



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 70(1) of the Private Housing Tenancies (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/22/0731

Re: Property at 38 Queens Highlands, Aberdeen, AB15 4AR (“the Property”)

Parties:

Ms Shawn Cunningham, 38 Queens Highlands, Aberdeen, AB15 4AR (“the Applicant”)

Ms Nichola Harrison, 17 Waterlands Gardens, Carlisle, ML8 4EX (“the Respondent”)

Tribunal Members:

Ruth O'Hare (Legal Member) and Mark Andrew (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to make an order in the sum of Five hundred and sixty six pounds and eighty four pence (£566.84)

Background

- 1 By application to the Tribunal dated 7 March 2022 the Applicant sought an order seeking refund of her tenancy deposit of £1500, refund of three months rent in the sum of £2700, refund of any unused portion of rent and a waiver of the lease clause requiring 28 days notice to vacate. The Applicant stated that the Respondent had failed to perform due diligence prior to the start of her tenancy and had let the property with a faulty plumbing and heating system. The problems with the system had worsened and the Applicant had been denied the enjoyment of the unit as she required to perform labour on a daily basis to get heat and hot water. In support of the application the Applicant provided a copy of her tenancy agreement, a chronology of events, copy photographs, excerpt text messages with contractors and copy email correspondence between the Applicant and the Respondent's letting agent.

- 2 By Notice of Acceptance of Application dated 30 March 2022 the Legal Member with delegated powers of the Chamber President determined that there were no grounds upon which to reject the application. A Case Management Discussion was assigned for the 8 June 2022. A copy of the application paperwork was served upon the Respondent by Sheriff Officers.
- 3 On 16 May 2022 the Tribunal received written representations from the Respondent's letting agent which were intimated to the Respondent. In summary the Respondent did not accept that the property was let with the faulty plumbing and heating system. All certification was in place at the commencement of the tenancy. When problems arose the Respondent had relied upon advice from contractors. Reports of issues were responded to and contractors sent out where required. After efforts to repair the boiler it was ultimately determined that a new boiler was required and this had been installed timeously. The property had now been relet and the new tenants had reported no issues with the boiler. In support of the representations the Respondent's agent provided copy emails from the contractors confirming the repairs that had been carried out.

The Case Management Discussion

- 4 The Case Management Discussion took place on 8 June 2022. The Applicant was present. The Respondent was represented by Morna Petrano of Morna Petrano Leasing, who was accompanied by her colleague Moira Gove.
- 5 As a point of clarification the Tribunal asked the Applicant to confirm what she was seeking. The Applicant confirmed that she sought refund of three months rent in the sum of £2700, as well as £500 of her deposit. She had been refunded the remaining £1000. The Tribunal then heard from the parties on their respective positions, following which the Tribunal identified the issues to be resolved as:-
 - (i) Whether the heating system was in a reasonable state of repair and proper working order at the commencement of the tenancy, and throughout the tenancy term.
 - (ii) Whether the property had satisfactory provision for heating and hot water at the commencement of the tenancy and throughout the tenancy term
 - (iii) What effect, if any, the condition of the heating system had on the Applicant's enjoyment of the property.
 - (iv) Whether the Applicant is entitled to any abatement of rent as a result of the condition of the heating system.
 - (v) What sums, if any, the Applicant is entitled to for inconvenience as a result of any lack of enjoyment of the property.

- 6 Having identified the above issues to be resolved the Tribunal determined to fix a hearing. A Direction was issued requiring parties to submit any additional documentation or lists of witnesses. The Applicant responded to confirm that she had no additional documents or witnesses to call at this time.
- 7 The first hearing fixed was adjourned due to the absence of the Respondent, as the Tribunal was unable to confirm that she was aware of the Hearing and her requirement to attend. A further hearing was scheduled for 12 October 2022. The Tribunal received an email from the Respondent on 27th September 2022 advising that she wished to revise her application to amend the sum sought. She was seeking a payment of £5,540 which constituted the remainder of her deposit in the sum of £500 and 80% of all rent paid for the property which amounted to £5040.

