



**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 26 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in relation to an application for eviction/ possession of a Rented Property in terms of Rule 109 of the Procedure Rules.**

**Chamber Ref: FTS/HPC/EV/22/0335**

**Re: 16A Ernest Street, Arbroath, DD11 1UB ("the Property")**

**Parties:**

**Lorraine Lee residing at Pine Ridge, Inverurie, AB51 5JL ("the Landlord and Applicant")**

**Rentlocally Tayside & Fife, Lindsay Court, Gemini Crescent, Dundee, DD2 1SW ('the Applicant's Representative')**

**Dawn Swankie, 16A Ernest Street, Arbroath, DD11 1UB ("the Tenant and Respondent")**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal")**

**Tribunal Members: Jacqui Taylor (Legal Member) and Eileen Shand (Ordinary Member)**

## **1. Background**

1.1. The Applicant submitted an application to the Tribunal for eviction/ possession of the Rented Property under section 51(1) of the Private Housing Tenancies (Scotland) Act 2016, in terms of Rule 109 of the Procedure Rules.

1.2 The application was dated 4<sup>th</sup> February 2022. The application stated that the ground for eviction was as follows:

Ground 12: Tenant is in rent arrears over three consecutive months. The rent arrears situation has worsened with tenant now almost five times rent arrears having reached £1940 arrears.

1.3 Documents lodged with the Tribunal were:-

- The Tenancy Agreement dated 30<sup>th</sup> January 2020 and 5<sup>th</sup> February 2020. The commencement date of the tenancy was 5<sup>th</sup> February 2020.

- A rent statement for the period 3<sup>rd</sup> February 2020 to 5<sup>th</sup> January 2022.
- Notice to Leave dated 31<sup>st</sup> March 2021 advising the Tenant that an application will not be submitted to the Tribunal for an eviction before 3<sup>rd</sup> October 2021.
- Section 11 Notice addressed to Angus Council.

## **2. Written Representations**

The Respondent had not submitted any written representations:

## **3. Case Management Discussion**

This case called for a conference call Case management Discussion (CMD) at 10.00 on 5<sup>th</sup> May 2022.

Paul Goodman, Director of Rentlocally, the Applicant's representative, attended the CMD.

The Respondent and her partner Allan Duell attended the CMD.

### **3.1 The Tribunal identified with the parties the following agreed facts, which were accepted by the Tribunal:**

3.3.1. The Respondent is Tenant of the Property in terms of the lease between the parties. The start date of the Tenancy was 5<sup>th</sup> February 2020.

3.1.2. The lease is a Private Residential Tenancy in terms of the Private Housing Tenancies (Scotland) Act 2016 ('The 2016 Act').

3.1.3. The Applicant, Lorraine Lee, is Landlord of the Property. The Tribunal had a copy of the Applicants' title deeds being Land Certificate ANG7664. Section B of the Land Certificate confirmed that the Applicant purchased the Property on 3<sup>rd</sup> August 2017.

3.1.4 The rent detailed in the tenancy agreement was £390 per month payable in advance.

3.1.5 The Notice to Leave was dated 31<sup>st</sup> March 2021 and it was sent to the Respondent by email on 31<sup>st</sup> March 2021.

3.1.6 Clause 4 of the lease agreed that all communications in relation to the lease could be served on the other party by email.

3.1.7 The Notice to Leave stated that the Respondent was in rent arrears over three consecutive months, which is Ground 12 of Schedule 3 of the Private Housing (Tenancies) Scotland Act 2016.

