

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision in respect of a referral to the First-tier Tribunal for Scotland Housing and Property Chamber for a Determination of Rent under Section 28(1) of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/RN/24/3268

Property: 33 Blair Street, Edinburgh EH1 1QR (“the Property”)

Parties:

Mr Anthony Middleton and Mx Joanna Ross-Barrett (“the Tenants”)

and

Scottish Midland Co-operative Society Limited (“the Landlords”)

Tribunal members: George Clark (Legal Member/Chair) and Sara Hesp (Ordinary Member/Surveyor)

Background

1. The lease in the present case is a Private Residential Tenancy with a current rent of £1,081.50 per month. On 3 April 2024, the Landlords gave notice to the Tenant of their proposal to increase the rent to £1,211.28 per month from 28 July 2024. The Tenants referred the rent for determination by Rent Service Scotland and, on 14 June 2024, the Rent Officer determined the open market rent to be £1,150 per month. As the percentage difference between the current rent and the open market rent was between 6% and 24%, a tapering formula was applied to determine the maximum allowable increase in rent. The tapering formula was 6.33% and the Rent Officer determined that the maximum increase allowed resulted in a monthly rent of £1,150. The comparables used were both fully

furnished four room flats, namely Cornwall Street at £1,365 per month and Castle Terrace, £1,250 per month.

2. The Landlords appealed against the rent set by the Rent Officer and, on 9 July 2024, the open market rent was determined by a Senior Rent Officer to be £1,450 per month. As the proposed rent was lower than the maximum allowed, the rent was set at £1,211.28 per month. The comparables used in arriving at that Decision were £1,950 for a flat in Brighton Street and £1,395 for one at Cowgatehead. Both had four rooms.
3. On 13 July 2024, the Tenants appealed against the Rent Officer's decision of 9 July 2024 to the Tribunal under Section 28(1) of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act/the Act"). They contended that the furnishings in the flat at Brighton Street were of a higher quality than those in the Property. The comparables were not partial basement flats, so would be further away from street noise, the present Property being within a few metres of one of the most disruptive night life spots in Edinburgh. They provided information regarding a very similar flat, at 13/2 Blair Street, rented out at £1,325 per month from 7 February 2024, two months before the rent increase requested by the Landlords. It is a second floor flat, which is HMO compliant. It has proper central heating and insulation and came with more furnishings than the present Property. It has a similar number of rooms, namely two bedrooms, a living room, kitchen and bathroom, with an additional room/study, but is in general slightly larger. The Tenants referred to the condition of the furnishings in the Property and to the fact that, due to a problem with drainage pipes in the tenement, the kitchen has been flooded twice during their tenancy. The Tenants regarding their energy bills as shocking, as the Property has very poor energy efficiency and stressed the proximity to several Cowgate night clubs, with a great deal of noise late at night. This was a particular problem in the bedrooms, which do not have secondary glazing.
4. The Landlords provided the Tribunal with comparable rental evidence by way of a Best Price Guide by Citylets dated 22 October 2024. They were all for three-bedroom flats, but there was no information as to which floor of the building they

occupied. They were all shown as no longer being advertised and were presumed by the Tribunal to have been let at the stated rent. In addition to the flat at Cowgatehead used as a comparable by the Senior Rent Officer and a flat at Cockburn Street at £2,800 per month, which appeared to the Tribunal to be an outlier, the comparables were:

- i. Old Assembly Close. 3 total bedrooms, reception room, two bathrooms. Furnished. £1,990 per month.
- ii. Victoria Street. Three bedrooms, two bathrooms. Unfurnished. £1,795 per month.
- iii. Cowgatehead. Three bedrooms. Secondary glazing, Gas central heating. £1,695 per month.
- iv. Hill Square. Three bedrooms, Shower. White goods. £1,600 per month.

5. The Landlords stated that the comparables all had a higher monthly rent than the proposed figure for the Property. The Tenants had stated in their application that the comparable at Brighton Street, used by the Senior Rent Officer, was in the heart of the University Campus and therefore avoided any noise issues caused by local nightlife. The view of the Landlords was that it is in close proximity to a number of public houses and night clubs which are open late and to the University Student Union, so the nightlife issues were comparable to those of the present Property. They referred to the Blair Street comparable offered by the Tenants as a two-bedroom flat, whereas the present Property has three bedrooms. All other comparable properties used to determine open market value were three- bedroomed. In any event, the evidence provided by the Landlords indicated that rents in the area had risen since February 2024. No evidence to support the Tenants' view that other flats had a better quality of furnishings had been provided, so their view on the matter was purely speculative. The Landlords were unaware of any issues regarding pipes having caused the kitchen to be flooded with water waste, apart from one incident which had been resolved immediately and should be regarded as unpredictable.

