



Written Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 of the Private Housing (Tenancies)(Scotland) Act 2016.

Chamber Ref: FTS/HPC/CV/23/1489

Re: Property at 84g Broughty Ferry Road, Dundee, DD4 6JS (“the Property”)

Parties:

Mrs Leeann Cross, Mr Louis Cross, 37 Jeffreys Road, Flat 3, London, SW4 6QU (“the Applicant”)

Mr Ross Parkinson, 84g Broughty Ferry Road, Dundee, DD4 6JS (“the Respondent”)

Tribunal Member:

Lesley Ward (Legal Member) Robert Buchan (Ordinary Member- Surveyor)

1. Outcome

The Tribunal having heard oral evidence made no order in favour of either party.

2. This was a hearing in connection with an application to recover rent arrears in terms of section 71 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the Act”) and rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the rules”). The Applicant was represented by Ms Carole Donnelly Property Administrator of Struan Baptie Property Management (hereafter referred to as ‘the Applicant’s representative’). The Respondent attended and he was accompanied by Ms Esmerelda Oller as his supporter. The Respondent has lodged a detailed written submission in December 2023 setting out his position and stating that he was withholding rent due to the condition of the property. A case management discussion (‘CMD’) was held via teleconference on 17 January 2024 and the Tribunal made the following directions:

The Applicant is required to provide:

- (1) Details of how the deposit of £510 was dealt with at the conclusion of the tenancy.
 - (2) Evidence that a repair was carried out to the living room window of the property around February 2022 including a receipted invoice for the repair.
 - (3) Evidence of the steps the Applicant took to arrange for the repair of the roof to the property including any correspondence with other owners and the local authority.
 - (4) A copy of any correspondence sent by the local authority to the owners in the tenement regarding the repair of the common roof.
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- (5) A copy of the most recent inspection report for the property before the Respondent left the property in May 2023.
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- (6) A list of witnesses who will be giving evidence at the hearing.
 - (7) Any other documents they have to substantiate their position.

The Respondent is required to provide:

- (1) Vouchers for any losses he is claiming.
- (2) A list of witnesses who will be giving evidence at the hearing.
- (3) Any other documents he has have to substantiate his position.

The documents are to be lodged by close of business on 17 February 2024.

3. The Tribunal had before it the following documents:

- Application dated 9 May 2023 and amended application of 29 August 2023. □
Rent statement
- Land certificate.
- Landlord registration details.
- Copy emails between the parties between March and May 2023.
- Respondent's submission dated 25 December 2023 with photographs and copy emails.
- Abatement Notice by Dundee City Council dated 10 February 2023.
- Updated rent statement dated 19 January 2204.
- Inspection report dated 20 January 2022.
- Email from Applicant's representative with photographs dated 28 February 2024.
- Email from Respondent with details of losses dated 15 February 2024.

Preliminary hearing

4. The Tribunal held a preliminary hearing to consider what items had been lodged by the parties in compliance with the directions.

5. Regarding direction 1, the Applicant's representative had lodged an updated rent statement, which took into account the deposit of £510 paid by the Respondent. The Applicant's representative explained that the Applicant had obtained the deposit from the tenancy deposit company to apply towards the arrears. The net sum due was therefore £1466.11.

Regarding direction 2, the Applicant had provided an invoice for £60 in connection with a repair to a window in the property. This was dated 19 May 2022 and the Applicant's representative confirmed that the repair was therefore likely to have been carried out around May 2022 and not February 2022 as she advised in January 2024 at the CMD and as noted in the CMD note.

Regarding direction 3, the Applicant did not provide any documents setting out the steps the Applicant took to arrange for the repair of the roof to the property including any correspondence with other owners and the local authority.

Regarding direction 4, the Applicant had provided a copy of the Abatement Notice by Dundee City Council dated 10 February 2023 and the Applicant's representative stated that this notice was sent to all of the owners in 82, 84 and 86 Broughty Ferry Road.

Regarding direction 5 the Applicant provided a copy of the most recent inspection report for the property dated 20 January 2022.

