



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended (“the Regulations”)

Chamber Ref: FTS/HPC/CV/23/4631

Re: Property at 10 Albyn Drive, Murieston, Livingston, EH54 9JN (“the Property”)

Parties:

Mr Barry Simpson, Ms Catherine Muir, c/o 16 Royal Exchange Square, Blackburn, Glasgow, G1 3AG; c/o 16 Royal Exchange Square, Glasgow, G1 3AG (“the Applicant”)

Mr Jon William Morrison, Miss Jessica Pech, Ms Maria Elena Pech, 71 Redcraig Road, East Calder, Livingston, West Lothian, EH53 0QX; 9 Burns Crescent, Boness, EH51 9UR; 9 Burns Crescent, Boness, EH51 9UR (“the Respondent”)

Tribunal Members:

Nicola Weir (Legal Member) and Tony Cain (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment by the Respondent in the sum of £7,659.36 should be made in favour of the Applicant.

Background

1. By application received on 21 December 2023, the Applicant sought an order for payment against the Respondent in the sum of £9,900 in respect of rent arrears, plus interest at the rate of 8% from the date of any order. Supporting documentation was lodged with the Tribunal, including a copy of the tenancy agreement and a rent statement.
2. On 26 February 2024, following initial procedure, a Legal Member of the Tribunal with delegated powers from the Chamber President issued a Notice of

Acceptance in respect of the application in terms of Rule 9 of the Regulations. Papers were served on the First Respondent by Sheriff Officer on 3 April 2024 and on the Second and Third Respondents on 2 April 2024. No written representations were lodged by the First Respondent prior to the CMD. However, the Second and Third Respondents did lodge written representations by email on 17 April 2024 (circulated before the CMD) and 7 May 2024 (received before the CMD but not circulated until after the CMD) attaching some supporting documentation from Safe Deposits Scotland dated 28 February 2024 and 7 May 2024. The Second and Third Respondents admitted that there were rent arrears, but disputed the sum claimed on the basis that the tenancy deposit of £3,000 had been released to the Applicant in respect of rent arrears (which the Respondent had agreed to).

3. On 25 April 2024, by email, the Applicant's solicitor lodged an updated rent statement, increasing the sum claimed by way of rent arrears to £10,659.36 as at 2 February 2024, the date the Second and Third Respondents vacated the Property (the First Respondent having vacated previously).

Case Management Discussion – 8 May 2024

4. The CMD took place by telephone conference call on 8 May 2024 at 2pm. It was attended by Ms Alexandra Wooley, the Applicant's solicitor from Bannatyne Kirkwood France & Co and by the Third Respondent, Ms Maria Pech. Ms Pech confirmed that the Second Respondent, Miss Jessica Pech, was her daughter and would not be attending the CMD as she was unwell but that their position was the same. Ms Pech confirmed that she has no contact with the First Respondent, Mr Jon Morrison.
5. At the CMD, reference was made to the representations lodged by both Ms Maria Pech and Miss Jessica Pech and also the updated Rent Statement lodged on behalf of the Applicant, increasing the sum claimed from £9,900 to £10,659.36, being the stated arrears as at 2 February 2024 when the Property was vacated. Ms Pech confirmed that she agreed that the increased figure was owing, but maintained that the sum of £3,000 recovered by the Applicant, being the tenancy deposit, should be shown in the updated rent statement and deducted from that sum. She accordingly agreed that the sum of £7,659.36 was owing and that she and her daughter were agreeable to an order for that sum being granted.
6. Ms Wooley advised that the Applicant was seeking an order for the full sum of £10,659.36 and did not agree that the £3,000 recovered by way of the tenancy deposit should be deducted from the rent arrears as the deposit monies were recovered in respect of dilapidations as well as rent arrears. The Applicant's letting agents dealt with this side of things and also with the tenancy deposit scheme concerned, Safe Deposits Scotland. Ms Wooley confirmed that she has had sight of the document from Safe Deposits Scotland lodged by Ms Pech with the Tribunal and that it states that it was proposed that the landlord would receive £3,000 in respect of "rent arrears". However, Ms Wooley stated that the Applicant and their letting agent had made in clear in communications sent to

Ms Pech that there were substantial dilapidations which the Respondents were liable for and that it was always intended to recover the deposit and use it to cover the cost of repairs and dilapidations.

