

Housing and Property Chamber First-tier Tribunal for Scotland



Statement of Reasons for Decision of the Housing and Property Chamber of the First-tier Tribunal for Scotland

(Hereinafter referred to as “the Tribunal”)

Under paragraph 10(1) of schedule 5 to the Rent (Scotland) Act 1984

Case Reference Number: FTS/HPC/RR/18/0371

Re : Property at 221 (2F1) Gorgie Road, Edinburgh EH11 1TU (“the Property”)

The Parties:-

Iain McDougall, (“the Tenant”) 221 (2F1) Gorgie Road, Edinburgh EH11 1TU

Rachel Duffy, c/o Cox & Co., 28 Thistle Street, Edinburgh, EH2 1EN (“the Landlord”)

The Tribunal comprised:-

Mr David Bartos - Legal member and Chairperson
Mr Robert Buchan - Ordinary member (surveyor)

Background:-

1. The Tenant is the tenant of the Property by virtue of a statutory protected tenancy. The tenancy commenced in 1976. The Tenant has lived there since that time. The tenancy is covered by sections 43 to 54 of the Rent (Scotland) Act 1984. The rent under the tenancy is registrable under sections 46 to 50 of the 1984 Act. No furniture has been provided by any landlord under the tenancy. There are no services provided by the Landlord under the tenancy.
2. By application dated 17 January 2018 the Landlord applied to the Rent Officer for registration of a fair rent. At the time of the application the Tenant was

paying rent of £ 414.67 per month or £ 4968 per annum. In his reference to the Tribunal the Rent Officer (Rental Valuation Officer) noted that the previous registered rent was at this level.

3. On 9 February 2018 the Rent Officer registered a rent of £ 7355.04 per annum to be effective from 9 February 2018 (equivalent to £ 613 per month). This was intimated to the Tenant and the Landlord. The Landlord objected to this through the letter of his agents Cox & Co to the Rent Officer dated 13 February 2018 and received on 15 February 2018. The Rent Officer referred the objection to the Tribunal. An inspection of the Property and a hearing was fixed for 4 May 2018. The hearing was fixed for George House, 126 George Street, Edinburgh.
4. On 4 May 2018 the Tribunal inspected the Property at 10.00 a.m.. Both hearing and inspection had been intimated to the parties, and the Landlord's solicitors. The Tenant's wife Carol McDougall was present at the inspection. Neither the Tenant nor the Landlord nor her agents were present at the inspection. Only the Tenant was present at the hearing which took place at 11.30 a.m..
5. It was dry and sunny at the time of the inspection. The Property is a flat on the second floor of a late Victorian tenement on the south side of Gorgie Road in the Gorgie area of Edinburgh. There is no on-street parking. There are frequent bus links to the city centre. There are shopping facilities on Gorgie Road within a short walking distance.
6. The accommodation consists of two bedrooms, living room, internal kitchen, and bathroom with toilet, bath and shower. The Property has a gross internal floor area of 60 square metres. From the front door a corridor provides access to the living room, the kitchen, the bathroom, and the two bedrooms. The living room and larger bedroom face the front of the tenement and Gorgie Road. The second bedroom faces the rear drying green and garden of the tenement. The kitchen is internal between the living room and rear bedroom. The bathroom faces the rear drying green. The kitchen fittings are in a dated condition. The door leading to the front bedroom is evidently in a repaired condition.
7. The living room and rear bedroom have electric bar fires supplied by the Tenant. There is no other heating provision. The fireplaces in all of the rooms have been blocked off. Hot water is provided by an electric immersion heater in a hot water storage cylinder which is located in a cupboard in the rear bedroom.
8. There is double glazing in every room (other than the internal kitchen). The units were installed by the previous landlord. All decoration throughout the Property has been carried out by or on behalf of the Tenant. It comprises

standard woodchip and emulsion. All carpets and floor coverings have been provided by the Tenant.

9. The tenement close leads to the rear tenement drying green and garden which is shared by all of the tenement flats. Photographs taken by the Tribunal during its inspection are in a schedule to this decision.
10. The Tribunal took account of their inspection and in addition the following documentary evidence : -

- Copy form RR1 being the Landlord's application for registration of rent for the Property dated 17 January 2018
- Copy extract from the Rent Register for the Property showing among other matters the rent registered by the Rent Officer for the property on 9 February 2018
- Copy reference to the Tribunal from the Rent Officer dated 15 February 2018
- Copy letter of appeal from agents for the Landlord dated 13 February 2018
- Written representations from the Landlord dated 10 April 2018
- Archived notes of letting relating to flats at Gorgie Road, Westfield Road and Murieston Terrace, Edinburgh
- Citylets Report for Q4 2017
- Scottish Government Private Rented Sector statistics 2010 to 2017 (extracts – pages 1 to 8, and 11, 12, 19 to 23, 34, 49, 51 to 50)
- Rightmove average asking prices document
- Decision under reference PRHP/RR/15/0224 dated 5 November 2015
- Selected list of registered rents in EH11 area, including Parkhead and Dalry
- Extract rent register pages for 225 Gorgie Road (3F1) and 96/4 Gorgie Road

The Citylets Report, archived notes of lettings, the Scottish Government statistics, the asking prices document and the decision had been obtained by the Tribunal and copies had been intimated to the parties, and the Landlord's agents by notice dated 18 April 2018. The list of registered rents and the extract rent register pages were intimated to the parties and the Landlord's agents by notice dated 26 April 2018.

