



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71(1) of the Private Housing (Tenancies) (Scotland) Act 2016**

**Chamber Ref: FTS/HPC/CV/22/3517**

**Re: Property at 44 Arthurstone Terrace 1/1, Dundee, DD4 4QT (“the Property”)**

**Parties:**

**Mr Derek Tyson, Park House, Westfield Road, Cupar, KY15 5DR (“the Applicant”)**

**Mr Paul Saunders, Flat 9, 1 Weavers Yard, Dundee, DD4 6BS (“the Respondent”)**

**Tribunal Members:**

**Graham Harding (Legal Member) and Jane Heppenstall (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Applicant was entitled to an order for payment by the Respondent to the Applicant in the sum of £4205.66.**

**Background**

1. By application dated 20 September 2022 the Applicant’s representatives, Gilson Gray LLP, Solicitors, Edinburgh, applied to the Tribunal for an order for payment in respect of alleged rent arrears arising from the Respondent’s tenancy of the property. The Applicant’s representatives submitted a copy of the tenancy agreement together with a rent statement in support of the application.
2. By Notice of Acceptance dated 25 October 2022 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion (“CMD”) was assigned.

3. Intimation of the CMD was served on the Respondent by Sheriff Officers on 30 November 2022.
4. By correspondence received by the Tribunal administration on 21 December 2022 the Respondent submitted written representations to the Tribunal.
5. By email dated 13 January 2023 the Applicant's representatives submitted an application to increase the sum claimed to £4205.66 together with a further sum of £1100.96 in respect of legal costs.
6. By emails dated 25 and 26 January 2023 the Applicant's representatives submitted further written representations to the Tribunal.
7. A CMD was held by teleconference on 27 January 2023. The Applicant did not attend but was represented by Mr Runciman of the Applicant's representatives. The Respondent attended in person. The Tribunal allowed the sum claimed to be amended in accordance with the application.
8. After hearing from the Applicant's representative and the Respondent and noting that the facts were disputed the Tribunal adjourned the proceedings to a hearing and issued a Note.
9. By emails dated 27 April 2023 the Applicant's representatives submitted further written representations together with an Inventory of Productions, List of Witnesses and an application to amend the sum claimed to £10036.86.
10. By email dated 5 May 2023 the Applicant's representatives submitted further written representations to the Tribunal.
11. Written representations from the Respondent were received by the Tribunal on 16 May 2023 after the hearing had concluded. As these were late the Tribunal did not take them into consideration.

### **The Hearing**

12. A hearing was held by teleconference on 16 May 2023. The Applicant attended in person for some of the time and was represented by Mr Runciman. The Respondent attended in person. For the Applicant the Tribunal heard evidence from the Applicant, Pauline Traill and Ross Murray. For the Respondent the Tribunal heard evidence only from the Respondent himself.
13. Mr Tyson confirmed that he was a chartered surveyor by profession and was the owner of the whole block of flats in which the flat previously occupied by the Respondent was situated. He said that the property had been managed by Wallace and Co but Gilson Gray had taken over as letting agents. Mr Tyson confirmed that the Private Residential tenancy with the Respondent had

commenced on 1 November 2019 at a rent of £380.00 per calendar month with the rent being payable on the first of each month.

14. The Applicant was referred to Clauses 1,8,11, 20,25,27 and 47 of the tenancy agreement and confirmed the position with regard to each clause. He confirmed that the agreement allowed for interest to be charged on unpaid rent at the rate of 8% per annum and for the tenant to meet the landlord's legal costs for pursuing unpaid rent. He also said that the Respondent would have received a copy of the Energy Performance Certificate and Electrical Installation Condition Report.
15. The Applicant went on to say that the Respondent had vacated the property on 5 September 2023. He said that rent had not been paid on time and was referred to Applicant's production 2 showing rent due as at 1 September 2022 amounting to £4205.66. He said that the Respondent would have been contacted by the letting agents on a monthly basis to be advised of the amount of rent outstanding. He said that the Respondent had advised him that he was a taxi driver and during the Covid pandemic there had been no work. He had also said he had been sanctioned by Universal Credit.
16. The Applicant referred to an email dated 18 January 2021 he had sent to the Respondent in which he had tried to direct him to assistance that may be available. The Applicant said that the Respondent had never said he was withholding rent.
17. The Applicant confirmed he had received five invoices (31/1/23 £1430.24, 16/4/20 189.19, 29/10/21 £372.17, 31/10/22 £539.60 and 28/4/23 £3300.00) from Gilson Gray for legal work in respect of the removal of the Respondent from the property and the pursuit of the Respondent for the rent arrears. He said he had paid them all bar the latest one which would be paid on Friday.
18. The Applicant went on to say that the Respondent had accepted the property as being in good order and had never complained about uneven floors. The Applicant also said that as a chartered surveyor he would have been aware if there had been any structural issues at the property. He also said he would have been made aware of any water leaks at the property. The Applicant was referred to Applicant's Production 8, an email from Ross Murray of RPM Joinery confirming he had seen no problems with the floors or walls at the property and that it had been completed to a high standard.
19. The Applicant said that the Respondent had never complained to him that the property had failed to meet the repairing standard. He went on to say that according to the Energy Performance Certificate the property was heated by electric panel radiators. He said the respondent had never complained about a lack of heaters.
20. The Applicant was referred to Applicant's Production 6/1 An EICR dated 25/4/17 and confirmed this would have been supplied to the Respondent. He

