



DECISION OF

Sheriff George Jamieson

ON AN APPLICATION FOR PERMISSION TO APPEAL RECONSIDERATION
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)
IN THE CASE OF

Ms Katherine Chen Zhao, 10 Murdochs Wynd, Elgin, IV30 1TW

Appellant

- and -

Mr Edward Dunbar, The Old Manse, Duffins, Elgin, IV30 5QD

Respondent

FtT case reference FTS/HPC/PR/20/2505

17 March 2022

Decision

Grants permission to appeal against the decision of the First-tier Tribunal Housing and Property Chamber dated 6 September 2021 limited to the question whether the First-tier Tribunal adequately considered the Appellant's fourth head of claim set out at paragraph 7(c) of her Claim Form (Form G).

Introduction

[1] The appellant sought an order for payment in the sum of £4,000 representing losses occasioned by the respondent's breach of the parties' tenancy agreement. On 14 July 2020 she reported fungal mould within the property to the respondent. An inspection on 28 July 2020 established this to be dry rot. The respondent arranged for works to be carried out to the tenanted property and the larger property of which the leased subjects formed part. As of consequence of these works being carried out, the appellant and her daughter were unable to use a large bedroom within the tenanted property between August and October 2020. The appellant left the property on 30 October 2020. Before securing alternative property, she had to pay £300 for emergency property and taxi costs of £95.

[2] The First-tier Tribunal found the tenancy conditions in relation to habitability had been breached as the appellant had been unable to enjoy full use of the property. They assessed the appellant's losses in the sum of £770. The appellant is aggrieved by this decision and argues the First-tier Tribunal erred in law in certain respects in arriving at this sum. She insisted that her loss was properly assessed in the sum of £4,000.

Grounds of appeal

[3] The appellant's grounds of appeal were to the effect the First-tier Tribunal had not fully considered the evidence in arriving at their findings-in-fact. Her primary submission at the

reconsideration hearing was they had not adequately addressed the concept of “livability” and, in doing so, had not taken into account all relevant evidence in assessing her loss.

Discussion

[4] The First-tier Tribunal found in favour of the appellant so far as liability was concerned. They formed the judgment that the property was not fully habitable and assessed the appellant’s loss on that basis. The Appellant insisted however she was entitled to the loss as set out at paragraph 7(c) of her Claim Form. This was set out under five heads of claim:

1. A full refund of rent for August, September and October: £500 per month x 3 = £1,500.
2. Compensation for not terminating the tenancy earlier as a result of not informing her of the property’s unfitness on time in July: £500 per month x 3 = £1,500.
3. Emergency accommodation: £300.
4. Loss to be determined by the First-tier Tribunal for: (a) impact to our physical and mental health (eczema, coughing, fear, stress); (b) impact on our safety and security (flat open several nights, electric wires, holes, plastic sheets, etc.); and (c) impact on the time we had to spend to deal with all this.
5. Taxi cost: £95.

[5] In her email to the First-tier Tribunal dated 23 January 2021, the Appellant reframed her heads of claim 1 and 2. She described her head of claim 1 as compensation for the property no longer being liveable. The tenancy should have been terminated immediately by the respondent and she sought a three months’ rent rebate in compensation for this three month notice period.

Head of claim 2 was a full refund of rent for August, September and October as the building and flat were not liveable in terms of safety and security.

[6] The First Tier-tribunal awarded the appellant an abatement of rent for the room the appellant was unable to use for three months at $£125 \times 3 = £375$. They did not find it reasonable to award her a full refund of rent nor an additional compensation for a three month notice period. They awarded the appellant the losses under heads of claim 3 and 5. These three sums of $£375 + £300 + £95$ amounted to a total award of $£770$. They explained these findings at paragraph 37 of their Determination as follows:

“The Tribunal carefully considered the issue of the level of compensation to be awarded to the Applicant for her loss and inconvenience, and determined that it was fair and proportionate to make an order for the Respondent’s payment to her of the sum of $£770$. The Tribunal found that this sum will reasonably compensate the Applicant for not being able to enjoy all of the Property’s accommodation, as the bedroom and staircase were not habitable during the said months August, September and October 2020. The sum ordered will also reasonably compensate the Applicant for her emergency accommodation and travel costs. The tribunal found it was not reasonable to award the Applicant compensation for a notice period, nor for full rent paid in August, September and October 2020, as she did not have use of the majority of areas of the Property during those months.”