The Hearing

- 8 The hearing took place on 12 October 2022. The Applicant was in attendance. The Respondent was present and accompanied by Morna Petrano and Moira Gove.
- 9 As a preliminary matter the Tribunal agreed to allow the Applicant's request for amendment of the application to reflect the terms of her email and noted the sum sought was now £5540.
- 10 The Tribunal heard evidence from the parties on the issues to be determined. The following is a summary of the evidence relevant to the Tribunal's determination of the matter and does not constitute a verbatim account of what was said during the course of the hearing.

The Applicant's evidence

- 11 The Applicant gave her evidence with reference to the documents she had lodged with the application. She confirmed that she had moved in the property in August 2021 and at once recognised there were some minor issues with the heating. A heated towel rail was not operating and there were issues with the underfloor heating. On 28 August 2021 a representative of the letting agent named Mike had been in touch to mention that the Applicant would want someone to explain how to use the heating system, specifically referencing some problems with it. The Applicant subsequently had difficulties getting the boiler to fire, she could only do this by flicking a switch two or three times a day. The situation got worse and on 22nd September Mike contacted her to say he would come out and check the radiators, acknowledging that there was a problem. The Applicant was still having to flick the switch on and off to get heating and hot water several times a day. On 21st October 2021 the Applicant had sent an email to the Respondent's agent asking them to schedule a contractor to look at the room heating and related towel racks in both bathrooms, as these had been working sporadically and were now completely dead. Mike got in touch by text that same day and seemed to think these had been looked at when another issue was checked. On 27th October 2021 the Applicant had emailed the Respondent's agent to advise that she had no

heating or hot water. A plumber was sent out that same day and appeared to apply a temporary fix. He had however advised that he required to order parts. The Applicant was still having to flick the switch on and off. On 2 November 2021 the boiler stopped working again and the Applicant contacted the plumber who had come out previously. He had attended the property and shown her how to do a manual procedure to top up the pressure after which the boiler fired up.. The Applicant felt she should not be having to carry out the top up procedure in order to get heating and hot water, it was not her job. Furthermore if she left for the day she would come back to a cold flat. The Applicant had advised the letting agent of this and the plumber's view that there may be a leak in the system. On 10 November 2021 the Applicant had received a text from the plumber confirming that the parts would be received in around four weeks and she would have to continue to top up the pressure meantime.

- 12 The Applicant confirmed that she had continued to top up the pressure. She contacted the plumber again on 4 December 2021 to report another leak pertaining to the kitchen sink and advise that she was still performing the top up procedure several times daily. The plumber had advised that the parts for the boiler should be in that week. The Applicant had subsequently emailed the Respondent's agent to confirm this and to advise that she was still doing the top up procedure several times a day. The Applicant explained that was her existence at the time, she had to regularly check the boiler. She couldn't sit around for any length of time. On 21st December 2021 the Applicant had texted the plumber to ask about the parts. The plumber had advised that the parts were on back order and it would be some time in January. That same day Mike had texted her to ask if the heating had been fixed. Mike seemed surprised that it had not yet been addressed. He knew there were problems. The Applicant assumed that nothing would be done over Christmas. The flat was freezing. It had north facing windows so would be like a refrigerator if the heat didn't work. The parts has finally arrived in January 2022. However the heat still didn't appear to be working in several rooms. The Applicant had texted the plumber to confirm this. He had done something to the boiler however it didn't fix the problem.
- 13 On 15th February 2022 the Applicant had no hot water and the boiler did not appear to be firing despite the top up procedure. The Applicant had emailed the Respondent's agent as the plumber had informed her he had Covid. The Respondent's agent sent out another plumber. He was asking the Applicant questions about the boiler problems, such as whether there was a trick fuse in the consumer unit. These were not questions she should have to answer. This had been a running issue between them with the Applicant having to address issues that were not her responsibility and trying herself to fix the problems that were the responsibility of the landlord. She was not getting any support. She didn't want to do anything to damage the system and had to communicate everything she was doing. She was going back and forth with the plumber to try and fix the problems. On 21st February 2022 the Applicant texted the plumber to advise that the reset light was showing on the boiler, she had put the boiler on reset then tried to operate it a number of times and it appeared that the boiler required to be serviced. She was cold and stressed out. The plumber had been in touch on the 23rd February. He had taken her through the reset

procedure in the manual. In the beginning it had worked but she had to do it seven times a day as a minimum. The Applicant advised that the reset procedure didn't always work, the boiler might fire one time then go hours and hours without firing again regardless of the time period between resets. She had a daily problem with heating and hot water as a result.