went on to say that a new EICR had been instructed but the electrician had been unable to gain access until after the tenancy had ended.

21. The Applicant said that the property had been compliant in the past as regards mains connected smoke alarms and was now up to the current standard.
22. The Applicant was cross-examined by the Respondent and confirmed he had been a tenant in the property for 14-15 years.
23. The Respondent queried why the property did not have a heat alarm in the kitchen and a smoke alarm in the living room. The Applicant said that was why there needed to be an updated EICR to make sure everything was up to scratch. The Respondent referred the Applicant to the Smoke Detectors Clause in the tenancy agreement (page 14) which made reference to the Landlord ensuring there were interlinked mains connected smoke alarms in the main living area and hall and a heat detector in the kitchen. The Applicant said he did not inspect every property and that was why there was an EICR.
24. In response to a further question from the Respondent the Applicant said that he did not know where the panel heaters were located. He confirmed there was no central heating at the property.
25. On being re-examined the Applicant said that as far as he was aware tradesmen had not been granted access to prepare a new EICR while the Respondent remained in the property. He also said that they had not been granted access to fit new smoke alarms. He said that after the tenancy ended a new EICR was prepared.
26. The Applicant was referred to the EPC (Production 5/2) which confirmed that heating was by electric heaters.
27. Pauline Traill confirmed she was a Senior Property Manager at Gilson Gray. She said she managed the block in which the property was located and managed all the Applicant's properties. She said there had been no complaints from the Respondent about the condition of the property. She said he had not complained about any leaks or structural issues or uneven floors or lack of heating.
28. Ms Traill said that the Respondent had initially paid his rent on time but that had changed. She said she had emailed him on 18 June 2020 to say the rent was £380.00 not £365.00. Ms Traill went on to say she had sent a further email on 4 July 2020 as she was unable to carry out an inspection at that time due to Covid requesting the Respondent send photos of the property but he had not responded.
29. Ms Traill confirmed she had once been in the property with the Applicant. She spoke of the property not being particularly clean and that the Applicant thought that it would in time need renovated. Ms Traill said that the Respondent had been sent regular emails so had been aware the rent arrears were going up.

She said there had been no response to any of the emails. She said that at no time had the Respondent said he was withholding rent.

30. Ms Trail said that she had instructed contractors to prepare a new EICR and the Respondent had been copied in to the email (Production 7/1) She said the new EICR was not completed until January 2023 as the Respondent would not provide access. She said she had tried on a number of occasions but had no response. She said that the Respondent had not permitted access for the installation of heat detectors either and went on to say the property was now compliant with the legislation.
31. The Respondent asked Ms Traill if the Landlord had carried out a pre-tenancy check of the property in terms of Clause 18 of the tenancy agreement to see if the property required any work to meet the repairing standard. Ms Traill said she did not know.
32. Ms Traill confirmed the property did not have central heating. She said she did not remember how many smoke alarms had been in the property at the time of her visit in October 2021.
33. Ms Trail said she was unaware that the Respondent and Applicant would talk to each other on the telephone but if he had she thought he would then inform Gilson Gray.
34. Ms Traill said she did not recall seeing a crack in the kitchen wall nor any uneven floor in the kitchen. She also said she did not recall the rent being reduced from £400.00 per month to £380.00 because of the condition of the property.
35. On re-examination Ms Traill said that she had contacted the Respondent numerous times from 2019 to try to get access to fit new smoke alarms.
36. Ross Murray confirmed he was a joiner and had attended at the property on various occasions. He said he had not noticed any uneven floors or any signs of any water leaks or structural issues. He confirmed he had sent an email to that effect to the Applicant on 20 April 2023.
37. In reply to a question from the Respondent Mr Murray confirmed that he recalled the layout of the property and that his firm had removed the old kitchen and fitted the new one.
38. The Respondent advised the Tribunal that there was no central heating at the property. He said that because he had been in receipt of benefits Universal Credit would only pay £365.00 per month and not the full rent of £380.00. He had no income to pay the balance and arrears had accrued. He said it had got to the stage that he was struggling to cope and felt like screaming. He said he had fallen into debt as he did not have money to pay for things.

