



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section under Section 71 of the Private Housing (Tenancies) (Scotland) (Act) 2016.
Chamber Ref: FTS/HPC/CV/20/0963**

Re: Property at 4 Knowe Cottage, Kirkconnel, Sanquhar, DG4 6NN (“the Property”)

Parties:

Mr James Donnelly, 4 Knowe Cottage, Kirkconnel, Sanquhar, DG4 6NN (“the Applicant”)

Inkersall Investments Ltd, 46 Nottingham Road, Mansfield, Nottinghamshire, NG18 1BL (“the Respondent”)

Tribunal Members:

Martin McAllister, solicitor (Legal Member) and Ms Lorraine Charles, chartered surveyor (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent pay the sum of SEVEN HUNDRED AND SEVENTY POUNDS (£770.00) to the Applicant.

Background

- 1. This is an application for payment in respect of the costs incurred by the Applicant in relation to the septic tank of the Property.**
- 2. The matter was considered at the same time as a Hearing to determine a third party’s application under section 22 (1A) of the Housing (Scotland) Act 2006 for a determination of whether the applicant’s landlord has failed to comply with the duty imposed by section 14(1) (b) of the Act. That**

application is registered under reference FTS/HPC/RT/20/0494 and a Hearing on that matter took place immediately prior to this Hearing.

3. The claim of the Applicant is for an order of £1,230 to be made against the Respondent. Determination of the application had been delayed as a result of the coronavirus pandemic and the decision to postpone full consideration of it until both applications could be dealt with together.
4. Case Management Discussions had been held on 2nd December 2020 and 30th January 2021.
5. The Property is situated in a rural location and is semi- detached. Both it and the neighbouring property (3 Knowe Cottage) share a septic tank. The application FTS/HPC/RT/20/0494 deals with issues concerning the condition of the septic tank and, in connection with that application, an inspection by the members of the Tribunal had been carried out on 2nd June 2021. This application is in respects of costs which the Applicant states were incurred by him as a result of the poor condition of the septic tank.

The Hearing

6. The Hearing was conducted by teleconference. The Applicant was present and was supported by Mr Adam Black of Dumfries and Galloway Council. Mr James Woodcock, a senior manager of the Respondent was present. Parties had made written representations and had lodged documents.
7. Mr Donnelly gave details of his claim. It is in respect of four invoices paid by him:
 - 7.1 An invoice by Billy Bowie Tanker Services and Waste Disposal Contractors (“Billy Bowie”) for £460 dated April 2019.
 - 7.2 An invoice by Billy Bowie for £280 dated 13th February 2020.
 - 7.3 An invoice by SOS Drains Ltd for £190 dated 18th December 2020.
 - 7.4 An invoice by Xoli Ltd for £300 dated 21st December 2020.
8. It is useful to set out relevant sections of the tenancy agreement dated 9TH May 2016:

Section 14 imposes certain obligations on the tenant: “.....you will be responsible for keeping the property in a tenant-like manner which includes cleaning leaves from the gutters and gulleys, unstopping sinks and bath drains with blockages caused by the tenant’s own use, not to flush disposable toilet wipes, sanitary products, wet wipes or other substances likely to cause blockage.....”

Section 17 imposes further obligations on the tenant: “Where the property is serviced for sewerage and waste water by means of a septic tank or cess pit the tenant acknowledges that as they have no sewerage charges payable to a sewerage provide that they are responsible for the

organisation and cost of emptying the septic tank or cess pit and will indemnify the landlord for any cost or damage as a result of a failure to empty the septic tank or cess pit.”

9. Mr Donnelly acknowledged that, in terms of the tenancy agreement, he had an obligation to empty the septic tank. The position which he advanced was that he had been required to empty the septic tank more often than he would otherwise have had to if the septic tank had been in a good condition.
10. Mr Woodcock said that the Respondent’s position was that the septic tank had not been emptied more than would have been expected and that issues with the septic tank had been caused by inappropriate use of it. He said that there was evidence of sanitary products or similar having been introduced to the tank which would have caused issues including possible blockages.