3.1.8 The Rent Statement was correct. The relevant section of the rent statement was in the following terms:

Date	Rent Due	Rent Paid	Payment Period	Arrears
5 <sup>th</sup> Jan 2021	£390	Nil	5 <sup>th</sup> Jan to 4 <sup>th</sup> Feb	£390
5 <sup>th</sup> Feb 2021	£390	Nil	5 <sup>th</sup> Feb to 4 <sup>th</sup> March	£780
5 <sup>th</sup> March 2021	£390	nil	5 <sup>th</sup> March to 4 <sup>th</sup> April	£1170
25 <sup>th</sup> March 2021		£200		£970
5 <sup>th</sup> April 2021	£390	Nil	5 <sup>th</sup> April to 4 <sup>th</sup> May	£1360
6 <sup>th</sup> April 2021		£390		£970
19 <sup>th</sup> April 2021		£200		£770
4 <sup>th</sup> May 2021		£390		£380
5 <sup>th</sup> May 2021	£390		5 <sup>th</sup> May to 4 <sup>th</sup> June	£770
5 <sup>th</sup> June 2021	£390		5 <sup>th</sup> June to 4 <sup>th</sup> July	£1160
5 <sup>th</sup> July 2021		£390		£770
5 <sup>th</sup> July 2021	£390		5 <sup>th</sup> July to 4 <sup>th</sup> August	£1160
5 <sup>th</sup> August 2021	£390		5 <sup>th</sup> August to 4 <sup>th</sup> September	£1550
5 <sup>th</sup> September 2021	£390		5 <sup>th</sup> September to 4 <sup>th</sup> October	£1940
4 <sup>th</sup> October 2021		£390		£1550

5 <sup>th</sup> October 2021	£390		5 <sup>th</sup> October to 6 <sup>th</sup> November	£1940
4 <sup>th</sup> November 2021		£390		£1550
5 <sup>th</sup> November 2021	£390		5 <sup>th</sup> November to 6 <sup>th</sup> December	£1940
5 <sup>th</sup> December 2021	£390		5 <sup>th</sup> December to 4 <sup>th</sup> January 2022	£2330
6 <sup>th</sup> December 2021		£390		£1940
4 <sup>th</sup> January 2022		£390		£1550
5 <sup>th</sup> January 2022	£390		5 <sup>th</sup> January to 4 <sup>th</sup> February 2022	£1940

### **3.2 Oral Evidence by Paul Goodman at the CMD.**

Paul Goodman advised:-

3.2.1 The rent arrears amounted to £2330 as at 4<sup>th</sup> May 2022. He confirmed that two payments of £390 had been made by the Respondent on 4<sup>th</sup> February 2022 and 4<sup>th</sup> March 2022. He had not provided the Tribunal with an updated rent statement as his business partner was ill and he was under pressure.

3.2.2 He had received confirmation from Angus Council that the Respondent's hardship application had been rejected on 29<sup>th</sup> April 2022.

3.2.3 A damp specialist had inspected the Property in February 2021 and their report will be produced to the Tribunal. The report stated that the Property was affected by condensation.

3.2.4 His company had sent the Respondent Pre action letters. These were referred to on the rent report. Full copies will be provided as Mrs Taylor advised that the details were not shown on the rent report with the Tribunal's papers.

3.2.5 The Notes to the rent report show that the Respondent called the Letting Agents in September and October to say that she was having difficulty paying the rent. Mrs Taylor explained that the notes to the rent report are also not shown on the rent report with the Tribunal's papers.

3.2.6 The Respondent had indicated she would pay £25 per month towards the arrears but nothing had materialised.

### **3.3 Oral Evidence by Dawn Swankie at the CMD.**

Dawn Swankie advised:

3.3.1 She acknowledged that she is due to pay rent arrears of £1940 and explained that the arrears arose during the covid pandemic.

3.3.2 She was confused by the outstanding rent figures quoted by Paul Goodman as she had recommenced making monthly rent payments on 6<sup>th</sup> December 2021 and she had set up a standing order. She believed that a monthly rent payment had been made in April. She will check her bank statements and provide the Tribunal with a copy.

3.3.3 She had applied to Angus Council for a hardship grant and was still waiting to hear from them. She had sent emails to the Letting Agent keeping them up to date and can provide copies.

3.3.4 She is concerned about the state of repair of the Property. As far as she is concerned the Property is affected by dampness. She has advised the Landlord of the problem but she has not lodged a repairing standard application with the Tribunal. She has not written to the Landlord or the Letting Agent advising them that she was withholding rent due to the state of repair of the Property.