39. The Respondent went on to say that he would complain about things to the Applicant and assumed that he would take care of them. The Respondent went on to say that he was not the most articulate person and had found it hard to ask the letting agents to deal with problems when he was owing rent.
40. The Respondent went on to say that at no time had he not granted access but that he had changed phones between 2021 and 2022 and he had also been struggling to cope and had stopped looking at and answering emails and may have deleted them.
41. The Respondent explained that the leak from the upstairs property had left staining on the woodchip wallpaper and some of it had come away. He confirmed he had not reported the leak to Gilson Gray as by then he was in debt and he thought they would just ask for money. He said that with regards to the leak from his property into the downstairs property, this had not caused any damage to his property and had just dried out. He said it had been reported to Elaine Wallace who works for the Applicant.
42. With regards to the uneven floor in the kitchen, the Respondent said it was a tripping hazard and had caused the linoleum to crack. He said he had raised the issue verbally with the Applicant.
43. With regards to the crack in the kitchen wall he said it ran from the right-hand side of the window up to the roof and thought it was bound to need some repair. He said there had been a previous survey carried out for a bank and the surveyor had asked him how long it had been there.
44. The Respondent said that he thought the Applicant wished to refurbish the property so that he could obtain a higher rent. He said all the other properties in the block had been refurbished and tenants were paying more.
45. In response to a question from the Tribunal the Respondent said that he had supplied the heaters in the property and that only one had been working and he moved it from room to room. He confirmed there were no wall mounted heaters. He said there was only one smoke alarm in the hall and no heat alarm in the kitchen.
46. In response to a question from Mr Runciman the Respondent disputed that there had been wall mounted heaters in the property.
47. The Respondent accepted that he was due rent but that the property was in disrepair.
48. When asked if he accepted the property had sufficient heating the Respondent said he had provided his own heater and there was no central heating at the property. He confirmed the heater had a thermostat.
49. When asked about the terms of the tenancy agreement the Respondent said that he had signed the agreement without reading it after he had agreed a

reduction in the rent from £400.00 to £380.00 per month. He denied he had received a copy of the EICR or the EPC but agreed with benefit of hindsight that he had accepted the property was in good condition at the commencement of the tenancy.

50. The Respondent also accepted that he was not withholding rent. With regards to the legal costs incurred by the Applicant the Respondent accepted he had signed the lease albeit without reading it and that the invoices reflected the costs incurred by him but did not accept that it was reasonable he should pay when it had cost him less than £10.00 to defend the proceedings there had been no need for the Applicant to instruct a solicitor.
51. The Respondent went on to explain that he had not applied for a hardship loan for taxi drivers as this would have affected his benefits. He went on to accept that he had not responded to emails but that he and the Applicant had spoken on the telephone but nothing had been put in writing about the condition of the property.
52. The Respondent accepted there was no physical evidence submitted by way of reports, text messages, emails, letters or photographs to support his position with regards to the condition of the property.
53. The Respondent suggested it had not been a safe place to stay in and that this had been discussed with the Applicant but agreed that he had not made any application to the Tribunal under the Repairing Standards legislation.
54. The Respondent confirmed further arrears had accrued because he could not afford rent on two properties and he had no money in his bank.
55. The Respondent denied he had refused contractors access and had granted access for insurance and other purposes. He accepted he had made no offer in settlement as he had no money but denied he had made up his complaints about the property.
56. Mr Runciman submitted that the Applicant had established his case. He was a qualified Chartered Surveyor who had employed reputable letting agents. It had been established that the Respondent had accrued rent arrears of £4205.66. The evidence also showed that the Applicant had incurred reasonable costs of £5831.20. The Respondent accepted he had signed the lease. He had been put on notice at the CMD that legal costs would increase but despite this had made no offer to settle. The Applicant's entitlement to the legal costs had been established. With regards to the alleged breaches of the lease it was the Applicant's intention to refurbish the property. The EICR and EPC had both been produced. Neither the Applicant or Ms Traill had any recollection of the Respondent making any complaints about the condition of the property. Heating had been supplied at the property. The smoke alarm fitted complied with the regulations at the time the EICR was prepared. Access had been denied by the Respondent for additional alarms to be fitted. If the property was not in a good and tenable condition at the commencement of the tenancy the Respondent