- 14 The plumber had finally come back on 25 February 2022 to advise that the boiler required to be replaced. He had said that the property would be uninhabitable during the works as they would need to replace venting, which would involve ceilings being ripped out and ductings replaced. By this point the Applicant's relationship with the Respondent's agent had broken down. The Applicant couldn't stand the situation any more. She had emailed the Respondent's agent to confirm that the boiler required to be replaced immediately. The Applicant had spoken with the Respondent's agent who had offered to assist her with alternative accommodation as the property would be uninhabitable during the works.
- 15 The Applicant confirmed that the boiler had eventually been replaced. It was replaced because it didn't work properly and hadn't done so since the start of the tenancy. The works were messy, construction dust was everywhere and the contractors did not use tarps nor did they clean up at the end of every day. The Applicant was sleeping with dust everywhere.
- 16 The Applicant confirmed that part of her deposit had been retained for cleaning costs. She was seeking repayment of the deducted amount. In response to questions from the Tribunal she stated that she had not contested the deductions as she considered the application to the Tribunal would take precedence. She had therefore allowed the deposit scheme to run its course. The Tribunal asked whether the Applicant had considered moving at any point. She advised that she partly stayed because she had paid six months rent upfront, and partly because she was pursuing a masters degree at university which involved intense studying and attending classes. The thought of moving was overwhelming.

The Respondent's evidence

- 17 The Respondent gave evidence with reference to the documents lodged. She confirmed that neither her previous tenants nor herself when she resided in the property experienced problems with the boiler. The situation with the Applicant had been really unfortunate. It was difficult to get contractors in Aberdeen because of the volume of work and the backlog post-Covid. The Respondent had tried to get contractors that she had used previously but they were unavailable. The Respondent's agent had sent their contractors in and they had tried from the outset to fix the problem through a process of elimination. It had taken some time to get the necessary parts but this was not the fault of the contractor, it was a consequence of supply chain issues. The Respondent confirmed that she had spent over £500 on repairs in the period up to having the new boiler fitted. It had cost her a further £4000 on top of that to replace the boiler. The Respondent wished to apologise for what the Applicant had experienced but she had done everything the correct way in order to get the

boiler fixed and eventually the only solution was to replace it. This had been a significant financial hit because renting was her livelihood. She was unable to work due to illness and this was a massive sum of money. However she was more than happy to pay it and determined to get the work done. She had paid an extra £1000 on top of another quote because it was going to take longer and she wanted the problem resolved. She believed the contractors who had fitted the boiler had supplied electric heaters and had cleaned up after themselves but perhaps not to the standard expected by the Applicant. The flat was left a bit untidy at the end of the tenancy which was why cleaning costs had been deducted from the deposit. The Respondent believed her contractors had responded within efficient timescales, in recognition of the importance of heating and hot water at that time of year. She opined that the boiler had simply just gotten old, which was why it could not be repaired and therefore the only solution was the replace it.

