



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/CV/23/1538

Re: Property at 42/3 Annandale Street, Edinburgh, EH7 4AZ (“the Property”)

Parties:

Dr Lindsay Miller, Flat E, 3/F Block T12 Heng Shang Mansion, 19b Taikoo Shing Road, Quarry Bay, Hong Kong (“the Applicant”)

Mr James Kennedy, 42/3 Annandale Street, Edinburgh, EH7 4AZ (“the Respondent”)

Tribunal Members:

Fiona Watson (Legal Member) and Eileen Shand (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order is granted against the Respondent for payment of the undernoted sum to the Applicant:

Sum of THIRTY-FIVE THOUSAND, NINE HUNDRED AND SIXTY POUNDS (£35,960) STERLING with interest thereon at the rate of eight per cent per annum (8%) running from the date of the decision of the First-tier Tribunal to grant this order, being 22 November 2024, until payment.

- Background
- 1. An application dated 10 May 2023 was submitted to the Tribunal under Rule 70 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”), seeking a payment order against the Respondent in relation to rent arrears accrued under an assured tenancy agreement.

2. A Case Management Discussion (“CMD”) took place on 14 August 2023 by conference call. The Applicant was represented by Ms Matthew of Bannatyne, Kirkwood, France & Co. The Respondent appeared and represented himself.
3. A separate application under Rule 65 seeking a repossession order (under case reference FTS/HPC/EV/23/1537) was also before the Tribunal.
4. The Applicant’s representative moved for the order for payment to be granted. It was submitted that the Respondent had accrued rent arrears which now stood at £31k, with a monthly rent of £620. No payments had been made since October 2019. It was submitted that the tenancy was no longer viable or sustainable. It was submitted that the Applicant had allowed the Respondent not to pay rent for a period of 4 months in 2019 following him travelling to Canada to deal with the death of his mother. The Respondent had advised the Applicant that he would repay all of the arrears from a payment due to him under his late mother’s estate, but this has not happened. It was submitted that the Applicant had left matters this long because they had wrongly thought that during the covid lockdown period and beyond, they were not permitted to evict.
5. The Respondent opposed the payment order sought. It was submitted firstly that the Applicant, Dr Lindsay Miller, was not the landlord and that her partner, David Crawford, was the landlord. The Respondent disputed the level of arrears claimed due. It was submitted that the Respondent had withheld rent since 2019 due to repairing issues outstanding at the Property. It was submitted that the Applicant had failed to provide the Respondent with a parking permit, and which had deprived the Respondent of income from being able to sub-let the parking space. The Respondent submitted that he had instructed a number of repairs to the Property himself and paid for same. Specifically, it was stated that the heating did not work properly, the windows were cracked and that the water tank had dangerous wiring. The Respondent stated that the rent statement produced was incorrect, and that he had paid rent on some of the months which wasn’t shown, and which would reduce the balance. He wished to take legal advice. It was submitted that the copy lease lodged by the Applicant was false.
6. The Applicant’s representative responded by submitting that she would require to take specific instructions from her client, however the general position was that any repairing issues at the Property are of a minor nature and not worthy of withholding or abating of rent. It was submitted that the landlord has always been Dr Miller and that David Crawford has acted as the landlord’s agent for a time.
7. The CMD was adjourned to another CMD in order for:
 - (i) the Respondent to obtain legal advice;
 - (ii) for the parties to lodge documentation as outlined in the accompanying Direction and as set out as follows:

“The Applicant is required to provide:

1. *A copy of the complete lease between the parties (and which shows the signatures of the parties)*
2. *Evidence showing all inspections (or attempted inspections) at the Property.*

*The said documentation **must** be lodged with the Chamber no later than 14 days prior to the next Case Management Discussion.*

The Respondent is required to provide:

1. *A copy of the lease which he considers to be in place between the parties (and which shows the signatures of parties);*
2. *Evidence showing that the Respondent notified the Landlord of his intention to withhold rent;*
3. *Bank statements (in full and complete from October 2019 to date) which show the rental payments being put aside each month, and showing the total balance currently withheld;*
4. *Details of all repairs carried out to the Property organised by the Respondent and with receipts/invoices showing costs incurred;*
5. *Copies of all correspondence between the Respondent and the Applicant (or the Applicant's agent) reporting repairing issues in the Property and showing the Applicant's (or Applicant's agent's) response.*
6. *Evidence of all rental payments made by the Respondent since October 2019.*

The said documentation must be lodged with the Chamber no later than 14 days prior to the next Case Management Discussion. The said documentation must be paginated and accompanied by an inventory.”

