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 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/CV/20/1435

Re: Property at 3/2, 9 Robertson Street, Greenock, PA16 8DB ("the Property")

Parties:

Miss Chiara Louise Cacioppo, 7 Gleneagles Drive, Gourock ("the Applicant")

Mr Lee Doherty, 3/2, 9 Robertson Street, Greenock, PA16 8DB ("the Respondent")

Tribunal Members:

George Clark (Legal Member)

Decision (in absence of the Parties)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be decided without a Hearing and made an Order for Payment by the Respondent to the Applicant of the sum of £2,600. The Applicant's request for interest on the principal sum was refused.

Background

By application, received by the Tribunal on 1 July 2020, the Applicant sought an Order for Payment in respect of unpaid rent that had become lawfully due by the Respondent. The sum sought was £1,630. The Applicant was also seeking interest on the principal sum at the rate of 8% per annum.

The application was accompanied by a copy of a Short Assured Tenancy Agreement between the Parties commencing on 25 May 2017 at a rent of £475 per month and copy bank statements from 12 August 2019 to 5 March 2020. The Applicant contended that the rent due on 25 July 2019, 25 May and 25 June 2020 had not been paid, that the payment for March 2020 had been £50 short and the payment for April 2020 had been £125 short. He had also passed on to the Respondent a charge of £30, being payment of the call-out charge for an electrician, who had travelled from Glasgow to inspect the Property, but had been unable to gain access. This appointment had been intimated in advance to the Respondent. These sums added

together made up the claim for £1,630. On 8 September 2020, the Applicant asked to increase the amount sought to £3,055, as no rent had been paid for July, August or September 2020.

The Applicant provided copies of email exchanges with the Respondent's solicitors, in which, on 25 June 2020, the Applicant stated that the £30 cost of a call-out charge would be added to the unpaid rent, as the Respondent had been in the Property but had stopped access earlier that day, despite having had 48 hours' notice. The Respondent's solicitors said that they would not be recommending that he accept liability for the call out charges, as they had not confirmed that the time was suitable for their client. The correspondence also included an email from the solicitors saying that the Respondent had valued his items, damaged when the living room ceiling collapsed, at £5,016.99.

On 14 October 2020, the Respondent made written representations to the Tribunal. He disputed the claim in its entirety, on the basis that rent was not lawfully due as a result of the Applicant failing to fulfil his repairing obligation. There had been longstanding water penetration, with leaks at the bay window and the toilet window. The issues had been reported to the Applicant on several occasions. In June 2019, the Applicant had instructed roofers to attend the Property to carry out repairs and, since that work had been carried out, every room in the Property with the exception of the hallway, had developed a leak. The Respondent had obtained an architect's report dated 17 August 2019. The report noted that there was evidence of water penetration throughout the Property and that the Property had not been kept watertight during the repair works. The living room ceiling had collapsed several weeks prior to June 2020, causing significant damage and inconvenience. Due to the problems outlined, the Respondent contended that the Property did not meet the repairing standard during the period in respect of which rent arrears were being sought. The Applicant had a duty to ensure the Property was reasonably fit for human habitation throughout the tenancy. The Respondent had reported the issues, but any steps taken by the Applicant had not addressed the underlying issues. The Applicant was, therefore in a material breach of his contractual, statutory and common law duties and, accordingly, rent was not lawfully due. The Respondent was entitled to an abatement of the whole or part of the rent over the period during which the Respondent was in breach of his obligations, not limited to the period for which the Respondent was pursuing recovery of rent arrears. On 1 June 2020, the Respondent's agents had written to the Applicant, intimating a request for an abatement of rent and compensation for £5,016.99 in respect of the value of belongings damaged by the disrepair issues. The Applicant had not made an offer of settlement and the Respondent was currently applying for legal aid to make separate application to the Tribunal seeking compensation from the Applicant.

The Respondent pointed out that the Applicant was claiming for rent at £475 per month, but the rent had been reduced to £425 per month to compensate him for the continued issues with the leaking following the ceiling collapse. The Applicant had also agreed to the reduction of £125 for April, and the Respondent referred the Tribunal to WhatsApp correspondence on this point. The Respondent had not had the use of a living room for the past 6 months.

The Respondent provided the Tribunal with a copy of a report from Professor Tim Sharpe dated 17 August 2019, which noted that roof repair works were near completion, but it appeared that the Property had not been kept wind and watertight during the works period, although at the time of inspection the leaks did not appear to be ongoing. The Respondent also provided copies of WhatsApp correspondence

between the Parties, including a message dated 8 March 2020 from the Applicant agreeing to the Respondent retaining £50 per month from the rent until the problems with the roof were sorted and the Respondent's answer of the same day, which was "Yeah that's reasonable Gino, thank you" and a message from the Respondent on 24 April 2020 saying that he had sent a payment of £350 for that month "due to inconvenience caused by ceiling falling in living room, will return to regular payment with following month's payment". The Applicant responded "Thank you and sorry for inconvenience".