should not have signed the agreement. The Applicant would have known if there had been any issues with the property and it had been confirmed by Ross Murray that there were none. There was no evidence of water damage and none had been reported to the letting agents. Nothing had been provided to support the Respondent's submissions and his evidence was not credible. The Applicant and his witnesses' evidence were credible. The Respondent's defence of abatement could not succeed. Rent was not being withheld. The Respondent simply could not afford to pay the rent. The Respondent's submissions were entirely lacking in specification and were irrelevant and amounted to nothing more than a tactic amounting to an abuse of process. There had been grants available to the Respondent that he could have applied for but he had not read his emails. The Applicant had tried to assist the Respondent. The Respondent had not made any application to the Tribunal under the repairing standards legislation. The Tribunal should grant an order for payment by the Respondent in the sum of £10036.86.

57. The Respondent submitted that he should not meet the Applicant's legal expenses. He accepted he fell into arrears as a result of a shortfall between the payment made by Universal Credit and the actual rent due. He had been in the property for many years. He could not say what had been said in phone calls with the Applicant. It had been naïve of him to sign a contract without reading it. The Applicant had said he was going to fix things and therefore he had never thought he would need proof of that. As far as granting access, the Applicant's tradespersons were granted access when they wanted it. They weren't willing to fix anything they wanted him out. They wanted him out of the property to do it up. It was only the kitchen floor that was uneven. There was no smoke alarm in the living room and no heat detector in the kitchen. The Notice to Quit served on him stated that the property was below the tolerable standard. With hindsight he should have had documents and photographs. He just wanted to be treated fairly.

### **Findings in Fact and Law**

58. The parties entered into a Private Residential Tenancy that commenced on 1 November 2019 at a rent of £380.00 per calendar month.

59. The Respondent did not read the tenancy agreement before signing it.

60. The Respondent had resided in the property under a Short Assured Tenancy since about 2004.

61. The Respondent vacated the property on 5 September 2022.

62. At the date of leaving the property the Respondent owed rent of £4205.66.

63. At some point there was a minor leak of water into the property from the flat above. It did not cause any significant damage to the property and the Respondent did not report it to the Applicant's letting agents.



64. At some point there was a leak from the Respondent's property into the property below. This did not cause any damage to the Respondent's property.
65. Any unevenness in the floor in the kitchen of the property was minor and was not formally reported to the Applicant's letting agents.
66. Any crack in the kitchen wall is unlikely to have been significant.
67. The Respondent provided his own electric heater in the property.
68. The property was fitted with a single hard wired smoke detector in the hall and no heat detector in the kitchen.
69. The Applicant has incurred legal costs pursuing the Respondent for payment of the rent arrears amounting to £5831.20.
70. The tenancy agreement provides that interest of 8% per annum is payable on any late payment of rent.
71. The tenancy agreement provides that "The tenant shall be liable for any further reasonable costs incurred by the landlord through the tenant's failure to pay rent on time including, but not limited to, any administrative charges or late fees made by the landlord's bank, any expenses incurred by the landlord in pursuing the tenant for payment of said unpaid rent, legal or otherwise." This amounts to a premium in terms of Section 90 of the Rent (Scotland) Act 1984 and is not permitted in terms of Section 20 of the Private Housing (Tenancies) (Scotland) Act 2016. In any event it is not reasonable to recover what amounts to judicial expenses from the Respondent in this way.

### **Reasons for Decision**

72. The Tribunal was satisfied from the written representations and the oral evidence of the parties that a new private residential tenancy agreement was entered into by the parties on 1 November 2019. There was no explanation offered by the parties as to why it was considered necessary for there to be a new agreement given that the Respondent had been a tenant in the property since about 2004 but for whatever reason a new agreement was prepared and signed by the parties. On the whole the Tribunal found both the Applicant and the Respondent to be credible in the evidence they gave. It is quite likely that over a long tenancy the Respondent would have been able to communicate directly with the Applicant and in the past may not have referred everything through the letting agents. The Tribunal also thought it quite likely that the Respondent may not have read the tenancy agreement before signing it. However, that in itself would not make it any less enforceable against him in law.

