Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71(1) of the Private Housing (Tenancies)(Scotland) Act 2016.

Chamber Ref: FTS/HPC/CV/20/0083

Re: Property at 25 Cuiken Avenue, Penicuik, EH26 0DR ("the Property")

Parties:

Mrs Rushna Begum, 41 Roseburn Drive, Edinburgh, EH12 5NR ("the Applicant")

Mrs Margaret Fairnie, 162 Eskhill, Penicuik, EH26 8DQ ("the Respondent")

Tribunal Members:

Karen Kirk (Legal Member) and Frances Wood (Ordinary Member)

Present

The Applicant was not present but was represented by Mrs Jacqueline Ridley, Blacklocks, 89 Constitution Street, Edinburgh, EH6 7AS

The Respondent was present.

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") granted an order for payment against the Respondent for the sum of £2697.44.

Background/Introduction

This Hearing was fixed in terms of Rule 24 of the Procedure Rules and concerned an Application under Rule 111 of the Procedure Rules for civil proceedings in relation to a Private Residential Tenancy in terms of Section 71 of the Housing (Scotland) Act 2016. The Hearing took place by WebEx due to the covid-19 pandemic. The purpose of the Hearing being to allow parties to present their evidence in the case, make representations and cross examine. As one of the parties were unrepresented in the case the Legal Member explained the process of the Hearing at the outset and ensured the fairness of the Proceedings but explaining the procedure throughout.

This case had previously called before the Tribunal where it was determined that a WebEx hearing was appropriate as the Tribunal had been unable to hear the witness for the Applicant, Mr Hussein by telephone conference line. The Hearing took place over two dates, 31st March 2021 and 20th April 2021 and both were by WebEx.

Preliminary Issues

On 31st March 2021 Mrs Ridley advised that Mr Hussein was not able to give evidence but she was instructed to proceed. She intimated that she would take evidence from the letting agent Mr Rashid and there was no objection to this by the Respondent. During the course of the evidence heard on 31st March 2021 the Respondent raised issues regarding the accuracy of the rent statement. As the evidence could not be concluded on 31st March 2021 the Tribunal noted that the Applicant prior to the Hearing on the 20th April 2021 would consider the rent statement further. Mrs Ridley confirmed that since application was lodged deposit monies had now been allocated to the rent arrears and the rent arrears were now determined as £7017.44.

On 20th April 2021 as a preliminary matter the statement of rent was discussed and prior to the Hearing the Applicant and Respondent had lodged further representations regarding the accuracy of the rent statement. In particular a query had been raised regarding local authority payments towards the rent being received directly. Both parties following the further representations agreed that the rent statement was accurate and the Tribunal was grateful to both parties in assisting the Tribunal and each other to understand the payments received and the accuracy of the rent statement. Both parties agreed that rent due was £7017.44.

Evidence Summary

Mr Ali Rashid

Mr Rashid confirmed he was aged 40 years and was the proprietor and letting agent from APM lettings. He said he has been the proprietor for 10 years. Mr Rashid confirmed he was the letting agent instructed in regards the property for the duration of this tenancy only. He said that the rent for the property was £1200 per calendar month and the deposit of £1200 for the property was paid by the Respondent's daughter. He said the property had been subject to a repairing standards enforcement order which was not concluded until 25th November 2019. He confirmed he represented the Applicant at the Tribunal for this repairing standards order case. He said the tenancy started in December 2017 and ended in June 2019. Mr Rashid said he had limited involvement at the start as everything had been agreed between the tenant and the landlord before his involvement, although he did instruct an inventory company to carry out a report. He said he felt the property was grubby and needed a good clean. He said he understood that part of the agreement between the landlord and tenant at the outset had something to do with repairs being done to the property,

but this did not involve him. He understood the tenant and landlord were know to each other prior to the tenant moving into the property. In questioning, Mr Rashid said that had had gradually assumed responsibility from the landlord for dealing with all repairs on the property but this had definitely not been the position at the outset.