The Applicant made further written submissions in response to those lodged by the Respondent. He stated that the Respondent had been offered alternative accommodation but had refused to move to a flat in Gourock while the work was being done. It was not the Respondent who had instructed the roof repair works. The Applicant was entitled to rent, as it had been the Respondent's decision to stay in the flat and, only four days after the date of the architect's report, on 21 August 2019, the Respondent had messaged to say that all problems had been finally resolved. Despite being asked, the Respondent had not provided any evidence in relation to items he alleged had been damaged. The Applicant had advised the Respondent to contact his own insurance company, as the Applicant's insurance did not cover tenant's belongings.

Case Management Discussion

A Case Management Discussion was held by means of a telephone conference call on the afternoon of 9 November 2020. The Applicant participated but the Respondent was not present or represented. The Applicant said that he wished to increase the amount sought by a further £475, as the rent due on 25 October had not been paid. The Respondent tended to pay rent early in the month following the date it had become due, so he had not sought the increase in writing earlier, in case the Respondent made a payment between 25 October and the date of the Case Management Discussion.

The Applicant stressed that the Respondent had been offered alternative accommodation but had refused it. The Applicant had agreed to the £50 per month reduction in rent in March but was of the view that, as the Respondent had stopped paying rent altogether, that arrangement no longer applied. He did, however say that he would be content to accept the figure at £425 per month, should the Tribunal not agree with his view and he was still prepared to continue with the reduction of £50 per month until the situation was resolved, provided the Respondent paid the rent.

The Applicant confirmed that there was an ongoing dispute with neighbours regarding the repair works instructed in 2019 and that he could not unilaterally instruct work, as it required majority approval. As a result, the matter had dragged on for a long time and was still not resolved.

Reasons for Decision

The Tribunal was not prepared to allow the application to be amended to include rent that had become due on 25 October 2020, as the Respondent had not had notice of such a proposed amendment and was not present or represented. It was open to the Applicant to submit another application in respect of this and any other unpaid rent in future months.

The Tribunal held that the Parties had agreed a reduction in rent to £425 per month with effect from the payment due on 25 March 2020. This had been offered by the Applicant on 8 March and the Respondent had, in his WhatsApp message of the

same day, accepted the reduction as “reasonable”. Accordingly, the claim for unpaid rent fell to be reduced by £50 per month from 25 March 2020 and the Applicant’s claim for a £50 shortfall in the March rent was refused.

The Tribunal noted that the Respondent had only paid £350 towards the rent payment due on 25 April 2020. This had been a unilateral decision, but the view of the Tribunal was that the response of the Applicant, namely “Thank you and sorry for inconvenience” implied that he had accepted that the rent for that month only would be £350. Accordingly, the Applicant’s claim in respect of a £125 shortfall in the April rent was refused.

The Tribunal had before it conflicting evidence regarding the call out charge of £30. The Applicant was saying that the Respondent had been given 48 hours’ notice and the Respondent’s solicitors were saying that they had not confirmed that the time was suitable for their client. The Tribunal was unable to make a finding in fact on this matter so the Applicant’s request for the claim to include the £30 charge was refused.

Taking these decisions into consideration, the Tribunal calculated that the unpaid rent amounted to £2,600, being £475 for May 2019, and £425 for each of May, June, July, August and September 2020, under deduction of £50 in respect of the payment for March 2020. The Applicant’s claim for £3,055 must, therefore, be reduced by £125 in respect of April 2020, the £30 call out charge and £50 for March and each month from May until September 2020 (£300).

The Tribunal did not accept the argument put forward by the Respondent that the Applicant had been in material breach of contract, which entitled the Respondent to withhold rent. There was no doubting the fact that the living room ceiling had collapsed and it appeared that the necessary repairs had not yet been carried out, but the Tribunal was not prepared to make a finding that the Property does not meet the repairing standard when it has procedures in place whereby tenants can apply for a determination to that end and can seek a Repairing Standard Enforcement Order. The Respondent has not availed himself of the remedy that is open to him in this regard. Even if the Tribunal had been prepared to make such a finding, however, and even if that had resulted in the Tribunal holding that the Applicant was in material breach of the tenancy contract, the remedy available to the Respondent would have been to rescind the contract and possibly claim damages. He was not entitled to contend material breach and refuse to pay the rent, yet still occupy the Property. He could not continue to enjoy the benefits of occupation if his view was that the contract was to be regarded as having been rescinded. Further, it was clear from the evidence before the Tribunal that the Respondent did not regard the Applicant as being in material breach such as to entitle him to rescind the contract, as he had agreed with the Respondent a reduction in the rent to reflect the ongoing inconvenience arising from the ceiling collapse. He had also refused an offer of alternative accommodation.

The Tribunal refused the Applicant’s request for interest on the unpaid rent. It accepted that the tenancy agreement made provision for interest but was of the view that such a charge would be unfair in the circumstances of the present case, as the question of whether any rent was due at all had been disputed by the Respondent and he was entitled to have that dispute resolved by the Tribunal’s determination without suffering the additional imposition of interest. The Tribunal noted, however, that the tenancy agreement is ongoing and that, as the matter of liability for rent had been addressed in the Tribunal’s decision, the Respondent might be held liable to

pay interest on any future rent arrears, as this was specifically provided for in the tenancy agreement.

Decision
The Tribunal determined that the application should be decided without a Hearing and made an Order for Payment by the Respondent to the Applicant of the sum of £2,600. The Applicant's request for interest on the principal sum was refused.

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.

G Clark

_____ **9 November 2020**
Legal Member/Chair **Date**