Relevant Law

11. In considering an objection to the rent registered by the Rent Officer the Tribunal requires to determine for itself what rent is or would be a fair rent under a regulated tenancy of the property in question. If the Tribunal determines that the rent registered by the Rent Officer is a fair rent then it must

confirm the rent but if it takes the view that the rent so registered is not a fair rent, then it must determine the fair rent for the property in question without being bound by the Rent Officer's figure.

12. In determining the fair rent the Tribunal is required to strike an equitable balance between the interests of a tenant and Landlord respectively. In striking that balance the Tribunal is obliged under section 48(1) of the Rent (Scotland) Act 1984 to have regard to all circumstances (other than personal circumstances) and in particular to apply their knowledge and experience of current rents of comparable property in the area, as well as having regard to the age, character and locality of the dwelling-house in question and to its state of repair, and if any furniture is provided under the tenancy to the quality, quantity and condition of the furniture.
13. The disregard of personal circumstances means that the Tribunal must disregard a tenant's ability to pay the rent. The assets or financial position of the Landlord are also personal circumstances which have to be disregarded.
14. However in determining the fair rent the Tribunal is obliged under section 48(2) of that Act to assume that the number of persons seeking to become tenants of similar properties in the locality on the terms (other than those relating to rent) of the tenancy is not substantially greater than the number of dwellinghouses in the locality which are available for letting on such terms.
15. The Tribunal is also obliged to disregard any improvement or the replacement of any fixture or fitting carried out, otherwise than in pursuance of the tenancy, by the tenant or any predecessor of his under the tenancy.
16. The task of determining a fair rent under section 48(1) is a composite task which takes account of accepted methods of determining a rent, none of which is regarded as the primary method. (*Western Heritable v. Hunter* 2004 S.C. 635 at para. [41]). The three accepted methods are:
 - (a) having regard to registered rents of comparable dwellinghouses in the area;
 - (b) taking market rents of such dwellinghouses and deducting an amount in respect of improvement and the like by the tenant which requires to be disregarded under section 48(3) and an amount if the market rents do not reflect the assumption as to demand not being substantially greater than supply (the assumption as to absence of market imbalance) and
 - (c) calculating the appropriate return based on the capital value of the property, taking into account the assumed absence of market imbalance.
 The third method has been described as notoriously unreliable, "normally to be used only as a last resort" (*Western Heritable Investment Co. Ltd v. Husband* 1983 S.C. (H.L.) 60, 73).

17. Market rents may be used as a cross-check against registered rents to ensure that where there is no scarcity (market imbalance), registered rents do not come to be markedly out of line with current market conditions and to provide an adjustment for general inflation (Lord Drummond Young in the Court of Session decision in the current case at para. [13]). Equally registered rents may be used as a cross-check against market rents (Western Heritable Investment Co. Ltd v. Hunter 2004 S.C. 635, para. [41]).

The Hearing

18. After the conclusion of the inspection the Tribunal held a hearing at 11.30 a.m. at 126 George Street, Edinburgh. This hearing had been intimated to both parties and the Landlord's agents. The Tenant appeared. There was no appearance by or for the Landlord.
19. The Tenant gave evidence. He spoke to having put in all of the floor coverings and to having carried out all the decoration. There were just floorboards and light bulbs when he moved in. The former landlord had installed the double glazing about 3 years ago. The kitchen units and re-wiring were from the 1990s. The parking had been worsening over the years. There was no permit holder's parking. A neighbouring side-street had to be used. Parking was particularly difficult when there were football matches at Tynecastle even in mid-week.
20. The Tribunal accepted the Tenant's evidence of facts as credible and reliable.
21. The Tribunal considered carefully all the above evidence and written representations together with the observations of the Tribunal members at the inspection.
22. The Tribunal had the following comparable annual registered rents:
- Rent of £ 3480.00 (£290.00 per month) for 225 (3F1) Gorgie Road
 Rent of £ 4266.48 (£355.54 per month) for 96/4 Gorgie Road
 Rent of £ 4791.96 (£399.33 per month) for 10/6 Newton Street
- The rents for 225 Gorgie Road was registered on 20 March 2017 while the rents for 96/4 Gorgie Road and 10/6 Newton Street were registered on 13 December 2017.
23. Registered rents were set by the Rent Officer with no explanation or reasoning as to how the rent was set or what factors had been taken into account in that process.