Mr Rashid said the Respondent's daughter did report various repairs which required to be done. He said he recalled hearing that there were problems with the freezer early on. He said he had a good relationship with the tenant Mrs Petitt and he visited the property regularly to carry out repairs himself as he was "quite handy". He said that the property was not clean at the start of the tenancy and had he seen it beforehand, would have had it professionally cleaned. He pointed out in his evidence that in his view the tenancy was not uninhabitable at any point, though there were matters which needed attention and he had sought to remedy these.

Mr Rashid said his team were chasing mounting arrears for the property in mid 2018 when direct payments from the local Council had stopped, and problems started. He said prior to his involvement with the property there had been a lot going on between the Applicant's husband Mr Hussein and the tenant of which he had limited knowledge.

Mr Rashid told the Tribunal that from October 2018 the skylight in the ground floor bedroom of the property was wind and watertight. He said work had been carried out to this skylight at that time, with a guarantee. Prior to that he recalled that a local authority officer had called to ask him to remove a bag of sand and tarpaulin from the skylight acting on complaints from a neighbour. The respondent had suggested that this bag had been present there to try to stop water coming through, though Mr Rashid did not concede that point. He said however, he had seen water coming through the skylight himself when the Tribunal visited the property for the purposes of the Tribunal repair case in February 2019. He accepted that at this point the skylight was certainly not wind and watertight and that it was possible it had been leaking at other points throughout the tenancy.

Mr Rashid said he knew that the tenant when she moved in to the property had an issue with the skylight roof. He said he had an invoice to say that City Properties attended to strip and clear moss and make the skylight wind and watertight on 12th October 2018. Mr Rashid said there were also issues reported regarding the fridge freezer, coping missing from the front wall and the carpets. Mr Rashid said the tenant reported that there was tacks or staples sticking out of the stair carpet and he went and saw that this needed repair. Mr Rashid told the Tribunal he flattened all the tacks out and made sure the carpet was secure.

Mr Rashid gave evidence that a crack had been reported in a bathroom tile. He said there were other issues regarding the bathroom but they were covered by a 24 hour homecare policy set up by the Applicant with regard to plumbing and electrical repairs. Further he said that the tenant reported that every time she was cooking in the kitchen

the heat detector would go off so the extractor was not working. He said he replaced the carbon filter and the extractor fan was working.

Mr Rashid said in evidence that generally there was a problem when repairs had to be carried out for trades folk to gain access. The tenant was not an easy person to deal with he said in respect of arrangements for access and at times he had stepped out as "the middle man" and asked the tenant to make direct contact with repair people in order to facilitate repairs. Mr Rashid said that there were issues with the property but in his view they were not causing the property to be uninhabitable and that the property was never the best decoration wise, but it was inhabitable at all times. He said the issues would not restrict full enjoyment and use and that the property was in full use every time he went there, including the bedroom in which the skylight was situated. His position was that the rent should not be abated as there was full use of the property, or if it was to be abated then it was not to be by as much as 33%.

The Respondent

The Respondent confirmed she was 65 years of age and a retired finance officer. The Respondent began to give evidence and reiterated her position that in her view an abatement was necessary and that the Tribunal in regards the housing repair standards case had determined following inspection of the property, that the landlord failed to comply with their duty to her daughter, the tenant. She sought abatement of rent to 33% for the duration of the tenancy.The Respondent told the Tribunal that on one occasion when she was present at the property in the winter of 2018 Mr Rashid turned up with a repair man with a hammer but all the repairs required remained outstanding. She said they did rip the stair carpet and then fitted a new one themselves but the tacks were still there and it did not help. The Respondent said that once the carpet was professionally fitted after the repair tribunal decisions then they had put grippers down and this solved the problem.