- 18 Ms Gove gave evidence on the Respondent's behalf. She advised that the Respondent's agent had not realised how much communication had taken place between the Applicant and Mike, the agent's handyman. The agent had not been party to any of those messages and Mike was not feeding back each time he spoke to the Respondent. As soon as the agent knew there was an issue a plumber was sent out. He had ordered parts for the boiler but the parts were out of stock and that contributed to the delay. It got to the point where the first plumber could not longer deal with it due to contracting Covid therefore a second plumber was instructed. This contributed to the delays. Ms Gove pointed out that the contractors were not employed by the agent. The second plumber had tried to repair the boiler but had eventually come back and advised that a new boiler was required. A costing had been obtained, and the Respondent had also sought a quote from her own contractor. However she decided to go ahead with the agent's plumber as he could do the job more quickly. Both plumbers had advised that there was always heating and hot water at the property. Ms Gove made reference to the documents that had been submitted by the Applicant. She noted that every time the Applicant contacted the office she received a response. At that stage the agent was keeping the Respondent updated on the situation. Ms Gove explained that they had a process where they would always try and repair where possible, to avoid replacing things where repairs could fix the problem. The timeframe had been lengthy however the agent had properly followed through on all requests and the boiler had ultimately been replaced. It had been working fine since then.
- 19 Ms Gove advised that the Applicant had subsequently left the property without giving notice under the terms of the lease. She had posted the keys through the office door so they knew she had left which was confirmed by an email from her. Ms Gove felt everything had been done to resolve the problems with the boiler. There had however been a succession of bad luck, delays in getting parts and subsequent repairs, it was not the case that the Applicant had received no response.
- 20 Ms Petrano added that at no time had she said to the Applicant that the property would be uninhabitable during the boiler installation. She had checked with colleagues and no one had passed on such a message. The installation of

the boiler took approximately three hours, with contractors returning the following day to carry out redecoration, and heaters were provided. The ceiling was not taken down, it was just a case of putting new venting along the edges of certain walls. The contractors went in between the wall and the ceiling to do this.

- 21 The Applicant was given an opportunity to respond. She advised that in order to replace the venting the ceiling had to be taken down in the maintenance closet. The venting went through the bathroom then down the middle ceiling of the bedroom. It was not behind the wall, it was through the middle of the ceiling. The contractors had to tear out big chunks of the ceiling as a result. It took a number of days to get the ceiling sorted out. Different maintenance contractors were coming in and out and plasterers had laid down tarp on top of existing debris. Dust and debris had been tracked through the property.
- 22 Ms Petrano conceded there would have been dust but she could only go by what the contractors had told her. At no time was the Applicant in the property. The Applicant disputed this, explaining that she had lived there throughout the works. She had been there on the first day and had asked for heaters. The work was going on in the master bedroom where she was staying. This is why she knew it was a dirty job. Ms Gove explained that was not what the contractor had told the agent.
- 23 In response to questions from the Tribunal Ms Gove confirmed that the Respondent had obtained quotes on the 25th February 2022 and the boiler had been replaced on 14th March 2022. A gas safety certificate had been carried out by the Respondent's previous agent on 5 October 2020, and a further certificate carried out on the 5th October 2021 by the agent's plumber. The Respondent had not offered a rent reduction, the Applicant had not asked for this and the Respondent did not volunteer it. The first plumber had confirmed that the Applicant was never without heat and gas until the parts arrived because she was always able to top up the pressure.
- 24 The Applicant was given the opportunity to make further submissions. She disputed the statement that there was always heat and hot water. There could be many hours at a time when there was no heat and hot water, which is why she had to do the top up procedures. If she was out of the property all day she would come home to a freezing cold unit. With regard to her communication with the agent's contractors, the Applicant questioned why the agent was not communicating with them as it was their job to supervise contractors and representatives. With regard to the gas certification the Applicant had not heard anything to say that the heating had been checked. Had someone gone in to the individual rooms and turned the heating on they would have discovered the issue and it could have been fixed much sooner. The Applicant had been denied significant enjoyment of the property and had been subjected to an intense amount of worry and stress.
- 25 The Respondent was given the opportunity to make further submissions. She explained that it had taken time to resolve the issues, investigations into the

problem and obtaining parts was not a quick fix. She understood that it would have been an inconvenience to the Applicant having to use the switch to top up and reset. However it wasn't as if nothing was being done. Work was progressed. It would have been easier if the Applicant had communicated with the agent rather than the contractors directly as more could have been done.