7. As per her written representations, Ms Pech disputed that they were responsible for the costs of repairs and dilapidations. She maintained that the Applicant had not carried out repairs to the Property during the tenancy which were the Applicant's responsibility and that anything else was just down to wear and tear. Her position was that, if Safe Deposits Scotland had mentioned that the Applicant was looking to recover the £3000 deposit towards the costs of dilapidations, she would have disputed that and gone through the deposit scheme's dispute resolution process. As it was, she accepted that there were rent arrears and this is the basis on which she had agreed to the £3,000 being released to the Applicant. Reference was made to the documentation she had lodged from Safe Deposits Scotland confirming this. Ms Pech stated that she was not issued with any paperwork from Safe Deposits Scotland, other than what she had already lodged with the Tribunal. It was also disputed that she received the correspondence/documentation that the Applicant claims was issued to the Respondent regarding the alleged dilapidations or stating the Applicant's intention to put the deposit monies towards the cost of dilapidations. Finally, the Respondent did not accept that interest should be added to the amount owing, as had been claimed by the Applicant.
8. Given the disputed issues, particularly regarding the sum claimed, the CMD was adjourned to an Evidential Hearing. A CMD Note was issued detailing the discussions which had taken place. A Direction was also issued to parties regarding requirements to be met in advance of the Evidential Hearing, including further documentation to be lodged and details of any witnesses.

Direction – 8 May 2024

9. Following the CMD, a Direction was issued to parties dated 8 May 2024 in the following terms:-

*"The **Applicant and Respondent** are required to provide:*

1. *Copies of all written communications between them or from the Applicant's letting agents or Safe Deposits Scotland concerning the release of the tenancy deposit and/or the alleged dilapidations/repair costs incurred by the Applicant on the Respondent vacating the Property.*
2. *Any other documentation or written material obtained from Safe Deposits Scotland confirming the process and chronology of events leading up to the release of the £3,000 tenancy deposit to the Applicant in or around March 2024.*
3. *A numbered list or index page of any other documentation upon which the parties wish to rely; together with corresponding numbered copies of any such documents;*
4. *A list of any witnesses that the parties wish to call to give evidence at the Evidential Hearing to be fixed in respect of this application, and to make arrangements for the*

attendance at the Hearing of any such witnesses.

*The said documentation should be lodged with the Chamber no later than close of business **14 days** prior to the Evidential Hearing.”*

Further Procedure

10. On 29 August 2024, by email, the Applicant’s representative lodged timeously an Inventory of Productions on behalf of the Applicant, together with the names of two witnesses, in partial compliance with the Tribunal’s Direction dated 8 May 2024.
11. On 8 September 2024, by email, detailed written submissions and an Inventory of Productions was lodged on behalf of the Second and Third Respondents, which were stated to be in response to the Inventory of Productions lodged on behalf of the Applicant. This documentation was late in terms of the Direction but was circulated by the Tribunal Administration to the Applicant’s representative and to the Tribunal Members on 11 September 2024, the day before the Evidential Hearing.

Evidential Hearing – 12 September 2024

12. The Evidential Hearing took place by telephone conference call on 12 September 2024 at 10am. It was attended by the Applicant, Ms Catherine Muir, represented by Ms Alexandra Wooley, the Applicant’s solicitor from Bannatyne Kirkwood France & Co and by the Second and Third Respondents, Ms Jessica Pech and Ms Maria Pech. They confirmed that Ms Maria Pech would primarily be presenting their case. The Tribunal delayed the commencement of the Evidential Hearing for a few minutes to give the First Respondent, Mr Jon Morrison, an opportunity to join late but he did not do so.
13. Following introductions and introductory comments, the Legal Member raised a preliminary issue concerning the documentation which had been lodged late by the Respondent. In explanation, Ms Maria Pech explained that she had required to discuss and consult with her daughter, Ms Jessica Pech, before submitting their joint response to the documentation lodged recently by the Applicant and that, due to their work schedules, this was the earliest they could do this. Ms Wooley confirmed that she had been copied in to the Respondent’s email by the Respondent at the time it was being submitted to the Tribunal Administration (8 September 2024) so had seen this prior to the Tribunal circulating it yesterday. She had no objection to it being accepted late.
14. The Legal Member advised that the Tribunal Members wished to raise a second preliminary issue regarding the fact that it did not appear to the Tribunal that the Direction issued following the CMD had been fully complied with by the Applicant in that they had not lodged any documentation to or from Safe Deposits Scotland explaining the position with regard to the process of recovery by the Applicant of the tenancy deposit of £3,000 from the scheme. It was noted by the Tribunal that this is an application for payment of rent arrears only, not

for the costs of repairs/dilapidations; that the total amount claimed for rent arrears was £10,659.36 and that the Respondent admitted those arrears; that the dispute here centred around the tenancy deposit of £3,000 recovered by the Applicant and whether it should have been deducted from the rent arrears as argued by the Respondent and in accordance with the only documentation produced thus far from the tenancy deposit scheme. Ms Wooley was asked to confirm the Applicant's position in respect of the amount claimed and to explain the Applicant's failure to comply fully with parts 1 and 2 of the Direction in that no documentation had been produced either to or from the tenancy deposit scheme to explain the process which had been followed with regard to the return of the deposit to the Applicant.