The Respondent told the Tribunal that Mr Rashid was correct that the landlord had made arrangements with her daughter for repairs. When she first saw the property herself she thought "what a mess but her daughter had been in desperate need of a place to live as she had to vacate her previous tenancy in the same street. She said for example in the bathroom the mould was to be sorted but that instead the landlord sent her daughter gloss paint to paint over it. She said this would not cover the mould and damp there and was not a solution to the problem. The Respondent said that her daughter called out the plumber with the home serve package for the property due to bathroom drainage issues who said it was the drainage system that was wrong and it would not work until it was refitted. This had eventually been resolved as part of the Repairs case.

The Respondent said she felt the property was a mess with doors that did not fit properly, skirting missing in places throughout, poor fitting carpets and some that were

threadbare. The Respondent said that the skylight in the downstairs bedroom was leaking throughout the tenancy and that the only attempt to repair the skylight that she could see was that there was a piece of plastic and bag of sand on the skylight to stop the water coming in. When that had been removed, water started coming in again. The Respondent said even if there had been a repair then, it was not fixed by the time of the Housing and Property Tribunal inspection of February 2019 and not before her daughter left the property at the end of the tenancy. She said that from start of the tenancy there were buckets under the skylight full of water and her daughter also had to mop the floor. She referred to emails some of which had been lodged reporting a number of complaints about the property including the skylight. The Respondent said in December 2017 that her daughter reported that there was also an issue with the fridge freezer not being fit for purpose as it was mouldy and missing drawers. She referred to email correspondence some of which had been lodged.

The Respondent said she was aware of rent arrears and that money was coming from Midlothian council directly to her not her daughter for rent and that she sent it to the letting agency. The Respondent's view was that although she accepted she was the guarantor that she was not liable for rent without an abatement being made given the disrepair in the property. The Respondent said that her daughter was in a desperate situation at the time she accepted the property.

Shirley Petitt.

Shirley Petitt explained to the Tribunal that she was the tenant of the property and had lived there with her daughter and her now12 year old son. She said her son was going through an ADHD assessment at the time of the tenancy and the state of the property was having a negative impact on her family life. Ms Petitt told the Tribunal that the family did not want to be in the house because of the repairs and there were lots of arguments between herself and the letting agents causing stress to the family unit.

Ms Petitt said that she met with the landlord Mr Hussein at the start of December 2017 at the property and that he had promised all the repairs needed would be done as they had done a walk round of the property. She said further that the landlord had promised her that all the repairs would be carried out and finished before she moved in. Ms Petitt said that none of the repairs were done by the time she moved in and that she reported the fridge freezer issues straight away and the mould in the bathroom as being black. Ms Petitt said that Mr Hussein had said he would turn up to do it but that he had a broken arm and she reluctantly agreed to do it. She said however that he came round with a tin of gloss paint for her to paint over the mould. She had scrubbed the ceiling with a mask on in an attempt to remove the mould.

Mrs Petitt told the Tribunal that the bath was plumbed wrong and was the subject of another argument. She said she was told to phone a homeserve policy number and they said there was nothing they can do as the bath was plumbed wrong and provided

a report. She said that there was a cracked tile on the bathroom floor that moved and there was a possibility of injury as her son has no awareness of hazards and struggles with understanding risk. Mrs Petitt said the carpets in the hall needed replaced and both she and Mr Rashid had to hammer down loose tacks but they always became loose again

Ms Petitt said that she was having to constantly communicate with the letting agent and that one email thread was 66 emails long. Mrs Petitt said that matters only improved when she applied to the Housing Tribunal and the repairs case was decided in her favour. In regards the skylight in the bedroom she said Mr Rashid knew the bag and tarpaulin was there for the purpose of keeping out water, and he told her it was wind and watertight. She said it was not if the sand and tarpaulin was taken off and this happened after the Council required it be removed, and Mr Rashid attended to it. Mrs Petitt said that when it rained the sky light leaked and no soft furnishings could be left in the room. This made the bedroom with the skylight effectively unusable as she could never depend on it being dry and risked damaging her belongings. She also gave evidence of skirting boards being loose, repairs needed to the breakfast bar, extractor fan, bathroom plumbing and carpets.