24. The Tribunal were able to use their knowledge and experience of market rents from the Gorgie area of Edinburgh. The Tribunal had the following comparable market rents:
- Rents of £ 9900.00 (£825 per month) for two unfurnished 2 bedrooomed flats on Gorgie Road lets agreed and marketed from 13 July to 18 September 2017 and from 26 October 2017 to 19 December 2017 respectively
 - Rent of £ 9780.00 (£815 per month) for unfurnished 2 bedrooomed top floor flat on Gorgie Road let agreed and marketed from 15 August 2017 to 19 August 2017
 - Rent of £ 9540.00 (£795 per month) for unfurnished 2 bedrooomed top floor flat on Gorgie Road let agreed and marketed from 4 July 2017 to 4 August 2017
25. At the hearing the Tenant observed that the £ 290 per month registered rent for the 225 Gorgie Road flat appeared to be extremely low and out of line with other rents. He had no other comment to make on the registered rents. He said that he had been paying £ 517 per month since the Rent Officer had fixed the new rent now under appeal. Until then he had been paying £ 414 per month. He had expected a rent increase. The £ 724.50 per month sought by the Landlord he saw as a “massive” increase. Other than that he had no observations to make on market rents or any of the material supplied to him by the Tribunal which he acknowledged that he had received.
26. In their letter of appeal the Landlord’s agents sought a fair rent of £ 724.50 per month. They did not produce any comparables. In her written submission the Landlord submitted that the average price for a one bedroom property in Gorgie was £ 700 per month, and thus a two bedroom property should be achieving in excess of that figure. She also submitted that there were “similar properties” renting for £ 850 per month without specifying where they were.
27. Unfortunately the Landlord did not provide the Tribunal with actual comparable properties renting for £ 850 per month or £ 700 per month. In any event the Property is a two bedroom rather than a one bedroom property. In these circumstances the Tribunal was unable to rely on the Landlord’s submission.

Reasons for Decision

28. Using its knowledge of market rents and taking account of the market rents in the above comparables, and the Landlord’s representations presented by the her and her agents the Tribunal considered that a two bedrooomed unfurnished flat of the size and location of the Property in a satisfactory state of repair with

modern fixtures and fittings including double glazing, central heating and “white goods” (cooker, refrigerator, washing machine and tumble dryer) in the Gorgie area of Edinburgh would let in the open market for about £ 815 per month.

29. The Tribunal took the view that in order to achieve that market rent an allowance would have to be made for the costs to the Landlord of upgrading including the installation of central heating, new kitchen units, full decoration and installation of new flooring. Over the years the Tenant had installed all of the laminate flooring and carpets which fall to be disregarded under section 48 of the 1984 Act but would also have to be replaced to achieve the market rent of £ 815 per month. The cost of the white goods would also have to be taken into account as part of the upgrade.
30. Taking the limited lifetimes of the upgrades into account the Tribunal estimated their cost at £ 1600 per annum or £ 133.33 per month. Making such a monthly deduction from £ 815 the Tribunal considered that leaving aside the assumption as to no market imbalance (no scarcity) a fair rent on a market rent basis would be £ 681.67 per month or £ 8180 per annum.
31. The next question is whether the section 48(2) assumption mentioned above applies. This is that number of persons seeking to become tenants of similar dwellinghouses in the “locality” of the Property on the terms (other than relating to rent) of the tenancy is not substantially higher than the number of such dwellinghouses which are available for letting on such terms.
32. Case law has determined that in deciding whether the assumption exists a Tribunal must assess the rental market over a “large area” to exclude excessive demand caused by specific local amenities such as proximity to city centre shops, offices and transport links or a hospital or university. “Locality” must be decided in that context.
33. The Tribunal recognised that an easily definable “large area” in this case would be Edinburgh as a whole. The Tenant took no issue with that approach and the Landlord made no submission on it. Thus Tribunal decided that Edinburgh would be the “locality” for the purposes of the assumption.
34. Was the number of persons seeking to become tenants of similar properties in Edinburgh on the terms (other than those relating to rent) of the tenancy substantially greater than the number of dwellinghouses in Edinburgh available for letting on such terms ? In considering this question the Tribunal placed weight on the time taken to let similar properties and the levels of rent increase.
35. The City lets report for Q4 2017 in respect of these matters provides:

	Average rent	Rent change 1 year	Rent change 3 years	Rent change 5 years	Av Time to Let	Let within 1 wk	Let within 1 month
Edinburgh	£ 946	2.7%	13.6%	27.2%	24	19%	68%
Scotland	£ 696	-1.6%	0%	9.6%	34	15%	55%