15. Ms Wooley confirmed that the Applicant still wished to seek an order for the full amount claimed on the basis that the Applicant had also incurred substantial repair and dilapidation costs which are owed by the Respondent and had chosen to allocate the tenancy deposit of £3,000 towards those costs, rather than to the outstanding rent arrears which, she submitted, the Applicant was entitled to do. The Applicant had tried to get written confirmation of the position from Safe Deposits Scotland but had been unable to do so. Ms Wooley explained that the Applicant's claim with Safe Deposits Scotland was handled by one of their witnesses, Pauline Higgins, of 'Rent on Time' and that she would be able to give evidence about her dealings with Safe Deposits Scotland. The Applicant's position appeared to be that, whatever the wording in the paperwork issued to the Respondent by Safe Deposits Scotland, that the Respondent had been made aware by the Applicant directly that they were seeking to recover repair/dilapidations costs from the Respondent, in addition to rent arrears, and that the deposit would be put towards these costs.
16. Ms Maria Pech reiterated that the repairs/dilapidations costs claimed had always been disputed by the Respondent and that, had they been aware that the Applicant was claiming the tenancy deposit back from the scheme to cover those costs, as opposed to being put towards the rent arrears which were admitted, the Respondent would not have agreed to this and would instead have gone through the scheme's adjudication process. The Respondent's position is that they had relied on what was stated clearly in the correspondence they had received from the scheme and that it had been reasonable for them to consider this an authoritative statement of the Applicant's intention in respect of the deposit. If this had never been the Applicant's intention, then the Respondent had been misled into agreeing to the release of the deposit to the Applicant.
17. Ms Wooley was asked if consideration had been given to amending this application to bring in a claim in respect of the repair/dilapidations costs or if there was a separate application already underway with the Tribunal in respect of those costs. Ms Wooley confirmed not, but offered no further explanation for this.
18. The Tribunal adjourned to consider this issue in private and, on re-convening, the Legal Member confirmed that both Tribunal Members considered that it was not necessary, nor appropriate, to proceed with an Evidential Hearing today.

The Tribunal was satisfied that, in the circumstances, a payment order in favour of the Applicant in respect of rent arrears should be granted, although in the reduced sum of £7,659.36 admitted by the Respondent. The Tribunal's reasoning for this was explained in detail. It was further stated that the Applicant was at liberty to lodge a further payment application with the Tribunal at any time in respect of any repairs/dilapidations costs incurred by them, should they choose to do so.

19. The Legal Member confirmed that the Tribunal would now hear submissions on the payment offer that the Respondent had indicated that they were prepared to make and in respect of the interest claimed by the Applicant.
20. Ms Maria Pech confirmed that both she and Ms Jessica Pech were offering to pay at the rate of £50 per month each, totalling £100 per month, on the basis that this was the most they could afford. Ms Maria Pech explained that she had difficulties associated with her agency work through the Nursing Guild, was in receipt of Universal Credit, had utility bills and other expenses to meet and also other debts. Ms Jessica Pech confirmed that she is currently a full-time student nurse on a limited income and has other debts, including Council Tax. She stated that although £50 per month is all she could currently afford, she may be able to pay an increased amount once she qualifies. They now live in a Council house together, with one of Jessica's other siblings. In explanation for the rent arrears, Ms Maria Pech stated that these were due to their changing family and financial circumstances and the reason they had not made any payments in the interim, although they admitted a large proportion of the debt, was that they had not been asked to do so.
21. Ms Wooley stated that an offer at that rate is not acceptable to the Applicant, given the amount owing, the length of time it would take to pay off the debt at that rate, the length of time the rent arrears have been owing and the fact that no payments have been made by the Respondent towards the arrears since they vacated. She requested that the Tribunal grant an order for the principal sum, stating that it may still be possible for parties to negotiate an acceptable payment arrangement in due course.
22. As to the interest claimed, Ms Wooley asked for interest to be applied at the judicial rate of 8% for the same reasons as specified in paragraph 21 in relation to the payment offer refusal and also given the high bank base rates at the moment.
23. Ms Maria Pech and Ms Jessica Pech stated that it would be unreasonable for the Tribunal to apply interest as it would increase the amount payable and take even longer for them to pay it off. There was nothing in the tenancy agreement about interest being applied. They also consider it to be an unreasonably high rate of interest to claim.
24. The Tribunal adjourned again to consider these matters and, on re-convening, the Legal Member advised that the Tribunal were refusing the Respondent's time to pay application and would instead grant an 'open' order in respect of the