6. The Landlords acknowledged that the Property does not have gas central heating, but the Tenants had provided no evidence that the electric heating was

the cause of an allegedly poor energy efficiency rating or was more expensive to run. In relation to noise, this had been drawn to the Tenants' attention prior to the beginning of the tenancy and in any event only one room faces the street. All other rooms are to the rear and face onto a car park owned by a student building located on Stevenson Close.

7. The Landlords' view was that the estimated open market rent (£1,450) provided by the Rent Officer on 9 July 2024 was accurate. The comparables they had provided were all in the EH1 postcode and rents ranged from £2,800 to £1,395 per month, the average being £1,830, and the evidence indicated an upward trend in rents being sought.
8. The Landlords calculated the "permitted rent" in terms of Section 31A of the 2016 Act to be £1,248.15, which is more than the proposed rent. The proposed rent was also less than the open market rent assessed by the Rent Officer (£1,450), so the rent should be determined to be £1,211.28, as it has to be the lowest of the proposed rent, the open market rent and the permitted rent.
9. On 20 November 2024, the Tenants responded to the written submissions of the Landlords. They provided information regarding another flat, at 29 Blair Street, currently being marketed at £1,300 per month, which, like the present Property, was said to have two bedrooms and a spare room, lounge, kitchen and bathroom. It is multiple levels above the ground floor. They contended that the properties from the same street put forward by them better represented a figure from which a market rate could be determined than the comparable properties listed by the Rent Officer's second decision. The Property had been listed as a furnished two-bedroom flat, but all the Landlords' comparisons had three bedrooms. The Tenants provided a copy of the original listing on 4 March 2020, which described the Property as "2 bed flat to rent".

The Inspection

10. The Tribunal inspected the Property on the morning of 28 November 2024. The Tenants were present at the inspection. The Landlords were not present or represented.

The Hearing

11. Following the Inspection, a Hearing was held at George House, 126 George Street, Edinburgh EH2 4HH. The Tenant, Mr Middleton was present. The Landlords were represented by Mandy Forrest, their Residential Property Manager, and by Mr Gregory Smart of Gilson Gray, solicitors, Edinburgh. The Tenant submitted that the proposed increase was disproportionate. The properties used by the Landlords and the Rent Officer as comparisons did not reflect the situation in Blair Street regarding night life noise, the absence of heat insulation and the Property's location as the most exposed flat in the street. The comparable properties the Tenants had offered in Blair Street were more reflective of the market rates for that street.

12. The Landlords' representative told the Tribunal that they were looking to adopt the position set out in their written submissions. The Tenants' comparables were two-bedroomed, but the present Property is clearly three-bedroomed. The comparables offered by the Landlords would face similar night-life issues to the present Property. Ms Forrest added that, had it been let with three bedrooms, it would have become an illegal House in Multiple Occupation ("HMO"). If they had advertised it as three-bedroomed, they would have been inundated with enquiries from students, who they would have had to turn away, as it was not HMO compliant.

Reasons for Decision

13. Section 29 of the 2016 Act provides that, where an appeal is made to the Tribunal under Section 28(1) of the Act, the Tribunal must make an order stating that from the effective date the rent payable under the tenancy is the rent determined by the Tribunal in accordance with Section 32 of the Act. By Section 29(2) of the Act, the effective date in the present application is the first payment date falling on or after the day on which the Tribunal makes its Order.

14. Section 32 of the Act states that the determination is to be made on the basis that the property in question would be let by a willing landlord to a hypothetical willing tenant under a new tenancy which would (a) be a Private Residential Tenancy, (b) begin on the date on which the rent would have been increased in accordance with the rent-increase notice, had a referral to a Rent Officer not been made, and (c) have the same terms as the tenancy to which the referral or (as the case may be) appeal relates.

15. The Property is a lower ground floor main_door flat in a six-storey stone-built tenement erected c.1900. It is located within a mixed commercial/residential area in the centre of the city, with night life close by. The accommodation comprises a living room, kitchen, bathroom, two double bedrooms and a spare room not regarded by the Tribunal as a third bedroom as it was not advertised as such. Heating is by electric panel radiators. There is secondary double glazing to the front only. The gross internal floor area is 72 square metres or thereby. The Tribunal noted that, immediately behind the Property there is a car park, which belongs to an adjacent building. The entrance gate for cars is controlled by an entry system, but the pedestrian access is not secure. The Tenants told the Tribunal Members that the large number of people in the area when the night life venues are open is such that, on a regular basis, some of them congregate in the car park, immediately outside the bedroom windows of the Property, late at night.