The invoices

11. It was a matter of agreement between the parties that there had been issues with the septic tank and these are addressed in the repairing standard application. Parties did not dispute that the septic tank had been emptied since the tenancy commenced. The tank had been emptied in 2017 and it was Mr Donnelly’s recollection that it had been in September 2017. He said that this had been undertaken at the Respondent’s expense because work was being done to the septic tank. The tank was emptied in April 2019 on the instruction of the Applicant who paid for it. In December 2020, the Applicant commissioned a report on the septic tank and, prior to that, the tank was emptied and he paid for this to be done.
12. The Xoli Ltd and SOS Drains Ltd invoices: Mr Donnelly said that, in connection with this application and in connection with his belief that the Property did not meet the repairing standard, he had instructed a report from Xoli Ltd, a company dealing in wastewater treatment. The report is dated 21st December 2021 and is in respect of an inspection of the septic tank. The relevant invoice for £300 is dated 21st December 2021. Mr Donnelly said that, to facilitate the inspection, he had to arrange for the septic tank to be emptied and he instructed SOS Drains Ltd. Their invoice for £190 is dated 18th December 2020.
13. The report by Xoli Ltd set out its findings and made recommendations. Mr Woodcock said that he thought the cost of the report was somewhat high but conceded that its content was helpful. He said that, up until he had sight of the report, he considered that the Respondent had been properly addressing issues with the septic tank but that the report “moved things forward.” His evidence was that the report informed work which the Respondent subsequently carried out to the septic tank.

14. Mr Donnelly said that the invoice from Billy Bowie dated 8th April 2020 was in respect of emptying of the septic tank. It was for £480. Mr Donnelly said that his neighbour would have been due to pay half of any invoices in respect of the emptying of the septic tank. He said that she could not afford it and that he considered this to be a sum which he could claim from his landlord because he was of the opinion that he had to have the tank emptied at that time because of its defects. Mr Woodcock said, that in due course, he would address the issue of the frequency of emptying the septic tank.
15. Mr Donnelly said that the invoice from Billy Bowie dated 15th February 2020 was in respect of work done to deal with a blockage. He was directed to the detail of the invoice which stated “tanker to empty septic tank.” Mr Donnelly was at a loss to explain this. He said that he had called Billy Bowie and that a hose had been used to clear the blockage. Mr Woodcock said that the process being described was “jetting” and he said that it was possible that the invoice reflected the original job instruction rather than what was actually done. Mr Donnelly was certain that no emptying of the septic tank had been carried out on that occasion and that unblocking had been done. Mr Woodcock said that the blockage would have been caused by inappropriate use of the septic tank and he referred to his various inspections where he found sanitary products or similar in the tank. He also referred to the SOS Drains Ltd report dated 24th August 2021 which stated “There were no signs of blockages but there were sanitary towels floating on top of the septic tank contents. These in turn can bunch up and allow blockages to start and should not be flushed into septic tanks as they are not degradable.”

Inappropriate use of septic tank

16. The Respondents, in written representations, stated that the tenancy agreement set out the obligations on tenants with regard to usage of the septic tank. Mr Donnelly said that he has not introduced inappropriate items into the septic tank. Mr Woodcock said that it is always difficult, in situations such as this where septic tanks are shared, to know which property such items come from. Mr Woodcock said that the obligations on tenants in this regard are clearly set out in the tenancy agreement. He said that, on occasions where there have been issues with the septic tank and he had noticed inappropriate items in it, he had mentioned this to the tenants and had reinforced the proper way in which it should be used. Mr Woodcock said that, since complaints about the septic tank had been raised by Dumfries and Galloway Council, he had not given any formal or informal guidance to the neighbouring tenant. He acknowledged that this was against a background of his belief that inappropriate items had been introduced to the septic tank. Mr Woodcock said that there existed some sensitivity in dealing with the other user of the septic tank and provided reasons for this which it is not appropriate to record in this Decision.

Frequency of emptying the septic tank.

