tribunal is satisfied that the Respondent has incurred rent arrears of £5250.

23. The Respondent provided three reasons for non-payment of rent. She stated in written representations and at the CMD, that she is entitled to a full abatement of rent for these reasons and the application should be refused. The Respondent did not participate in the hearing so did not give evidence to the Tribunal about the matter. She did not provide the information and documents stipulated in the direction issued by the Tribunal. Written submissions and documents were lodged on the evening before the hearing. However, these were late, in terms of the Tribunal Procedure Rules. The Respondent also stipulated that these were not to be given to the Applicant, although she had been notified in the direction that submissions had to be crossed over or would

not be considered by the Tribunal. The Tribunal noted that the Respondent provided no valid reason for documents relevant to the application being withheld from the Applicant and that it would be contrary to principal of fair notice, and the Tribunal's overriding objectives, to consider documents and submissions which the Applicant had not seen or had the opportunity to consider and investigate.

Identity of the Applicant and validity/legality of the tenancy agreement

24. There are various aspects to the submission; -

- (i) The Applicant is not a real person and the address provided is fake.
- (ii) As a result, the tenancy is not valid or enforceable.
- (iii) The Respondent is entitled to deal directly with the Applicant and is not required to deal with the letting agent.
- (iv) As the property is not yet registered in the Land Register, the Applicant was not the owner of the property when it was let to the Respondent.

25. The Respondent has provided little in the way of documentary evidence in support of her claim. She submitted a letter which purports to be from Royal Mail and which states that they endeavoured to deliver a letter from her to the Applicant at an address in Equatorial Guinea. The letting agent had provided this address. The letter states that Royal Mail carried out a "hard search" in relation to the Applicant and concluded that "there is nobody of that name within a 30-mile radius of the delivery office so no further delivery attempts could be made". This appears to suggest that Royal Mail tried to track the Applicant down in the Falkirk area, when they were unable to deliver the letter to her in Malabo. This seems highly unlikely. Furthermore, the letter does not identify the name of the sender and the telephone number for the Falkirk depot is incorrect. The Tribunal also notes that the Respondent has provided no evidence of sending the letter, such as a post office certificate of posting and tracking number, or a picture of the envelope and letter which were apparently returned to sender. The Tribunal is not persuaded that the letter is genuine. However, even if the letter was sent to the Applicant, the return of that letter would not establish that the Applicant does not exist or that the address is invalid.

26. In response to the direction, the Applicant provided a letter from the solicitor who acted for her in the purchase of the property. The solicitor confirmed that her identity had been verified. As the Tribunal is aware, a solicitor cannot deal with the purchase of a property for a client without checking their identity as they are obliged to comply with Law Society Rules and Money Laundering Regulations. The Applicants have also provided evidence that the Applicant is registered with the Local Authority as a private landlord. The Tribunal also notes that the title information sheet for the property confirms the purchase by the Applicant. The date of the application is 10 March 2021. This does not mean that the Applicant only purchased the property on this date. The date of entry in the disposition is 14 January 2021. That is the date when the property

changed hands. The application for registration is still pending. However, that is not unusual with new build properties. The Tribunal also heard evidence from Ms McLaughlin who confirmed that she has met the Applicant on several occasions and can identify her.

27. The Tribunal is satisfied that the Applicant is the owner and landlord of the property and that the tenancy agreement is a valid and legally enforceable contract. The Tribunal is also satisfied that the Applicant was entitled to appoint a letting agent to manage the property on her behalf. Indeed, a failure to do so, when she works in a remote part of the world, would have been irresponsible in the circumstances.

Failure to carry out repairs

28. The Respondent claims that she reported repair issues at the property but that these were not addressed. As a result, she is not due to pay rent.

29. After the CMD, the Respondent was directed to provide evidence that she had reported the alleged issues with the hot water, ventilation, and door. She did not do so. Prior to the CMD, she lodged a copy of a letter addressed to the Landlord dated 19 July 2021, which includes complaints about these matters. However, she stated that this letter was not delivered (see paragraph 25 above). Furthermore, it was not copied to the letting agent. They only received a copy of it from the Tribunal, shortly prior to the CMD. The Respondent has provided no other evidence that the defects were reported.