73. The Tribunal was satisfied from the documentary and oral evidence that the Respondent had allowed rent arrears to accrue amounting to £4205.66 by the time the tenancy ended.
74. Although the Tribunal found the Respondent to be quite credible, as regards the two incidents of water leaks the damage to the property was minimal and would not justify the withholding of rent or any abatement. Similarly, although the Tribunal accepted the Respondent's evidence that the kitchen floor may have been less than perfect again this would not amount so far as can be ascertained to a defect worthy of any abatement of rent.
75. The Applicant is a qualified Chartered Surveyor and if the property was suffering from any serious structural issue the Tribunal is satisfied he would have been aware of it during his inspection of the property in October 2021. On the other hand, the Tribunal had no reason to disbelieve the Respondent when he said that there was a crack in the kitchen wall and that another surveyor had asked him about it some time previously when conducting a survey for a lender. Nevertheless, on balance the Tribunal was satisfied that the issue did not amount to a reason for withholding rent or granting an abatement.
76. The Tribunal was satisfied that as the Respondent fell into ever greater arrears and from the Respondent's own account more debt, he stopped communicating with the letting agents and may have deleted emails from them without reading them. It is therefore quite possible that this may have prevented the Applicant's contractor carrying out a further EICR in February 2022. The Respondent maintained that he had not previously been provided with the 2017 EICR or EPC. As these would have been arranged by the Applicant's previous letting agents it is not possible for the Applicant to be certain copies were sent to the Respondent. Nevertheless, the Tribunal does not consider that even if they were not provided that this would merit any abatement or the withholding of rent as the Respondent did not until the application was raised make any attempt to obtain copies from the Applicant's current letting agents.
77. The legislation requiring interlinked smoke and heat detectors has been in place now for many years and certainly long before 2019. It is therefore not at all clear to the Tribunal why new alarms were not fitted at the property some years ago. It may well be that more recently once the Respondent fell into arrears that gaining access was a problem but the Tribunal was not convinced that had always been the case. Nevertheless, once again although the Applicant ought to have taken further steps at a much earlier stage to ensure that the property complied with the legislation, given that the Respondent did not raise any formal complaints it is not appropriate to allow any abatement of rent.
78. Although the Respondent seemed to be under some misapprehension that the EPC claimed that the property benefited from central heating that was not the case. The EPC said that the property had electric panel heaters. The Respondent said that he had supplied these himself and that by the end of the tenancy only one was working. Although in his written representations the Respondent complained there was no heating in the property. In his own

evidence he did say that the heater he had was sufficient and he moved it from room to room as he needed it. That being the case the Tribunal cannot find that the Respondent is entitled to any abatement and of course once again no complaint about the heating or lack of it was made to the letting agents prior to the application for payment being made.

79. The Tribunal fully accepts that the Applicant has incurred significant legal costs in pursuing the Applicant. However, it is a matter for the Applicant to decide whether or not to instruct solicitors to represent him in these proceedings. Rule 40 of the First-tier Tribunal for Scotland Procedure Regulations 2017 provides that:-

“(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense. (2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made.”

It is well accepted that expenses should only be awarded against a party in Tribunal proceedings in circumstances where a party has been put to unnecessary expense through unreasonable behaviour of another party in the course of conduct of the case (*Ramirez Stich v Strachan* [2019] UT 64). By introducing the legal expenses clause into the tenancy agreement the Applicant is attempting to circumvent rule 40 by making a tenant pay for the pursuit of rent even when he feels he has a legitimate defence by making it a term of the contract. The Tribunal does not consider that this is reasonable. Furthermore Section 90 of the Rent (Scotland) Act 1984 defines a premium as any fine, sum or pecuniary consideration, other than the rent, and includes any service or administration fee or charge. The Tribunal considers that the imposition of legal fees on the Respondent for pursuing the payment of rent in this way therefore amounts to a premium and in terms of section 20 of the Private Housing (Tenancies) (Scotland) Act 2016 is prohibited. Even if the Tribunal was wrong in this regard, it does not consider that it would be reasonable for the Respondent to meet the Applicant's legal costs for making the application to the Tribunal and refuses this part of the application.

80. The Applicant is seeking interest at 8% per annum as is provided in the tenancy agreement. The Tribunal can in terms of Rule 41A include interest when making an order. The Tribunal is not obliged to award interest even when the tenancy agreement makes provision for it. The award of interest is at the Tribunal's discretion. In the circumstances the Tribunal does not consider that any interest should be applied.

## **Decision**

81. Having carefully considered the oral and documentary evidence the Tribunal finds the Applicant entitled to an order for payment by the Respondent in the sum of £4205.66.

## **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.**

**Graham Harding**

**Graham Harding  
Legal Member/Chair**

**17 May 2023  
Date**