3.3.5 She had sent emails to the Letting Agent regarding the arrears and would provide the Tribunal with copies.

3.3.6 She confirmed that the arrears will be paid back to the Landlord.

3.3.7 Her partner had been in hospital and her universal credit payments had been affected. She would send the Tribunal a copy of her Universal Journal in a format such that it is clear to the Tribunal what the current position is in relation to her Universal Credit application. She was not in receipt of any other benefits.

#### 3.4 Outcome of the CMD

3.4.1 The Tribunal determined that the application should proceed to a hearing. The matter of whether it is reasonable for the Tribunal to grant the Order for Possession would be considered at the hearing.

3.4.2 The Tribunal issued a Direction to the parties to produce the following documents to the Tribunal:

Documents the Applicant must produce to the Tribunal:

- (i) An up to date rent statement including the notes referred to during the CMD.
- (ii) Copies of any preaction letters sent to the Respondent.
- (iii) A copy of the email the Letting agent had received from Angus Council intimating that the hardship application had been declined.
- (iv) A copy of the damp specialist report the Applicant had obtained in February 2021 referred to during the CMD.

Documents the Respondent must produce to the Tribunal:

- (i) A copy of her bank statements evidencing rent payments made since 5<sup>th</sup> January 2022.
- (ii) A copy of her hardship application and any response received from Angus Council.
- (iii) Emails the Respondent has sent the Letting agents and /or the Landlord regarding the hardship application, arrears and condition of repair of the Property.
- (iv) A copy of her Universal Credit Journal clearly showing details of the award of Universal Credit and any changes to this during the period of the tenancy.
- (v) Documentary evidence of any other applications, including for state benefits applied for and the outcome of such applications made by her in respect of the rent arrears.

**4. Documents lodged by the parties in response to the Direction.**

**4.1.** The Applicant lodged the following documents:

4.1.1 Report by Martin Property Care Limited dated 24<sup>th</sup> February 2021 which stated that there is condensation in the property due to insufficient heating and ventilation in the property to manage the moisture vapour produced on a daily basis through showering, cooking, boiling kettle and even breathing.

4.1.2 Rent Ledger for the period 3<sup>rd</sup> February 2020 to 5<sup>th</sup> May 2022 which disclosed rent arrears of £2330 as at 5<sup>th</sup> May 2022.

Date	Rent Due	Rent Paid	Payment Period	Arrears
4 <sup>th</sup> January 2022		£390		£1550
5 <sup>th</sup> January 2022	£390		5 <sup>th</sup> January to 4 <sup>th</sup> February 2022	£1940
4 <sup>th</sup> February 2022		£390		£1550
5 <sup>th</sup> February 2022	£390		5 <sup>th</sup> February to 4 <sup>th</sup> March 2022	£1940
4 <sup>th</sup> March 2022		£390		£1550
5 <sup>th</sup> March 2022	£390		5 <sup>th</sup> March 2022 to 4 <sup>th</sup> April 2022	£1940
5 <sup>th</sup> April 2022	£390		5 <sup>th</sup> April 2022 to 4 <sup>th</sup> March 2022	£2330
5 <sup>th</sup> May 2022		£390		£1940
5 <sup>th</sup> May 2022	£390			£2330

4.1.3 Email from Angus Council to the letting agent dated 29<sup>th</sup> April 2022 advising that the application to the hardship fund had been unsuccessful.

4.1.4 Copies of pre action letters from the letting agent to the Respondent dated 11<sup>th</sup> November 2020, 11<sup>th</sup> January 2021, 15<sup>th</sup> January 2021, 26<sup>th</sup> January 2021, 16<sup>th</sup> February 2021, 4<sup>th</sup> February 2021, 25<sup>th</sup> February 2021, 8<sup>th</sup> March 2021.