principal sum. The Tribunal would also award interest on the principal sum from the date of the order, but at the rate of 5% rather than the 8% sought by the Applicant on the basis that the current Bank of England base rate is 5%. The Tribunal's reasons for these decisions were briefly explained.

25. The Legal Member confirmed that a detailed Decision would be issued in writing. Ms Wooley wished it noted that the Applicant was very disappointed with the Tribunal's decision but that they would review the Decision when it is issued and Ms Wooley would thereafter take the Applicant's further instructions in the matter. The Legal Member confirmed that this would be noted in the Decision document, as requested.

26. Parties were thanked for their attendance and the hearing brought to a close.

Findings in Fact

1. The Applicant was the joint owner and landlord of the Property.
2. The Respondent was the tenant of the Property by virtue of a Private Residential Tenancy which commenced on 20 February 2020.
3. The First Respondent had vacated the Property previously but remained on the tenancy agreement.
4. The tenancy ended on 2 February 2024 when the Second and Third Respondents vacated the Property.
5. The rent in terms of the tenancy was initially £1,500 per calendar month but this had been increased to £1,650 per calendar month from 1 December 2022.
6. The rent had fallen into arrears during the tenancy during various periods from early 2021 onwards but had been also been reduced back to nil on several occasions.
7. From June 2023 onwards rent arrears steadily increased and amounted to £10,659.36 by 2 February 2024 when the tenancy ended.
8. The last payment towards rent was £1,650 paid on 26 October 2023.
9. The Second and Third Respondents admitted that they owed arrears amounting to £10,659.36 at the end of the tenancy.
10. The tenancy deposit was £3,000 and was held in a tenancy deposit scheme with Safe Deposits Scotland.
11. Following the tenancy ending, an application was made to Safe Deposits Scotland on behalf of the Applicant for return of the tenancy deposit.

12. Safe Deposits Scotland wrote to the Third Respondent (“lead tenant”) on 28 February 2024 stating that a deposit repayment request had been received from/on behalf of the Applicant (“landlord”) for the whole tenancy deposit amount of £3,000 in respect of “Rent Arrears”.
13. The Third Respondent agreed to the Applicant’s request and Safe Deposits Scotland issued an acknowledgement of this to the Third Respondent on 7 May 2024.
14. The tenancy deposit of £3,000 was released to the Applicant.
15. The Applicant allocated the £3,000 towards repair/dilapidations costs which were disputed by the Respondent rather than towards the rent arrears which were admitted by the Respondent.
16. The Second and Third Respondents admitted that the sum of £7,659.36 was owing to the Applicant in respect of rent arrears, being the total arrears of £10,659.36, less the tenancy deposit of £3,000 already recovered by the Applicant.
17. The sum of £7,659.36 is due and owing by the Respondent to the Applicant in respect of rent arrears.

Reasons for Decision

18. The Tribunal was satisfied from the information contained in the application and supporting documentation lodged by both parties, together with parties’ written and oral submissions, that the sum of £7,659.36 was due and owing by the Respondent in respect of rent arrears, that this was admitted by the Respondent and that an order for payment in that sum could properly be made without hearing evidence on this.
19. The Tribunal gave careful and detailed consideration to the parties’ respective arguments as to the amount of the payment order which should be made. There was no dispute that, at the end of the tenancy, arrears amounted to £10,659.36, the sum claimed by the Applicant in terms of the amended application. However, there was a clear dispute between the parties as to whether the Applicant was entitled to apply the tenancy deposit of £3,000 that they had reclaimed from the tenancy deposit scheme towards repair/dilapidations costs that they claimed to have incurred, rather than towards the rent arrears. It had been apparent from at least April 2024 (before the CMD) when the Respondent’s written representations and supporting documentation from Safe Deposits Scotland were lodged with the Tribunal and circulated, what the basis of the Respondent’s argument in the matter was. The Applicant’s argument advanced at the CMD was essentially that, despite the terms of the paperwork from Safe Deposits Scotland, they were entitled to apply the recovered deposit to the repair/dilapidations costs, which the Respondent was aware were being