36. The Scottish Government report on private sector rent levels in Scotland over the years 2010 to 2017 includes statistics on the average monthly rents for 2 bedroom properties. No specific figures are provided for Edinburgh but there are figures for Lothian. Given that Edinburgh is by far the largest urban area within Lothian with the greatest number of properties to let the Tribunal inferred that the Lothian figures were heavily weighted by Edinburgh. The figures provided are as follows:

	2010	2016	2017	2010 to 2017 change
Lothian	£ 665	831	888	33.7%
Scotland	£ 536	616	643	19.9%

37. These statistics show that Lothian has the highest monthly rents for two bedroom properties and has had rent increases substantially above those for the rest of Scotland. In these circumstances the Tribunal found that within Edinburgh as a whole there was a demand for similar properties that was substantially greater than those available for let.
38. The question then came to be, what would the rent be, giving effect to the section 48(2) assumption? This is a matter which is inherently imprecise and therefore for the judgment and experience of the Committee. In the present case the Scottish Government report indicated that cumulative inflation under the UK consumer price index for seven years to September 2017 was 15.9%. The report shows an increase of rents over that period for Lothian of 33.7%. Appreciating that the matter is inherently imprecise, the Committee took the view that a deduction of approximately 10% from a rent of £ 8180 per annum was required to give effect to the assumption. This gave a rent of £ 7362 per annum or £ 613.50 per month on an adjusted market rent basis.
39. The calculation of an appropriate return based on the capital value of the Property did not appear appropriate given (1) the imprecision of such a calculation which invariably requires the use of contentious variables (in particular the decapitalisation rate) compared to the relative ease of using comparable rents and (2) the readily available evidence of open market let property and registered fair rents in the area of the Property.

40. However the fixing of a fair rent is a composite exercise where one method can be used as a cross-check of the figure using another method. Typically registered rents fall to be cross-checked against market rents and vice-versa.
41. Applying that approach the Tribunal considered the registered rents. That for the flat at 225 Gorgie Road was £ 290 per month. This was completely out of line with registered rents for 96 Gorgie Road and 10 Newton Street. Furthermore it was out of line with the registered rents for properties in the Parkhead area (which had been supplied to the parties) and which despite being located further from the city centre and with less amenities had registered rents from £ 416 to 470 per month. In these circumstances the Tribunal inferred that there must have been something peculiar to the flat that gave rise to a registered rent of £ 290 per month. It could not be relied upon.
42. Looking to the other two comparable registered rents, the Tribunal found that 96 Gorgie Road appeared to be a “contractual” tenancy that had commenced on 1 May 1990 which was after the regulated or protected tenancies could no longer be created following the Housing (Scotland) Act 1988. This cast a doubt on the valuation test that had been applied by the Rent Officer in that case. For that reason it could not be relied upon.
43. Looking to the other comparable registered rent, this pointed to a figure of £ 400 per month.
44. The adjusted market figure found by the Tribunal suggests that these registered rents are markedly out of line with what landlords in general and tenants negotiate for themselves as rent for properties similar to that of the Tenant. Even allowing for the inherent lack of precision in fixing a market rent, the registered rents are markedly below the level of open market rents in the area. Taking a broad and equitable view of the matter, the Tribunal took the view that £ 507 per month was a rent which was fair to a landlord and a tenant.
45. The Tribunal appreciated that this would be more than the registered rent for other nearby properties but this was the result of the Tribunal taking account of open market rents, which the law required it to do. Equally the Tribunal appreciated that this was less than an open market rent but conversely this was because it had to take account of registered rents. The Tenant should be aware that the Landlord is not obliged to charge rent at this level and that there are legal provisions requiring any increase in rent to be introduced in a staged process.
46. Accordingly for these reasons the Tribunal found that the rent registered by the Rent Officer was not a fair rent in terms of section 48 of the 1984 Act. The

Tribunal concluded that a fair rent for the property was £ 6084 per annum or £ 507 per month in terms of section 48 of the 1984 Act.

47. In reaching this decision the Tribunal had regard to all of the requirements of section 48 of the 1984 Act which it required to apply. The registration of the fair rent determined by the Tribunal takes effect from the date of this decision.

Signed **D Bartos**Date: 22 May
2018.....

David Bartos, Chairperson

Photographs taken during the inspection of
Flat 2F1, 221 Gorgie Road, Edinburgh, EH11 1TU



Front of block

Photographs taken during the inspection of
Flat 2F1, 221 Gorgie Road, Edinburgh, EH11 1TU



Rear



Street

Photographs taken during the inspection of
Flat 2F1, 221 Gorgie Road, Edinburgh, EH11 1TU



Kitchen



Bathroom

Photographs taken during the inspection of
Flat 2F1, 221 Gorgie Road, Edinburgh, EH11 1TU



Double glazing



Consumer unit