No other documents were produced and the Applicant did not attend the hearing to provide any oral evidence.

6. The Respondent was asked to provide vouchers for the items he was claiming for. The Respondent had already provided photographs. The Respondent's email of 15 February 2024 stated that he was seeking the sum of £188.99 in respect of a futon (estimated replacement cost of £149.99) 4 pillows (estimated replacement cost of £22) and a duvet (estimated replacement cost of £17).

7. The Respondent was seeking an abatement of rent, given he identified an issue with the roof of the property by email in April 2022. The inspection report of 20 January 2022 also raised this matter some three months before the Respondent's first email. The Applicant had failed to comply with direction 3 and it was not therefore clear to the Tribunal what steps the Applicant had taken to repair the roof between January 2022 and April 2023 when the repairs were carried out. The Tribunal adjourned to give the Applicant's representative and the Respondent an opportunity to discuss matters in the light of the further documents lodged. The Applicant's representative stated the Applicant was prepared to accept the sum of £1000 in settlement of the claim however, the Respondent considered that no sum was due given the terms of his counterclaim. Matters were not capable of resolution and the hearing proceeded.

Hearing

8. The Applicant is seeking to recover the rent arrears for the property, which accrued between January and May 2023. The Applicant's representative set out the Applicant's position, which she also outlined at the CMD in January 2024. She clarified that the window leak was repaired around May 2022 (as opposed to February 2022, which she stated at the CMD). She produced an invoice from Window Man dated 19 May 2022 in support of this. The Respondent did not accept that any window repair was carried out during his period of occupation. He accepted that a window company came out to inspect the window but they decided it was a roofing issue and took no action. He speculated the £60 charge may have been a call out fee. The Applicant's representative did not accept that Window Man was in the habit of charging a call out fee but she was unable to provide any other information about the repair to the window. The Applicant's representative maintained that the delay in the roof repair being carried out was due to the Applicant's difficulty in obtaining three quotes for the repair and liaising with the other owners of the tenement at 84 Broughty Ferry Road and the adjoining tenement at 82. She also made reference to the Respondent failing to allow access at times, but was unable to explain why access was needed internally to look at the roof. She was also unable to provide any evidence of the Respondent's failure to allow access or to set out what steps the Applicant had taken to have the roof repaired within a reasonable time scale. The Applicant's representative was unable to clarify the extent of the roof repair which was carried out in April 2023 or how much this had cost the Applicant.

9. The Applicant's representative was unable to comment on why the Respondent was not offered an abatement of rent given that it was apparent from the inspection in January 2022 that the property did not meet the repairing standard in being wind and water tight. She was unable to account for why no further inspections were carried out after January 2022. The Applicant's representative was something at a loss to understand some of the questions the Tribunal had, despite the clear terms of the detailed CMD note and directions. She stated that she had sent all of the Tribunal documents to her clients but the Applicant told her today that they had not received the documents including the Respondent's detailed submissions of 25 December 2023. She did not however seek an adjournment and she also submitted that she was fully instructed to proceed with the hearing. She also reiterated that it was the Applicant's position that the increased mould was due to the Respondent not wiping the mould away and properly heating and ventilating the property. However she was unable to explain why the inspection report from 20 January 2022, some two years 4 months after the Respondent moved into the property, refers to 'slight mould in the bathroom ceiling ' whereas the photos provided by the Respondent suggest that the mould issue was far worse around November 2022.

10. The Respondent's position remained as he set out at the CMD. The Respondent decided to withhold rent in January 2023 due to issues with the property which have been ongoing since the end of 2021 but which he first raised in writing in April 2022. The inspection report of 20 January 2022 confirms his position regarding the window and water ingress and the start of the mould issue. He contacted Dundee City Council in January 2023 as he considered the property fell below the repairing standard. They inspected it around February 2023 and they advised him that the issues with mould