claimed from them. Given this clear dispute, the Legal Member had issued a Direction following the CMD, as reproduced in paragraph 9 above. Parts 1 and 2 of the Direction directed the parties to lodge all documentation relevant to the release of the tenancy deposit to the Applicant, including written communications with or from Safe Deposits Scotland. Although the Applicant had partially complied with the terms of the Direction by lodging copies of communications between the Applicant/their agent and the Respondent(s), they did not lodge any communications or written material to or from Safe Deposits Scotland. The Tribunal was of the view that it was essential to see either the earlier communications between the Applicant's agent and the scheme and/or a report on the process and chronology of events from Safe Deposits Scotland because, if the Applicant had claimed return of the deposit in respect of rent arrears only, in the Tribunal's view, there was no further argument to be had. The paperwork produced by the Respondent from Safe Deposits Scotland is in clear terms and it was on the basis of this paperwork that the Respondent agreed to the release of the whole deposit to the Applicant rather than engaging in the deposit scheme's dispute resolution process. This denied the Respondent the right to have disputed repairs/dilapidations costs adjudicated on at the relevant time by the scheme, prior to release of the deposit, this being one of the main purposes of deposits being placed in a tenancy deposit scheme. Given the terms of the Safe Deposits Scotland paperwork produced by the Respondent, the Tribunal did not consider it relevant whether or not the Applicant was able to establish that they or their agent had separately written to the Respondent regarding their intentions with the deposit nor whether any claim for repair/dilapidations costs against the Respondent was well-founded or not. This was an application for payment of rent arrears only. Had the application been amended by the Applicant at any time to add a claim for payment in respect of repairs/dilapidations, the situation may have been different as these issues could then have been looked at as a whole.

20. The Applicant's representative explained that they had been unable to get any paperwork from Safe Deposits Scotland but did not explain why no paperwork or communications from the Applicant to Safe Deposits Scotland had been lodged. It was their intention instead to lead oral evidence at the Evidential Hearing from a witness, Ms Higgins, who was apparently the Applicant's agent who had dealt with Safe Deposits Scotland in respect of the release of the deposit. The Tribunal did not consider this to be appropriate. Given the lack of documentation required in terms of the Direction to be lodged at least 14 days prior to the Evidential Hearing, the Tribunal was of the view that this did not give the Respondent (or the Tribunal) fair notice as to what the Applicant's position in terms of Safe Deposits Scotland actually was. The Tribunal also considered whether, as an alternative, the Evidential Hearing should be postponed to a later date for the required documentation to be lodged by the Applicant. However, the Tribunal's view was that the Applicant had already had a lengthy opportunity to produce the documentation required in terms of the Direction dated 8 May 2024, or to provide an explanation for their failure to do so and perhaps seek a postponement of the Evidential Hearing in advance. In considering these matters, the Tribunal had regard to the over-riding objective to deal with proceedings justly and in particular in a manner proportionate to

the complexity of the issues and the resources of the parties, ensuring so far as practicable that the parties are on an equal footing procedurally and avoiding delay, so far as compatible with the proper consideration of the issues (Rule 2 of the Regulations).

21. Having considered the oral information provided by the Respondent in respect of their application for time to pay and the submissions of the Applicant's representative in connection with the matter, the Tribunal was not satisfied that it would be reasonable in all of the circumstances to make a Time to Pay Direction in terms of the Debtors (Scotland) Act 1987, as amended, allowing the Respondent to pay the amount due by instalments of £100 per month. Accordingly, the Tribunal refused the time to pay application. In doing so, the Tribunal had regard to the factors listed in Section 1A of the 1987 Act. The Tribunals took into account the information the Respondents had provided regarding their limited finances but considered that this was outweighed by the fact that it would take over six years for the debt to be cleared at the rate offered and the length of time the arrears had been outstanding without any payments or offers of payment being made by the Respondent, despite admitting arrears.
22. The Tribunal considered the request from the Applicant to apply interest on the principal sum from the date of the order until payment at the rate of 8% in terms of Rule 41A of the Regulations and the reasons put forward in justification for this and in justification of the rate sought, together with the contrary arguments put forward by the Respondent. Whilst the Tribunal considered it reasonable to exercise its discretion and apply interest in the circumstances of this case, the Tribunal considered the rate should be 5% per annum, given current Bank of England base rates, rather than the judicial rate of 8%.

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.

Nicola Weir

Legal Member/Chair

12 September 2024
Date