30. The Applicant lodged a bundle of correspondence with the Respondent and with CALA Homes. This appears to establish that the Respondent reported several issues at the start of the tenancy – defective washing machine, noise from the washing machine, problems with blinds and curtain poles. None of the emails lodged make any reference to the three matters specified in the letter of 19 July 2021. In an email dated 8 April 2021 to Ms McLaughlin, she queries a request for CALA to get access to fix a threshold bar saying, “I’ve not reported anything”. Ms McLaughlin gave evidence to the Tribunal that the letting agents were unaware of the alleged defects until they received a copy of the letter of 19 July from the Tribunal in late September 2021. Since then, they have tried to get access to investigate the complaints but have been unsuccessful. She referred to a letter from Ms Dawson from 19 October 2021 which states, “Clearly your statement of not accepting any liability means you will not be granted access”. Ms McLaughlin also provided the Tribunal with copies of emails and letters sent to the Respondent about access, including evidence that she did not provide access for the gas boiler service in July 2021.

31. The usual basis of a claim for abatement of rent is a failure by a landlord to fulfil their contractual repairing obligations to the tenant. A landlord is also obliged to comply with the statutory repairing standard, but it is their contractual obligations which are relevant to a claim that rent is not due. To establish that a full abatement of rent is due because of repair issues at the property, the

Respondent requires to show that the defects were reported to the Landlord and that they materially affected the Respondent's use and enjoyment of the property. The Tribunal also requires to be satisfied that the Respondent has allowed the landlord or her agent access to the property to carry out the repairs. The Respondent has failed to establish that the alleged repair issues were reported or indeed that they exist. The letting agent and Applicant did not become aware of the complaints until the end of September 2021. Since then, they have attempted to get access and been denied. The Tribunal is therefore not persuaded that the Respondent is entitled to an abatement of rent because of the condition of the property.

Noise issues/being misled about the availability of the property in the long term

32. It is certainly unsatisfactory that the Respondent was served with a Notice to leave 2 months after she moved into the property when she had been told that the Applicant intended to let it out in the long term. However, the regulation of private residential tenancies is governed by the 2016 Act. This allows a tenant to give 28 days' notice to a landlord, even if they have just moved in. It also allows a landlord to serve notice and seek an eviction order if one of the eviction grounds in schedule 3 to the Act applies. Neither party is entitled to insist on a fixed or minimum term and is not possible for parties to contract out of these provisions. Furthermore, there is no legal basis for withholding rent or seeking abatement of rent where a landlord has exercised their statutory right to serve a notice to leave.
33. From the correspondence lodged by the Applicant, it is evident that the Respondent made complaints about the construction noise. Initially these appear to have been sent to CALA, but there are also emails to the letting agent. However, the Respondent was fully aware of the status of the property and the development when she agreed to rent the property. Furthermore, the noise and associated disruption are matters which are wholly outwith the control of the Applicant. There is no provision in the tenancy agreement (or the 2016 Act) which requires the Applicant to take steps to resolve such an issue. Furthermore, it is hard to see what action she could have taken. The Respondent's remedy is to give notice and vacate the property. As there has been no breach of contract by the Applicant, the Respondent is not entitled to withhold and/or seek an abatement of rent. The purpose of a "rent strike" is to force a landlord to attend to repairs or other contractual obligations of the tenancy. That does not apply. The Respondent is not entitled to an abatement of rent because of noise disturbance at the development.
34. The Tribunal is therefore satisfied that the Respondent is liable for the unpaid rent and not entitled to an abatement of rent for the relevant period.

Decision

35. The Tribunal determines that the Applicant is entitled to a payment order against the respondent in the sum of £5250

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.



Josephine Bonnar, Legal Member

30 November 2021