- 26 The Tribunal then turned to the question of abatement of rent and gave parties the opportunity to make submissions on this point. The Applicant advised that heating and hot water was essential, especially in Scotland. She was not getting much value from the property. She couldn't think of anything more important than protection from the elements and from extreme cold. She shouldn't have had to take the action she did in order to get heat. If someone had bothered to check the thermostat they would have realised the problem. The Applicant referred to her request for 80% of the rent paid over the course of the tenancy which she felt was justified. The situation had gone beyond inconvenient, it was a fundamental issue with the property itself which had caused significant discomfort and loss of enjoyment.
- 27 The Respondent stated that nobody would know how long a problem would take to fix. At the beginning of the tenancy, if it was such a big problem, the Applicant should have sought advice from the agent or checked her lease to see if she could move out. It was simply bad luck that it took place over the winter. The Respondent pointed out that heaters had been provided when the boiler was installed to ensure the Applicant could keep warm. The Respondent explained that she was at the mercy of professional tradesmen and their advice. At no time was it mentioned that a new boiler was required, until February 2022. Ms Petrano added that they had done everything they possibly could. The Applicant should have been coming directly to the agent instead of communicating with contractors directly. The contractors had not passed on the detail of the communications so the agent was not aware of most of it.
- 28 The Tribunal heard submissions regarding the deposit. Ms Gove explained that the Respondent had claimed for the rent due for the notice period until the property was relet (£325.48), cleaning costs (£70) and damages to repair a chip to the shower tray and replace lamp shades (£100). The total value of the claim was £495.48. The Applicant advised that she considered it mean spirited for the Respondent to claim more from her than they already had. According to the agent the Respondent had refused to repair the shower tray. There was nothing wrong with the condition of the property, she had left it in a clean condition, therefore the cleaning costs were not justified.

Findings in Fact

- 29 The Applicant and Respondent entered into a tenancy agreement for the property which commenced on 27 August 2021.
- 30 Shortly after moving into the property the Applicant began experiencing problems with the heating and hot water system.

- 31 Between 12 September 2021 and 2 November 2021 the Applicant required to flip the master central heating on/off switch in order to operate the gas boiler.
- 32 Between 2 November 2021 and 15 February 2022 the Applicant required to carry out a manual top up procedure no less than three times a day in order to operate the gas boiler.
- 33 The Applicant had access to hot water for bathing throughout the tenancy from an electric tank water heater.
- 34 The Applicant reported the ongoing issues with the heating and hot water system to the Respondent's agent and the agent's contractors.
- 35 The Respondent's agent instructed contractors upon receiving notification of the issues to investigate and carry out repairs.
- 36 On 18 January 2022 the agent's contractor replaced defective parts in an attempt to repair the boiler.
- 37 Between 15 February 2022 and 13 March 2022 the Applicant required to carry out a reset procedures several times a day in order to operate the gas boiler. The reset procedure was not always effective resulting in the boiler not firing.
- 38 On 25 February 2022 the Respondent was advised that the boiler required replaced.
- 39 The heating and hot water system was not in proper working order throughout the term of the Applicant's tenancy.

Reasons for Decision

- 40 In reaching its decision the Tribunal had regard to the application paperwork, the documents submitted by both parties and the evidence at the hearing. The Tribunal considered it had sufficient information upon which to reach a determination of the application.
- 41 The Tribunal found the Applicant to be logical and truthful in her evidence which was supported by the documents she had lodged. The Tribunal had no reason to doubt the credibility of her evidence. The Tribunal noted she had experienced these issues first hand, whereas the Respondent and her agent had been partly removed from the ongoing issues. Whilst the Respondent had questioned why the Applicant had corresponded with contractors directly, the Tribunal felt that she was entitled to do this having been provided with their details. It was incumbent upon the contractors to feed back any issues that were being reported.
- 42 It was noted however that the majority of the evidence in this case was in fact a matter of agreement. It was not disputed that the heating and hot water had experienced issues throughout the tenancy, albeit the Respondent disputed

that it was faulty from the start. The Tribunal did however find it difficult to believe that the system was in fact in proper working order at the start of the tenancy given how quickly the issues with its operation came to light. The Respondent had not produced any evidence to support her view regarding the condition of the heating and hot water system at the commencement of the tenancy albeit she had confirmed that a valid gas safety certificate was in place. Having accepted the Applicant's evidence regarding the issues with the heating and hot water system, the Tribunal considered it could reasonably assume that the system was not in proper working order for the majority of the tenancy term.