- 17. Mr Donnelly said that he had experience of using a septic tank in another property where he had lived. He said that it had been occupied by a family of five and that its septic tank did not have to be emptied on as regular basis as the one at the Property. He said that the design of that septic tank was of a traditional type which is the same as that of the Property. He maintained that he had required to empty the septic tank more than he should have been required to and that this was because of the faults which it had.**
- 18. Mr Woodcock said that, in respect of the Property, he did not think that it had required to be emptied at a frequency which he would describe as inordinate. He said that annual or biannual emptying would be appropriate and that, in relation to the Property, the septic tank was emptied in September 2017, April 2019 and December 2020. Mr Woodcock said that contractors charge more where a tank is allowed to get too full because it then has to be emptied on an urgent basis rather than a scheduled visit being arranged in advance. Mr Woodcock referred the Tribunal to documents which he had lodged. One was an email from Mr Eric Williamson of Xoli Ltd to the Respondent dated 19th January 2021 where he states, in response to a query in relation to the frequency of emptying of septic tanks: “Every manufacturer has their own recommendations which is usually annually.” Mr Woodcock also referred to a document published by British Water entitled “Code of Practice - Guide to the Desludging of Sewage Treatment Systems.” In relation to frequency of emptying septic tanks it states “In the absence of a manual or any recommendations the following intervals are suggested: Domestic Sewage/Wastewater Treatment Plants- half-yearly.”**
- 19. Mr Donnelly said that December 2020 was the last time when the septic tank was emptied.**
- 20. Mr Woodcock said that inappropriate items in a septic tank could lead to issues such as blockages which might lead to the tank requiring to be emptied more frequently.**

Other matters

- 21. Mr Donnelly said that the fact that there had been excessive ground water on top of the septic tank would have allowed water to seep into it because of the faulty slabs forming the lid and he referred to gaps between the slabs.**
- 22. Mr Woodcock said that, when he inspected the Property on a number of occasions, he had not noticed the existence of excessive groundwater but he conceded that he had inspected when the weather was dry. He accepted that there had been flood conditions in February 2021 when the septic tank was under water but he did not accept that this necessarily**

would have put more pressure on the capacity of the tank and he said that the gaps between the slabs were not excessive.

23. Mr Donnelly said that the septic tank appeared to be working properly since the Respondent completed works to it and the surrounding area.

Submissions

24. Mr Donnelly asked the Tribunal to make a payment order for £1230. He said that he had paid to have the septic tank emptied and that the number of times he had required to do it was excessive. He said that, to progress his application and the repairing standard application, he had instructed the report from Xoli Ltd and had also required to arrange for the septic tank to be emptied to facilitate that company's inspection. He submitted that it was reasonable to be reimbursed since that report had assisted the Respondents and aided his application. Mr Donnelly said that the work required in respect of the unblocking of the sewerage system had nothing to do with what he had done to the septic tank. He had put nothing into the tank which would have caused any blockage.

25. Mr Woodcock said that he had attempted to resolve the issue with Mr Donnelly but had not been successful in doing so. He said that the tenancy agreement made it clear that the Applicant was responsible for the cost of emptying the septic tank. He said that he thought that the cost of the report prepared by Xoli Ltd had been excessive and that, if the Respondent was to be held liable for its cost and the associated emptying of the tank, the Applicant would benefit unfairly because he would not have had to pay for its emptying. He did concede that the report had been of some benefit to the Respondent. Mr Woodcock said that the Respondent had spent money in rectifying issues with the septic tank and that some of these had been caused by inappropriate use of the system. He said that the principal issue identified in the report by Xoli Ltd had been that the soakaway had been blocked. Mr Woodcock said that it cannot be certain which of the users of the septic tank was using it inappropriately and he asked the Tribunal to take into account that there should be some element of set off because the Respondent had made no counterclaim in respect of damage to the septic tank.

Findings in Fact

- I. The Applicant has paid the sum of £300 to Xoli Ltd in payment of its invoice dated 21st December 2021.
- II. The Applicant has paid the sum of £190 to SOS Drains Ltd in respect of its invoice dated 18th December 2020.
- III. The Applicant has paid the sum of £460 to Billy Bowie in respect of its invoice dated 28th April 2019.
- IV. The Applicant has paid the sum of £280 to Billy Bowie in respect of its invoice dated 13th February 2020.

- V. In terms of the tenancy agreement between the parties dated 9th May 2016, the Applicant and another party is *inter alia* obliged to pay for emptying of the septic tank which serves the Property.
- VI. The work carried out referred to in the Billy Bowie invoice of 13th February 2020 is in respect of clearing a blockage in the sewerage/septic system.