4.1.5 Rent Ledger for the period 3rd February 2020 to 5<sup>th</sup> July 2022, which disclosed rent arrears of £2720 as at 5<sup>th</sup> July 2022.

4.2 The Respondent lodged the following documents:

4.2.1 Photographs showing black mould in the property.

4.2.1 An email from the Respondent with copy standing order details showing that payments of £390 were made to the letting agents on 4<sup>th</sup> January 2022, 4<sup>th</sup> February 2022, 4<sup>th</sup> March 2022, 5<sup>th</sup> May 2022, 6<sup>th</sup> June 2022.

4.2.2 Text message dated 31<sup>st</sup> December 2020 from the Respondent to the Landlord advising that she is experiencing issues with damp in the property and response from the Landlord stating that there is no issue with dampness in the property as the problem is condensation caused by lack of ventilation

## **5. Hearing**

This case called for a conference call Hearing at 10.00 on 21st July 2022.

Paul Goodman, Director of Rentlocally, the Applicant's representative, attended the Hearing.

The Respondent and her partner Allan Duell attended the CMD.

5.1 The parties confirmed that they had received copies of the productions that had been lodged in response to the Direction and they agreed that the content of the rent statements were correct.

Ms Swankie acknowledged that had had not lodged her Universal Credit Journal or evidence of any other state benefit applications with the Tribunal. She confirmed that her Universal Credit payments are up to date and the housing element is paid to her. She also confirmed that as far as she is aware she receives all the benefits she is entitled to and there are no outstanding applications.

5.2 In relation to the requirements of Ground 12 of the Private Housing (Tenancies) (Scotland) Act 2016 the parties advised as follows:

At the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits ( being the date of the CMD 5<sup>th</sup> May 2022) the tenant is in arrears of rent by an amount equal to or greater than the amount which would be payable as one month's rent under the tenancy on that date.

Both Ms Swankie and Mr Goodman agreed that the rent arrears on 5<sup>th</sup> May 2022 amounted to £2330 which is in excess of one months rent of £390.

At the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits (being the date of the CMD 5<sup>th</sup> May 2022) the tenant has been in arrears of rent (by any amount) for a continuous period, up to and including that day, of three or more consecutive months.

Both Ms Swankie and Mr Goodman agreed that on 5<sup>th</sup> May 2022 Ms Swankie had been in arrears of rent for three consecutive months.

The tenant being in arrears of rent over the period of three or more consecutive months is not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.

Mr Goodman made no comment.

Ms Swankie confirmed that her Universal Credit payments are up to date as far as she is aware she receives all the benefits she is entitled to and there are no outstanding applications.

Requirement that the Tribunal are satisfied that it is reasonable to issue an eviction order.

Mr Goodman explained that the arrears are now £2720. In connection with the dampness/ condensation referred to by the Tenant, he advised that the Landlord had obtained the specialist report from Martin Property Care Limited dated 24<sup>th</sup> February 2021, which had been produced to the Tribunal. The report stated that the property suffered from condensation. He clarified that the company Martin Property Care Limited are an independent company and there is no connection between that company, the Landlord or the letting agency. He also explained that the Landlord had installed a wall heater in the lounge of the property in May 2022. He also clarified that the required preaction letters had been sent to the Tenant and copies have been provided to the Tribunal. In the circumstances he stated that it is reasonable for the Tribunal to grant the eviction order.

Ms Swankie advised the Tribunal that it is not reasonable for the Tribunal to grant the eviction order. There is dampness in the property. She suspected that the dampness was rising damp. The property is a first floor flat and other flats in the building suffer from dampness. She has not obtained a separate report confirming that the property is affected by dampness. She questioned if there was a relationship between Martin Property Care Limited and the Landlord or letting agents. She was told by the Landlord and the letting agent to open the windows and keep the heating on. She always keeps the windows open. Due to the dampness the health of herself and her partner has suffered. She has incurred expenses due to the fact that some of her furniture, clothing and bedding has been affected by the dampness. The cost of replacing or cleaning the damaged items will exceed the amount of the rent arrears. She confirmed that she has not lodged a repairing standard application with the Tribunal and she has not lodged an application for damages with the Tribunal.