8. A further CMD took place on 7 November 2023 by conference call. The Applicant was represented by Ms Wooley of Bannatyne, Kirkwood, France & Co. The Respondent appeared and represented himself.
9. The Applicant's representative submitted that no further rent has been paid and the arrears now stood at £33, 480. The Applicant's representative moved for the order to be granted.
10. The Respondent submitted that he had been ill since the last CMD, he had been in hospital for a week and a half and had been diagnosed with heart failure. He had an appointment with a solicitor but had to cancel due to his hospitalisation. He is now on six different types of heart medication. The Respondent submitted this as being the reason why he had not fully adhered to the terms of the Direction previously issued.
11. The Respondent had lodged a series of emails with the landlord as productions and nothing further. Upon questioning by the Tribunal, the Respondent was unable to direct the Tribunal to a particular email which shows that he had given

notice to the Landlord that he intended to commence withholding his rent, however the Respondent stated that one of the emails did show this. He confirmed that he did not hold a copy of the alternative lease referred to previously. He confirmed that the signature on the lease lodged by the Applicant was his, but submitted that the front page had been changed and that he had only ever signed a lease with David Crawford as landlord. He could not produce this. The Respondent submitted that he was withholding rent but this was being held in a safe for him by his friend, Lisa Anderson, who lives in London. The Respondent submitted that none of the repairs have been carried out and the following issues remain: the Property is not wind and watertight, windows are cracked, carpets are mouldy, there is dangerous wiring in the bathroom and near the boiler and storage heaters are not working. The Respondent submitted that he is unable to produce receipts and invoices to show the costs he has incurred in instructing repairs himself but estimates these to be in the region of £600-£700.

12. The Tribunal decided to adjourn the CMD and fix a Hearing to determine the following:

- (i) whether there are repairing issues within the Property which have affected, and continue to affect, the habitability of the property, and
- (ii) whether or not the Respondent has been withholding his rent, and
- (iii) whether or not the Respondent has been entitled to withhold his rent.

13. The Tribunal also issued a Direction setting out documents which must be lodged by the Respondent within 28 days of the CMD to enable the Hearing to proceed. The Tribunal noted that if the Respondent is unable to comply with the Direction due to his ongoing health issues, he must produce a medical certificate which confirms same.

- The First Hearing

14. A hearing took place on Monday 15 April 2024 by video conference. The Applicant was present and represented by Ms Wooley of Bannatyne, Kirkwood, France & Co. The Respondent did not appear nor was he represented.

15. On Friday 12 April 2024 at 15:27 the respondent emailed the Tribunal administration advising that he had attended the Royal Infirmary Hospital and would not be able to attend the hearing on 15 April due to illness and requested a postponement of the Hearing. The Respondent was notified by e-mail that he would require to produce a sole and conscience certificate from his doctor. This was not produced.

16. The applicant opposed the request for postponement of the hearing due to the delays already incurred in proceedings and on the basis that the Applicant's witness had flown to Scotland in order to attend the hearing from the UK and had faced disruption to his work schedule to accommodate the hearing.

17. The Tribunal notified the Applicants representative that the request to the FCDO for permission to hear evidence from the Applicant whilst resident in Hong Kong had been refused on Friday 12 April. Accordingly, evidence could not be heard from the Applicant directly at the hearing. Due to the Respondent's failure to appear, it was agreed that the Tribunal would initially hear submissions from the Applicant's representative and thereafter adjourn to discuss whether or not a decision could be made on the basis of those submissions without requiring to hear evidence from the Applicant directly.
18. The Applicant's representative moved for permission to amend the application under Rule 14A to increase some sort to £35,960, being the figure of rent due by the Respondent as at 3 March 2024. An application to amend the sum sought had been submitted to the Tribunal on 1 April 2024. Further rent arrears had accrued since that date, and the current level of rent arrears is £36,580. Interest on that sum was also sought at the rate of 15%, as set out in clause THIRD of the tenancy agreement between the parties.
19. The Tribunal was satisfied that the Respondent was obliged to pay a monthly rent of £620 under the Agreement between the parties and had failed to do so. The Tribunal was satisfied that the Applicant was entitled to the sum sought of £35,960 and that an appropriate application had been made to increase the sum sought to that figure under rule 14A of the rules. and which had been intimated on the Respondent by tribunal administration.
20. The Tribunal was satisfied that the Respondent had not produced evidence as had been required in terms of previous directions issued, to satisfy the Tribunal that there had firstly been any withholding of rent, and secondly that there had been any basis for doing so.
21. The Tribunal noted the Respondent's late request for a postponement of the hearing and refused same on the basis that no medical evidence had been produced in relation to the Respondent's alleged medical issues. The Tribunal noted that it had been set out in a previous direction issued to the Respondent that if he was unable to comply with directions of the Tribunal due to medical issues he should produce medical evidence, and he had not done so.
22. The Tribunal granted an order against the Respondent for payment of the sum of £35,960 to the Applicant.
 - Application for Recall
23. On 16 April 2024 the Respondent emailed the Tribunal administration advising that they had not attended the Hearing as they "*had to go to the emergency at Royal Infirmary on Fri April 12, 2024 as I had worsening symptoms of my heart failure as you can see clearly in the Soul and Conscience letter from my gp.*" The Respondent sought recall of the Order granted. An accompanying GP letter issued by Dr Diamond of The Hopetoun Practice and dated 15 April 2024 stated that "*I certify on Soul and Conscience that this person, who is a patient at this*

practice, has significant medical problems which would make it impossible for them to attend a tribunal hearing today.”