16. There is no public register of rentals in Scotland and valuation is largely by evidence of advertised rentals in the district and the application of the knowledge and experience of the Tribunal Members. The Rent Officer only provides the briefest of detail of comparisons used in their assessment with no specific address, style, floor area or rationale as to how their valuation is arrived at. Accordingly, the Tribunal cannot analyse the Rent Officer's assessment.

17. The assessment by the Tribunal is necessarily based on taking what evidence is available and adjusting for the various differences in age, style, accommodation, floor area and any other relevant factors, such as location, condition, garden, garage, amenity etc., to arrive at a valuation that can be

compared with that of the Rent Officer. In such circumstances, the assessment will be based on a range of values and a degree of judgement that is wider than would normally be considered.

Decision

18. Adopting the approach set out in Paragraphs 16 and 17 of this Decision, the Tribunal determined the rent on the basis of its Members' own experience and all the evidence before it. The Tribunal considered the second floor flat at 13/2 Blair Street to be the best comparison. It is not main door, but it has the advantage of full gas central heating and, whilst the accommodation is similar (two bedrooms plus an extra room/study), the floor area is 25% greater than the Property. It will be significantly less impacted by late night noise. It was rented out from 7 February 2024 at a monthly rent of rent of £1,325.

19. A further flat at 29 Blair Street was advertised for let on 16 October 2024 at £1,300 per month. As with the present Property, it has two bedrooms and a spare room.

20. The Tribunal did not accept that the assessment should be based on three-bedroomed comparables. They would require a HMO Licence, unless they were let to members of one family and the view of the Tribunal was that such flats would command higher rents because they appeal to a wider tenant market.

21. Having considered carefully all the evidence before it, and taking into account the potential security issue at the rear of the building, the Tribunal determined that an open market rent for the Property compliant with the provisions of Section 32 of the Act would be £1,200 per calendar month.

22. Section 31A of the 2016 Act, introduced by The Rent Adjudication (Temporary Modifications) (Scotland) Regulations 2024 makes the following provisions:

“Determination of rent payable

(1) Where an order maker is to determine the rent payable under section 25(1) or (as the case may be) 29(1), the determination is to be made on the basis that the rent payable is the lowest of—

- (a) the proposed rent,**
- (b) the open market rent,**
- (c) where the market difference is more than 6%, the permitted rent.**

(2) The permitted rent is—

- (a) where the market difference is less than 24%, the calculated amount,**
- (b) where the market difference is 24% or more, 12% more than the current rent.**

(3) The calculated amount is the amount (to the nearest £1) determined using the formula—

$$\text{Amount (£)} = C \times \left(106\% + \frac{(D\% - 6\%)}{3} \right)$$

where—

C is the current rent,

D% is the market difference expressed as a percentage.

(4) In this section—

“the proposed rent” means the rent specified in accordance with section 22(2)(a)(i) in the rent-increase notice which prompted the referral,

“the current rent” means the rent payable under the tenancy immediately before the date on which the rent would have been increased in accordance with section 22(4) had a referral to the rent officer not been made,

“the market difference” means the percentage figure (to the nearest two decimal places) determined using the formula—

$$\text{The market difference expressed as a percentage (D\%)} = \left[\left(\frac{M - C}{C} \right) \times 100 \right] \%$$

where—

C is the current rent,

M is the open market rent,

“the open market rent” means the rent determined in accordance with section 32.]

23. In the present case, the current rent is £1,081.50, and the open market rent is determined by the Tribunal to be £1,200. The market difference between the two figures, in percentage terms, is 10.96% which, being more than 6% but less than 24%, becomes the “permitted rent”. Applying these figures to the formula above produces a permitted rent of £1,164.23. This is lower than the proposed rent and the open market rent. The Tribunal’s determination is, therefore, that the rent for the Property will be £1,164.23 per calendar month, with effect from the first payment date falling on or after the date of this Decision.

24. The Tribunal’s Decision was unanimous.

25. In terms of Section 30 of the 2016 Act, the Tribunal’s Decision is final and can not be appealed.

G Clarke

.....
(Legal Member/Chair)

Date: 20 December 2024