She confirmed that she had sent a text message to the Landlord advising her of the dampness on 31<sup>st</sup> December 2020 and a copy of the text message had been produced to the Tribunal.

She confirmed that she has not retained the amount of the rent arrears in her bank account.

She also confirmed that she resides in the property with her partner and there are no other residents of the property.

## **6. Decision**

### **6.1. Requirements of Section 109 of the Procedure Rules.**

**6.1.1** The Tribunal confirmed that the application correctly detailed the requirements of section 109(a) of the Procedure Rules namely:-

- (i) the name, address and registration number of the Landlord.
- (ii) the name and address of the Landlord's representative.
- (iii) the name and address of the Tenant.
- (iv) the ground of eviction. The ground stated in the application is that the tenant is in rent arrears over three consecutive months.

The Tribunal accepted that this is Ground 12 of Schedule 3 of the 2016 Act.

**6.1.2** The Tribunal confirmed that the application complied with the requirements of Section 109(b) of the Procedure Rules:

(i) evidence showing that the eviction ground or grounds had been met.

The rent statement for the period 3<sup>rd</sup> February 2020 to 5<sup>th</sup> July 2022 had been provided.

(ii) a copy of the notice to leave given to the Tenant as required by section 52(3) of the 2016 Act.

The Tribunal confirmed that the Notice to Leave was in correct form as set out in Schedule 5 of the Private Residential Tenancies Notices and Forms (Scotland) Regulations 2017.

The Notice to Leave was dated 31<sup>st</sup> March 2021 and advised the Tenant that the Applicant intends to apply to the Tribunal for an eviction order in respect of the property on the basis of Ground 12 (The Tenant is in rent arrears over three consecutive months). It also advised that an application would not be submitted to the Tribunal for an eviction order before 3<sup>rd</sup> October 2021.

The Tenancy commenced on 5<sup>th</sup> February 2020. As at 31<sup>st</sup> March 2021 (the date of the Notice to Leave) the Tenant had resided in the property for more than six months. As the Notice to Leave had been served on the Respondent after 7<sup>th</sup> April 2020 the provisions of The Coronavirus Act 2020 apply. Therefore, six months notice is required.

The Notice to Leave was sent to the Respondent by email on 31<sup>st</sup> March 2021 and consequently the Respondent had been given the required period of six months notice.

(iii) a copy of the notice given to the local authority as required by Section 56(1) of the 2016 Act.

The Tribunal confirmed that a copy of the required notice had been provided.

**6.1.3** The Tribunal confirmed that the application form had been correctly signed and dated by the Landlords' representatives as required by Section 109(c) of the Procedure Rules.

6.2 The Tribunal made the following findings in fact:

6.2.1 The rent arrears as at 5<sup>th</sup> February 2022 was £1940.

6.2.2 The rent arrears as at 5<sup>th</sup> March 2022 was £1940

6.2.3 The rent arrears as at 5<sup>th</sup> April 2022 was £2330.

6.2.4 The rent arrears as at the date of the CMD on 5<sup>th</sup> May 2022 amounted to £2330.

6.2.5 The rent arrears was not due to the delay or failure in the payment of a benefit.

6.2.6 On the balance of probabilities, the property suffered from condensation as opposed to dampness. The Appellant had produced the specialist report by Martin Property Care Limited dated 24<sup>th</sup> February 2021 which stated that there is condensation in the property due to insufficient heating and ventilation in the property to manage the moisture vapour produced on a daily basis through showering, cooking, boiling kettle and even breathing, which was accepted by the Tribunal. The Respondent did not provide any evidence or specialist report confirming her belief that the property suffered from dampness.

6.2.7 The Landlord's representatives had sent the Respondent pre action letters dated 11<sup>th</sup> November 2020, 11<sup>th</sup> January 2021, 15<sup>th</sup> January 2021, 26<sup>th</sup> January 2021, 4<sup>th</sup> February 2021, 16<sup>th</sup> February 2021, 25<sup>th</sup> February 2021 and 8<sup>th</sup> March 2021.