24. The Tribunal considered matters in terms of the provisions of Rule 30 of the Rules which states as follows:

30 (1) In relation to applications mentioned in Chapters 4, 6, 8, 11 and 12 of Part 3 of these Rules, a party may apply to the First-tier Tribunal to have a decision recalled where the First-tier Tribunal made the decision in absence because that party did not take part in the proceedings, or failed to appear or be represented at a hearing following which the decision was made.

(2) An application by a party to have a decision recalled must be made in writing to the First-tier Tribunal and must state why it would be in the interests of justice for the decision to be recalled.

(3) An application for recall may not be made unless a copy of the application has been sent to the other parties at the same time.

(4) Subject to paragraph (5), an application for recall must be made by a party and received by the First-tier Tribunal within 14 days of the decision.

(5) The First-tier Tribunal may, on cause shown, extend the period of 14 days mentioned in paragraph (4).

(6) A party may apply for recall in the same proceedings on one occasion only.

(7) An application for recall will have the effect of preventing any further action being taken by any other party to enforce the decision for which recall is sought until the application is determined under paragraph (9).

(8) A party may oppose recall of a decision by— (a) lodging with the First-tier Tribunal a statement of objection within 10 days of receiving the copy as required under paragraph (3); and (b) sending a copy of the statement to any other party, at the same time.

(9) After considering the application to recall and any statement of objection, the First-tier Tribunal may— (a) grant the application and recall the decision; (b) refuse the application; or (c) order the parties to appear at a case management discussion where the First-tier Tribunal will consider whether to recall the decision.

25. The Tribunal determined that in light of the GP letter produced, that it was in the interests of justice that the application for recall of the Decision of the Tribunal dated 15 April 2024 is granted. The application was remitted back to a Hearing, to take place by video conference.

- The Second Hearing

26. A further hearing took place on 22 November 2024 by Webex video conference. The Applicant was present and represented by Ms Wooley of Bannatyne, Kirkwood, France & Co. The Respondent did not appear nor was he represented.
27. The Respondent had been invited to attend a Webex test prior to the Hearing which he also did not attend.
28. The Tribunal had received no correspondence from the Respondent since the recall application was granted and the Hearing fixed.
29. The Applicant's representative submitted that the Applicant had no communication from the Respondent since the last Hearing, despite attempts by the Applicant (and by an agent acting on the Applicant's behalf) to communicate with the Respondent regarding the ongoing proceedings as well as to gain access to the property to carry out an inspection. No further rent had been paid and the arrears had continued to increase and now stood at £40,920. It was submitted that the Applicant was very frustrated at the length of the proceedings and moved for the Orders which were granted at the April hearing and subsequently recalled, to be reinstated.

- Findings in Fact

30. The Tribunal made the following findings in fact:

- (i) The parties entered into a Short Assured Tenancy Agreement ("the Agreement") which commenced on 1 March 2013.
- (ii) In terms of Clause THIRD of the Agreement, the Respondent was obliged to pay a monthly rent of £620 to the Applicant;
- (iii) The Respondent had failed to make payment of rent as fell lawfully due, and had accrued arrears of rent amounting to £40,920.

- Reasons for Decision

31. The Tribunal was satisfied that the Respondent was obliged to pay a monthly rent of £620 under the Agreement between the parties and had failed to do so. The Tribunal was satisfied that the Applicant was entitled to the sum sought of £35,960. Whilst the further increase of arrears was noted, as no application to amend under Rule 14A had been made, no order could be granted in that increased sum.
32. The Tribunal noted that despite the Respondent having applied for a recall of the Order, he had again failed to produce evidence as had been required in terms of previous directions issued, to satisfy the Tribunal that there had firstly been any withholding of rent, and secondly that there had been any basis for doing so. No explanation had been given as to his non-appearance.

33. The Tribunal also noted that the Applicant had attempted to communicate with the Respondent since April both personally and via an agent, and the Respondent had failed to respond.

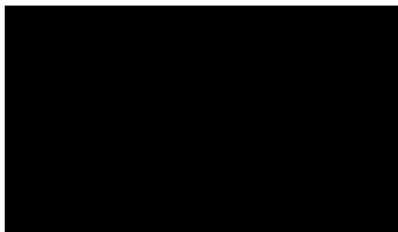
- Decision

34. The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order is granted against the Respondent for payment of the undernoted sum to the Applicant:

Sum of THIRTY-FIVE THOUSAND, NINE HUNDRED AND SIXTY POUNDS
(£35,960) STERLING

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.



Date: 22 November 2024