were due to poor ventilation and an extractor in the bathroom and kitchen would assist with this. He has now had sight of the letter that the Council sent to all of the owners of 82, 84 and 86 Broughty Ferry Road which he considers was sent as a direct result of him bringing matters to the Council's attention. When it became clear in March 2023 that the roof repair was finally being arranged, he contacted the Applicant's representative by email on 30 March 2023 and stated that he anticipated recommencing his rental payments for April 2023. He was however served with a notice to leave on 7 April 2023. The Respondent disputes that he failed to keep the property heated. He tried to ventilate it as much as he could however it is not practical to open the window in the kitchen due to its location behind the cooker, and the bathroom window opens on to a wall a few feet away which limits how much ventilation it can provide. The mould did not become a particular issue until the roof and window leak became a concern in late 2022 and the inspection report is in support of his version of events. The Respondent's position is that it would have been reasonable for the roof repair to be effected by May or June 2022. He was unable to enjoy the lounge in the flat as he was unable to close the blinds and the furniture had to be moved away from the wall. His futon was water damaged and things got so bad that the mould in the bedroom meant his quilt and pillows had to be replaced.

11. Findings in fact

- The Applicant is the owner and registered landlord of the property.
- The parties entered into a private residential tenancy agreement for let of the property on 30 August 2019 with a start date of 2 September 2019.
- The agreed monthly rent was £460.
- The agreed deposit was £510.
- Struan Baptie Property Management were instructed by the Applicant to act as letting agents on a full management basis.
- The property is a one bedroom flat with spacious lounge and small bathroom and kitchen and a modest bedroom.
- Struan Baptie Property Management carried out an inspection of the property on 20 January 2022, which identified poor ventilation in the property due to the small and compact bathroom and small window, a leak coming from the lounge window and signs of damp on the upper surface of the wall where the blinds are attached.
- The Respondent contacted the Stuart Baptie Property Management around April 2022 regarding water ingress from the lounge window and the area around the lounge window.
- The Respondent contacted Struan Baptie Property Management by email on 18 November 2022 regarding a worsening of the leak and providing photographs of mould to the property.
- The Respondent contacted Struan Baptie Property Management by email on 30 December 2022 regarding a worsening of the mould to the bathroom and a worsening of the leak and providing photographs of mould in the property.
- The Respondent withheld rent from January 2023 until he left the property in May 2023.

- The Applicant was aware that the Respondent had decided to withhold rent and the email from Struan Baptie Property Management to the Respondent of 30 March 2023 refers to him withholding rent.
- The respondent contacted the Environmental Health Department of Dundee City Council on 17 January 2023 regarding the roof leak and black mould in the property.
- Various workmen attended at the property to inspect it from around April 2022 until early 2023.
- There was one occasion in September 2022 when the Respondent did not allow access as he was unwell but he contacted Struan Baptie Property Management the following day to try and rearrange the appointment.
- The Respondent emailed Struan Baptie Property Management on 30 March 2023 stating that as he was beginning to see progress in connection with the repairs he would be resuming payment of rent on 7 April 2023.
- The Respondent was served with a notice to leave on 7 April 2023 and he left the property on 10 May 2023.
- The accrued rent arrears from January 2023 until 10 May 2023 were £1976.11.
- The deposit of £510 was applied to the arrears giving a net sum of £1466.11.
- The Respondent had damage to his futon and bedding as a result of the water ingress and mould and these would cost around £189 to replace.
- The Respondent was unable to enjoy and fully use his property due to the water ingress in the lounge and the resultant problem with mould.
- He was unable to close his blinds and he had to use multiple containers to collect the water.
- Before January 2022, the Respondent was able to adequately heat and ventilate the property despite the small window in the bathroom and kitchen and mould was not a major problem.
- After January 2022 the property had an increasing problem with mould that spread to the bedroom around December 2022.
- The Respondent was never offered an abatement of rent pending the water ingress problem being fixed.
- The problem was not fixed until Dundee City Council issued an abatement notice to all owners, due in part to the Respondent's email of 17 January 2023 and the roof repair was carried out around April 2023.