Mrs Petitt explained that her benefits changed during the tenancy. She had initially been in receipt of ESA and Housing Benefit. Full rent had been paid. After a change of circumstances, she moved onto Universal Credit and also received a discretionary housing payment but this did not meet the rent. She said she asked that the rent be reduced but she said she was asked to get the repairs done herself in order to get the rent reduction. Mrs Petitt said that she was told by neighbours that the property had previously been an unlicensed house of multiple occupation and 12 mattresses had been thrown out of the house prior to her moving in. She also said she had had to dispose of an old car left outside.

Submissions

For the Applicant

Ms Ridley for the Applicant submitted that the application had come about as the Respondent signed a personal guarantee for £1200 per month rent and that there was no dispute regarding this personal guarantee. The Applicant she submitted sought in terms of that guarantee the sum due of £7017.44. However although Ms Ridley submitted that on the evidence there was no getting away from the fact there were issues with the property and that the tenant had applied to the Housing Tribunal under a separate repairing standard case the property was fully habitable and rent was therefore due. She further submitted that there was a number of items to be repaired but when looking at the separate Housing and Property Tribunal decision of 25th Nov 2019 all matters were rectified by April 2019 with the exception of the Skylight which was not rectified until after the tenancy had ended.

Ms Ridley submitted that in the Tribunal decision of November 2019 there was no mention of the property being uninhabitable during the tenancy and there is no mention as to whether or not the tenant was entitled to an abatement of rent. Ms Ridley submitted that it was accepted there were issues but the applicant's position was that there should not be an abatement of rent and in the second place any abatement should not be a third of the rent. Ms Ridley said the rent for the tenancy from December 2017 until June 2019 was £21,600. The tenant had never sought to formally withhold rent if repairs were not made. Rent payments continued to be made although shortfalls were always there. There were 9 rooms in the property and the respondent seeks to say that 3 rooms were uninhabitable. That was not the case. She submitted that the Applicant was entitled to the sum sought.

For the Respondent

The Respondent submitted that it was clear from all said that there were issues right from the start of the tenancy and that the landlord was well aware from the start about them, but the letting agent was not and would not have let the property in that condition. She submitted her daughter was assured by the landlord there was no problem with the repairs being carried out but that her daughter's requests to get the repairs done continued from December 2017 to the Repairing standards tribunal in February 2019. The landlord had failed to meet his obligation to carry out the required repairs. The Respondent incorporated written submissions lodged with the Repairing Standards Tribunal making legal submissions for an abatement in rent of 33%. The submissions referred to case law and submitted that the tenant was entitled to an abatement on the basis that the property was in disrepair.

Findings in Fact

1. The Respondent entered into a guarantor agreement on 5th December 2017 for all liabilities in terms of the tenancy entered into by her daughter Shirley Petitt with the Applicant for the property.
2. This tenancy commenced on 13th December 2017 to June 2019.
3. The property was throughout the tenancy in a poor state of repair.
4. The bathroom of the property had mould and drainage problems.
5. Carpets throughout the house needed repair or replacement.
6. The kitchen extractor fan needed repaired. There were also issues with the breakfast bar and the fridge-freezer.
7. The skylight on the roof of the extension in the property was not wind or watertight for most if not all, of the tenancy.
8. The property had missing skirting.
9. Ms Petitt the tenant regularly reported the disrepair within the property to the letting agency but the repairs were not effectively carried out until the Repairing Standard case.
10. The letting agency made some attempts to carry out repairs but they were not all effective, particularly making the skylight wind and watertight.