**6.3 In relation to the requirements of Ground 12 of the Private Housing (Tenancies) (Scotland) Act 2016 the Tribunal found as follows:**

6.3.1 Section 2(a)(i) At the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits ( being the date of the CMD 5<sup>th</sup> May 2022) the Tenant is in arrears of rent by an amount equal to or greater than the amount which would be payable as one month's rent under the tenancy on that date.

The Tribunal determined that as the rent arrears on 5<sup>th</sup> May 2022 amounted to £2330, which is in excess of one months rent of £390, the requirements of section 2(a)(i) of Ground 12 had been met.

6.3.2 At the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits (being the date of the CMD 5<sup>th</sup> May 2022) the tenant has been in arrears of rent (by any amount) for a continuous period, up to and including that day, of three or more consecutive months.

The Tribunal determined that as at 5<sup>th</sup> May 2022 the Respondent had been in arrears of rent for three consecutive months, the requirements of section 2(a)(ii) of Ground 12 had been met.

6.3.3 The tenant being in arrears of rent over the period of three or more consecutive months is not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.

The Tribunal determined that the rent arrears was not due to a delay or failure in payment of a relevant benefit to the Tenant and consequently the requirements of section 2(b) of Ground 12 had been met.

**6.3.4 The Tribunal's Decision as to whether it is reasonable to grant the application for eviction.**

The Tribunal did not accept the Respondent's position that it was unreasonable to grant the eviction order due to the dampness in the property which entitled her to withhold the rent.

Adrian Stalker: Evictions in Scotland (second edition) states: 'Withholding rent is a remedy open to a defender if a landlord is in breach of its obligations. The remedy of Retention has two purposes. It may be used as a means of compelling the Landlord to fulfill its obligations, and it also provides the tenant with security for a claim for damages. If the retention is only for the first purpose then, in theory, the tenant would pay the whole amount of the rent retained as soon as the obligation was fulfilled.... Because the tenant's retention of rent is an equitable remedy, which is controlled by the court, it has to be satisfied that the remedy is being exercised in good faith... It is suggested that, in order to demonstrate good faith, it would be advisable for the tenant to warn the landlord that he is about to cease paying rent, unless the necessary repairs are effected. Furthermore, 'retention' entails that the tenant puts the rent to one side. Once the repairs have been effected, his obligation to pay rent, including the withheld rent revive, subject to any claim he may have for an abatement over the period during which the repairs were delayed, or damages. If he cannot demonstrate that he has kept the rent for this purpose, the court may form the view that he is not acting in good faith.'

The Tribunal find that the right to withhold rent does not apply to this application for the following reasons:

6.3.4.1 The Tribunal has found that on the balance of probabilities the property suffered from condensation which was caused by the Tenant's occupation of the property and was not caused by a defect of the property for which the Landlord would be liable in terms of the repairing standard under the Housing (Scotland) Act 2006.

6.3.4.2 The Tenant did not warn the Landlord that she was about to cease paying the rent unless the necessary repairs are effected. The Tribunal acknowledged that the Tenant had advised the landlord by text message on 31<sup>st</sup> December 2020 that there was dampness in the property but that text message did not state that she was therefore retaining rent until the dampness was remedied.

6.3.4.3 The Tenant had not put the rent aside. The Tenant has confirmed that she had not retained the rent.

Consequently, as the Tribunal have found that the Tenant was not entitled to withhold the rent and also due to the amount of the rent arrears the Tribunal were satisfied that

it was reasonable to grant the eviction order and consequently the requirements of section 3(b) of Ground 12 had been met.

6.4 The Tribunal determine that the order for possession of the Property be granted as Ground 12 of Schedule 3 of the 2016 Act has been met.

## **7. 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.**

# J Taylor

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Legal Member

21<sup>st</sup> July 2022