Findings in Fact and Law

- I. The Respondent is liable to reimburse the Applicant for the sum of £300 paid to Xoli Ltd.
- II. The Respondent is liable to reimburse the Applicant for the sum of £190 paid to SOS Drains Ltd.
- III. The Respondent is liable to reimburse the Applicant for the sum of £280 paid to Billy Bowie.
- IV. The Applicant and another party are responsible for payment of the invoice of Billy Bowie for £460 dated 28th April 2019.

Discussion and Reasons

- 26. The Tribunal considered the matter to be focussed. There are four distinct components of the claim and it considered each in turn.
- 27. The Applicant was a party to the application raised by Dumfries and Galloway Council in relation the repairing standard. He took the decision to instruct a report from Xoli Ltd to assist him in this application and to inform the repairing standard application. In the case management note dated 2nd December 2020, Mr Donnelly had been advised by the Tribunal that that it would require to have evidence on why lack of maintenance of the septic tank might lead it to be emptied more frequently. It seemed entirely reasonable to the members of the Tribunal that Mr Donnelly instructed a report from a company such as Xoli Ltd. It was accepted by Mr Woodcock that the report was of some assistance to the Respondent. In considering all the circumstances it was considered appropriate that the Applicant be reimbursed the sum of £300 in respect of the report.
- 28. The septic tank required to be emptied to facilitate the inspection by Xoli Ltd and the members of the Tribunal considered it reasonable that he be reimbursed the sum of £190 for this. It was accepted that such reimbursement benefited him because he would otherwise require to have emptied the septic tank at some point but, in all the circumstances, it was appropriate that he be reimbursed because it was a sum of money that, but for the investigations by Xoli Ltd, he would not have had to pay at that time.
- 29. Mr Donnelly had paid £480 to have the septic tank emptied in April 2019. He chose not to share the cost with the tenant at 3 Knowe Cottage. The

tribunal considered that, if it were to make an award in respect of this sum, it would be inappropriate for that to be more than £240. The tribunal accepted the evidence of Mr Woodcock in relation to the frequency of emptying the septic tank. It had been emptied in September 2017 and Mr Donnelly arranged for it to be emptied in April 2019 which is almost eighteen months later. Mr Woodcock's position was supported by the email from Mr Williamson and the British Water document. Mr Donnelly had not provided evidence to prove that the requirement to empty the septic tank in April 2019 was excessive. The tribunal did not find this particular component of the application to be proved. It is a matter for the Applicant as to whether or not he seeks some relief and payment from the tenant of 3 Knowe Cottage.

30. The Tribunal accepted that the invoice from Billy Bowie of 13th February 2020 was in respect of clearing a blockage rather than emptying the septic tank. It could be argued that the Respondent should have no liability in this regard and that such a cost should fall on the Applicant. The tribunal accepted Mr Donnelly's evidence that he had done nothing to impede the proper functioning of the septic tank. It accepted that he had previous experience of a septic tank. The tribunal considered that the issue which had to be considered is whether or not the Respondent, when it had a reasonable apprehension of misuse of the sewerage system (and after matters had been intimated by Dumfries and Galloway Council), had an obligation to take any kind of action in relation to the occupier of the other property which shared the septic tank. The tribunal came to the view that any reasonable landlord would have taken steps to investigate further and, if necessary, reinforce guidance and education. Mr Woodcock said that no formal or informal approaches were made to the occupier of the other property. The members of the Tribunal had some sympathy with the position of Mr Woodcock and it would be inappropriate to disclose what information he shared in relation to his difficulties in making an approach but nevertheless the tribunal considered that the Respondent had a duty to the Applicant to ensure that the other user of the septic tank was using it in an appropriate manner. For that reason, the tribunal determined that the Applicant should be reimbursed the sum of £280 in respect of the cost of unblocking the system.
31. The tribunal considered Mr Woodcock's submission that it have regard to "offset" in respect of damage caused to the septic tank which the Respondent had to make good. It took no regard of this because no evidence had been produced by the Respondent that the Applicant had used the septic tank in an inappropriate way.

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.

**Martin J. McAllister
Legal Member
27th August 2021**