11. Ms Petitt applied to the Housing and Property Tribunal under the Housing (Scotland) Act 2006 due to the continuing disrepair in 2018.
12. On 16th February 2019 the Tribunal issues a Decision in terms of Section 24(1) of the 2006 Act that the Landlord had failed to comply with section 14(1)(b) of the Act and made a Repairing Standard Enforcement Order.
13. On 16th April 2019 the Tribunal carried out a reinspection and noted all the repairs had been carried out with the exception of the skylight. This was completed by the time of a subsequent inspection carried out in November 2019 by the Tribunal after the tenancy had ended in June 2019.
14. Throughout the tenancy Ms Petitt was in regular contact with the letting agency to try to effect the repairs.

Reasons for Decision

The Tribunal heard detailed evidence from the Respondent and the witnesses. The Tribunal also had the benefit of written evidence lodged by both parties. In particular the Tribunal had the benefit of a detailed inventory lodged which showed a number of pictures of the property at the start of the tenancy. It was clear from the evidence of all parties that a degree of disrepair was accepted and the photographs of the property in the inventory also established this. The Tribunal also had the benefit of the Housing Tribunal decisions in the Housing Disrepair standard case under the 2006 Act and noted the Tribunal made a number of findings in fact which supported the disrepair following three inspections. The Tribunal noted that all but the repair to the skylight had been carried out by April 2019 when the tenant was still in the property. The Tribunal considered that all of the evidence established a degree of disrepair but there was a dispute as to whether an abatement was due or whether by contract the Respondent was liable for the remaining rent due. The amount of the rent due was not in dispute but the Respondent considered she was not liable for the rent due as the tenant was entitled to an abatement and this was disputed by the Applicant.

Throughout the Tenancy the Respondent's daughter had to regularly report repairs, had to have tradesmen visit to assess repairs and she also made and pursued a successful Application to the Tribunal under the 2006 Act. Given that the repairs were outstanding for a significant period of the tenancy, the amount of repairs overall were not insignificant the Tribunal determined having regard to *Adrian Stalker on Evictions in Scotland, 2nd Edition page 130 and 131* and *Renfrew District Council v Gray 1987 SLT (Sh Ct)* that the Respondent can claim an abatement of rent "on *the basis that the tenant has not enjoyed what she has contracted to pay rent for"*. *Stalker* goes on to state that position that both the abatement of rent and withholding rent is an "*equitable right and controlled by the Court by reference to equitable considerations in light of the circumstances of each case and that function may be exercised by the Tribunal"*, page 281. The Tribunal had the benefit of the evidence both written and oral from both parties. In balancing the evidence and interests of both parties it was clear that whilst there was an element of good faith from both, the Respondent had demonstrated that her daughter had actively sought the repairs to be carried out, had suffered

considerable inconvenience and had pursued a successful Tribunal disrepair case to seek to have the repairs rectified.

However the Tribunal did not consider in all the circumstances and in their discretion that it was appropriate that the rent due be abated at the sum the Respondent sought of 33%. Instead the Tribunal considered that for the duration of the tenancy given the skylight remained in disrepair and was only wind and watertight for some three months thanks only to a poor temporary measure, the rent should be abated by 20% to the amount of £4320 to reflect the equitable right of the tenant. This was on the basis that due to the inconvenience and the lack of enjoyment caused to the tenant and in turn the Respondent as Guarantor should not be liable for the full contractual amount. The tenant had been credible in her evidence and this was supported by the Applicant's only witness that there had been an agreement at the start to carry out a number of repairs. The disrepair continued throughout and the Tenant in the Tribunal's view was material and significant such to establish abatement as appropriate. The tribunal understood the position of the Applicant but in the all the circumstances, having regard to the overriding objective and the evidence heard they determined in their discretion it was appropriate to grant a payment order in favour of the Applicant for the amount of **£2697.44.** This sum represents the agreed rent arrears of £7017.44 minus the abatement of rent of £4320 applied by the Tribunal after hearing the evidence in this case.

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.

Karen Kirk **20 April 2021**

Legal Member/Chair **Date**