Reasons

12. The Applicant did not attend the hearing and the Applicant's representative had very limited information to provide to the Tribunal. The Applicant did not comply with the direction to provide evidence of the steps the Applicant took to arrange for the repair of the roof to the property including any correspondence with other owners and the local authority. The terms of the inspection report dated 20 January 2022 make it clear that that the Applicant was aware that the property had a leak coming from above the lounge window when it rains and there were signs of damp on the upper surface of the wall where the blind is attached. The Respondent first raised this matter in writing with the letting agent in April 2022 and he has produced various emails

between April 2022 and January 2023 regarding an escalating problem with this leak. The Respondent decided to withhold rent in January 2023 due to a lack of progress in resolving the issue. Regarding the steps the Applicant took to fix the roof, the Applicant's representative stated that the Applicant 'tried to obtain quotes' but no evidence was produced. The Applicant's representative stated at the CMD that the Respondent had caused a delay by failing to allow access but no evidence was produced in support of this. The email evidence produced by the Respondent suggested that he had been allowing access and on the one occasion when he was unwell he proactively contacted the Applicant's letting agent to rearrange an appointment.

13. The Respondent gave evidence that it would be reasonable for the roof repair to have been carried out by May or June 2022 given the terms of the inspection report from January 2022. The Respondent was never offered an abatement of rent and when he decided to withhold rent pending the repair he was served with a notice to leave. He considered that an abatement of 25 percent of his rent from May or June 2022 onwards would have been fair.

14. The Applicant has a contractual obligation and a statutory obligation to comply with the Repairing Standard and there was no factual dispute that from January 2022 until April 2023 they did not meet this obligation. Abatement of rent is a common law remedy and in the Tribunal's view, this remedy and a claim for damages is available to the Respondent as a defence to an application for recovery or rent arrears. Stalker on Evictions at page 283 makes it clear that the Housing (Scotland) Act 2006 (and a claim for failure to comply with the repairing standard) does not displace the contractual repairing obligations that are implied at common law and does not preclude a claim based on the parties contract.

14. The Tribunal decided that it was fair in all of the circumstances to deduct the sum of £189 from the rent arrears given the damage to the Respondent's property as a result of the leak from the roof coming in at the lounge window. The tenancy agreement provides that the Applicant will maintain the property in a tenantable and habitable condition and it was not disputed that the repair was not carried out until around April 2023, some 15 months after the 20 January 2022 inspection report. The evidence of the inspection report provided by the Applicant, the length of time that the leak persisted, and the photographic evidence provided by the Respondent together with what seemed a relatively modest claim for the items involved, were entirely consistent with the oral evidence given by the Respondent.

15. Regarding the claim for an abatement, the Tribunal taking a broad brush approach and taking into account that the lounge was the main living space and the Respondent had lost part of his use and enjoyment for over a year, decided that an abatement of rent was appropriate. The Tribunal considered that a reasonable landlord would and should have offered some reduction in the rent to reflect the obvious inconvenience to the tenant in having to endure the roof leak especially given the length of time involved. It is consistent with the content of the report of January 2022 that the spreading mould would have been related to the water ingress. It is reasonable for the Applicant to have effected the roof repair by the end of June 2022, some 5 months after the inspection

report was obtained. This is giving the Applicant the benefit of the doubt that there was difficulty in obtaining the consent of the other owners to effect the repair. The fact that the council sent a letter to the other owners in February 2023 suggests that this may have been the case. The property is a one bedroom flat the lounge is the lounge was a large room in comparison with the small kitchen and bathroom and modest bedroom. Taking into account the nature of the problem, the length of time for even a temporary repair to be undertaken and the apparent lack of any concern by the Applicant in not even re-inspecting the property to monitor the problem, it was fair to award an abatement of 25 per cent of the monthly rental payment from July 2022 until the end of April 2023 July to April is 11 months at £115 per month totalling £1265. If the sum of £189 is added, that comes to £1454. As the Applicant is seeking £1466.11 the Tribunal decided to award the remaining balance of £12.11 to the Respondent for his inconvenience. The Tribunal therefore made no award in the circumstances.

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.

Lesley Ward

Legal Member/ Chair

16th April 2024
Date