[7] The Appellant was unable to persuade me that the First-tier Tribunal had erred in law in its assessment of heads of claim 1 and 2. They awarded the Appellant her losses under heads of claim 3 and 5, but appear to make no specific reference to head of claim 4.

The First-tier Tribunal had the responsibility of assessing the Appellant's loss.

It was open to the Tribunal in relation to heads of claim 1 and 2 only to abate the rent for the three months rather than award a full refund of rent in circumstances where they found the property was partly but not fully habitable, and to refuse an additional award based on a notice period.

In her email to the Upper Tribunal dated 16 December 2021, the Appellant referred to the First-tier Tribunal not having considered her losses in relation to "all other practical factors such as construction dust, fungi spores, dead flies, electric wires, leaking of roof, opening of the flat, etc." She also referred in that email to her inability to produce a formal medical report in relation to her eczema and mental health sufferings which "were taken as nothing".

[8] The Appellant informed me she had brought these matters to the attention of the First-tier Tribunal during the hearing of her claim. The respondent also accepted the Appellant had done this and the First-tier Tribunal's Determination dated 6 September 2021 appeared to omit any specific discussion of head of claim 4. At paragraph 15 of their separate Decision dated 15 November 2021 refusing the Appellant permission to appeal, the Tribunal noted that the "Applicant did not provide evidence to support claims for compensation for injury to mental or physical health, arising from stress or mould", but I was unable to find any indication in this later Decision that the Tribunal had also considered head of claim 4(b) in relation to the impact on the

Appellant's safety and security. Although worded differently from her email to the Upper Tribunal dated 16 December 2021, I think it is clear that the Appellant feels aggrieved because the First-tier Tribunal appears to have left out of account specific discussion of head of claim 4(b) from its original Determination which extended to and included such factors as construction dust, fungi spores, dead flies, electric wires, leaking of roof and the opening of the flat.

[9] I asked the First-tier Tribunal to comment on this matter.

They responded on 23 February 2002.

They referred to paragraph 15 of their Permission to appeal Decision, noting the Appellant had not provided any evidence of injury to health, or losses arising from any such injury at the Case Management Discussion and Hearing. They took account of her written and verbal statements, but determined not to make any award in respect of injury to health.

They also stated they took full account of inconvenience caused to the Appellant when making their Decision, and considered this was reflected in the sum of money awarded to the Appellant.

I was not satisfied, however, with this explanation.

[10] Head of claim 4(b) might be characterised as a claim for inconvenience from having to put up with such things as construction dust, fungi spores, dead flies, electric wires, leaking of roof and the opening of the flat. Such a claim is arguably distinct from any claim for injury to health. Given there was no medical evidence to confirm injury to health, the First-tier Tribunal might have been justified in refusing to make an award therefor; but their award does not consider head of

claim 4(b) as a potentially separate head of claim for inconvenience. No award is made therefor. Their Determination does not demonstrate they considered this as a separate head of claim, either to award or reject that head of claim. No such sum is included in the award made by the First-tier Tribunal.

[11] I am therefore persuaded by the Appellant that there is an arguable ground of appeal in that the First-tier Tribunal erred in law by not adequately considering her head of claim 4. As their original Determination gave no explanation for rejecting the Appellant's claim in respect of injury to her health, permission to appeal extends to all parts of head of claim 4.

Conclusion

[12] I was willing to assist parties reach settlement on the basis that the appeal might be allowed of consent with an additional sum of £430 for the inconvenience described by the Appellant in her email to the Upper Tribunal dated 16 December 2021, taking the total award to £1,200. While the Respondent was amenable to this course of action, the Appellant insisted however that she be awarded the full £4,000 claimed by her. She has not been granted permission to appeal in respect of any aspect of the First-tier Tribunal's award other than in relation to its handling of head of claim 4. She put a figure of £605 on head of claim 4 in her email to the First-tier Tribunal dated 23 January 2021. I explained to her that it was entirely a matter for the Upper Tribunal Member hearing her appeal whether her appeal would be allowed; and, if allowed, whether any issue of an

additional award of compensation for head of claim 4 would be determined by the Upper Tribunal, or remitted by the Upper Tribunal to the First-tier Tribunal for its reconsideration.

Sheriff George Jamieson

Member of the Upper Tribunal