- 43 The Tribunal did however accept having regard to the evidence from both parties that where issues were notified to the Respondent's agent instructions were given timeously to contractors and repairs attempted prior to the decision to replace the boiler having been taken. The Tribunal accepted that the Respondent was entitled to rely upon the advice of her contractors in trying to find a solution, and had taken prompt action upon being advised that a new boiler was required. Notwithstanding the Tribunal considered that it had taken a significant amount of time for the matter to be resolved, particularly given the importance of the efficient operation of the system during the winter months. The Tribunal noted the Respondent's position that the property was never without heating and hot water, supported by the statements from the first plumber. However it was clear that the system was not functioning correctly, as evidenced by the significant efforts the Applicant had to put in to ensure she had heating and hot water. These went beyond a tenant's responsibilities in the view of the Tribunal. The Tribunal also accepted the Applicant's evidence that there were periods when she was unable to reset the boiler which would have exacerbated the situation and left her in a position without these essential elements of any property during the winter period. In that respect the system was not in proper working order for the majority of the tenancy term, which is further evidenced by the fact that the boiler was eventually replaced.
- 44 With regard to the installation of the boiler the Tribunal preferred the Applicant's evidence on the basis that she would have experienced this first hand. The Tribunal therefore accepted that the works took longer than one day and that the living conditions were disrupted during that period.
- 45 Accordingly with regard to the claim for rent abatement the Tribunal was satisfied that for the period between 16 September 2021 and 17 March 2022 the property did not meet the repairing standard and therefore the Respondent was in breach of her common law obligation to keep the subjects in a tenable and habitable condition throughout the tenancy. The Tribunal considered the escalation of the issues in considering what figure of abatement would be appropriate. The Tribunal did not agree with the Applicant that a figure of 80% was reasonable, on the basis that the heating and hot water system did still mostly function during the tenancy albeit with a level of effort on her part to operate the system. For the period 16 September 2021 to 1 November 2021 the Tribunal concluded that a figure of 5% would be appropriate during which time the system could be operated by the manual switch. For the period 2 November 2021 to 14 February 2022 the Tribunal concluded that a figure of 10% would be appropriate during which time the

Applicant was having to perform a more extensive manual top up procedure to address the lost pressure in the system. Finally for the period 15 February 2022 to 13 March 2022 the Tribunal considered that a figure of 20% would be appropriate having regard to the reset procedure that was required which wasn't always effective. These figures reflect the extent to which the Applicant's enjoyment of the property was affected due to the problems with the boiler. The Tribunal further concluded that the Applicant was entitled to a refund for rent paid in respect of the 14th and 15th March 2022 during which time her enjoyment of the property was impacted by the installation of the boiler and the disruption that work had caused. The calculation of the abatement due is therefore as follows:-

Monthly rent	£900	
Daily rent	$£900 \times 12 / 365 = £29.60$	
Period 16.9.21-1.11.21	$5\% \text{ of } £29.60 \times 47 =$	£69.56
Period 2.11.21-14.2.22	$10\% \text{ of } £29.60 \times 94 =$	£278.24
Period 15.2.22 – 13.3.22	$20\% \text{ of } £29.60 \times 27 =$	£159.84
Period 14.3.22-15.3.22	$£29.60 \times 2 =$	£59.20
	TOTAL	£566.84

- 46 With regard to the deposit the Tribunal considered that it was unable to make any award in terms of the sum sought by the Applicant. The correct route for determination of the dispute would have been via the dispute resolution mechanism offered by the tenancy deposit scheme. It is not for the Tribunal to make a ruling as to whether the outcome of said dispute resolution is correct or not. The appropriate course of action would have been for the Applicant to avail herself of the opportunity to challenge any deductions requested by the Respondent.
- 47 Accordingly the Tribunal determined to make an order in the sum of £566.84. The decision of the Tribunal was unanimous.

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.

Ruth O'Hare

12 December 2022

Legal Member/Chair

Date