Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber)

Chamber Ref: FTS/HPC/CV/19/0512

Re: Property at Laurenstone, Westown, Errol, PH2 7SU ("the Property")

Parties:

Mr Derek McLeod and Mrs Louise McLeod, c/o 45 King Street, Perth, PH2 8JB ("the Applicant")

Mr Dean Thomson, 3 Cox Street, Downfield, Dundee, DD3 9HA ("the Respondent")

Tribunal Members:

Virgil Crawford (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

BACKGROUND

1. This case has a long history. The application was first presented to the Tribunal on 15 February 2019. The Applicants were seeking an Order for payment of rent arrears in the sum of £10,343.70;

2. The tenancy between the parties commenced on 28 January 2016. It ended during October 2018. By the time the application was made, therefore, the tenancy between the parties was at an end;

3. The application was initially intimated upon the Respondent by advertisement on the First Tier Tribunal for Scotland Housing and Property Chamber website. At a Case Management Discussion held on 13 June 2019 there was no appearance by the Respondent and the Tribunal granted an Order for payment in the sum of £10,343.00;

4. The Respondent thereafter became aware of the Order having been granted and, by letter dated 19 August 2019, Solicitors instructed by him requested that the Order be recalled;

5. The Tribunal assigned a further case management discussion to consider the application to recall the Order for payment. That Case Management discussion was assigned to take place on 28 October 2019;

6. On that date, the Tribunal recalled the Order of 13 June 2019. The decision of that date states, at paragraph 9, that

   "the Legal Member noted that the defence put forward by the Respondent in the application for recall was lacking in specification...."

   and issued a direction that the Respondent

   "submit full details of the disrepair complained of... and an explanation as to why abatement of rent in the sum of 50% is justified.....".

   A further Case Management Discussion was assigned for 6 December 2019;

7. At the Case Management Discussion on 6 December 2019, while appreciating the decision made by the Tribunal on 28 October 2019, the Tribunal enquired of the Respondent's legal agents as to whether or not there was, in fact, a stateable defence to the application. The Tribunal, in particular, noted that it was accepted by the Respondent that the sum of £10,343.70 claimed had not, in fact, been paid by the Respondent to the Applicants. The Tribunal also noted that there was no dispute that, by the time the application to the Tribunal was made, the tenancy was at an end;

8. The Tribunal also enquired of the Respondent as to whether or not there had previously been any application by the Respondent for an Order under the Repairing Standards Provisions within Chapter 4 of the Housing (Scotland) Act 2006 and whether or not, if it was being asserted that payment of rent was withheld because of disrepair in the property, the Respondent had retained the rent money and set it aside for payment in the event that any repairs were effected. The answer to both was no. The Tribunal was advised that the Respondent was not aware of the Repairing Standards provisions. The Tribunal was advised that the Respondent would be in a position to make payment if required but, when pressed, it was confirmed that the monthly rental payments had not been set aside for payment if or when any repairs were effected;

9. The Tribunal referred parties to the following case law:-

   a. Pacitti .v. Manganiello 1995 SCLR (Notes) 557;
   b. Lamont and Ors .v. Chattisham [2018] CSIH 33;
   c. Stobbs and Sons .v. Hislop 1948 SC 216;

At the request of the Respondent's Solicitor the Tribunal adjourned the Case Management Discussion to a later date to enable parties to consider the case law and to provide any further submissions in relation to the same. A further Case Management Discussion was assigned for 20 March 2020;

10. The Case Management Discussion on 20 March 2020 was postponed administratively due to the coronavirus pandemic. Initially a further Case Management Discussion was assigned for 9 July 2020 although that was, again, administratively postponed until 10 July 2020 and was set to take place by teleconference;

11. On 10 July 2020 the Case Management Discussion proceeded. Discussion again took place in relation to whether or not there was, as a matter of law, a stateable defence to the claim. The respondent's Solicitor again requested a postponement to enable him to fully consider the law in the matter and to lodge any further submissions felt appropriate. Separately, he indicated that consideration would be given to raising separate proceedings in relation to any claim the Respondent may have, if so advised. The Case Management Discussion was again postponed. A further Case Management Discussion was thereafter assigned to take place on 28 August 2020;

12. Prior to then the Respondent submitted a separate application to the Tribunal seeking an order for payment against the Applicants in this case. That application was not submitted early enough to enable the Tribunal to conjoin the applications in order that they call together on 28 August 2020;

13. On 28 August 2020, in the present case, a further case management discussion was held by teleconference. The Respondent's Solicitor requested that, again, this case be adjourned to enable this case and the separate application now submitted by the Respondent to be considered by the Tribunal at the same time. The Tribunal refused that request;

14. Thereafter, the Respondent's Solicitor made Submissions to the Tribunal, based upon written submissions previously lodged, to the effect that there was a stateable Defence to the claim for payment of rent. The Tribunal did not accept those Submissions and thereafter granted an Order for payment in the sum of £10,343.70;

THE CASE MANAGEMENT DISCUSSION

15. The Case Management Discussion on 28 August 2020 was the 7th Case Management Discussion held in this case. It is noted by the Tribunal, however, that the Case Management Discussions assigned for 20 March 2020 and 9 July 2020 did not proceed and were each postponed administratively due to the coronavirus pandemic. Even leaving those two aside, however, the Case Management Discussion on 28 August 2020 was the 5th case management discussion which had called and that was more than 18 months after the application was initially presented to the Tribunal;

16. The Applicants, Derek McLeod and Louise McLeod, both participated in the Case Management Discussion by teleconference, as did their representative, Mr A Keddie of Premier Properties, Perth. The Respondent did not participate in the Case Management Discussion but was represented by his Solicitor, Mr S Forsyth of MML Solicitors, Dundee;

17. Mr Forsyth confirmed that a separate application had been submitted to the Tribunal seeking an abatement of rent and damages arising from alleged defects/disrepair on the property during the tenancy. Previous written submissions had suggested that

"the monthly rent should be abated so (sic) a significant degree, of 75% to 100%. The Respondent is also entitled to rely on the remedy of damages. If the abatement applied results in a higher amount than claimed by the Applicant, the Respondent seeks the balance in damages together with the sum of £5,000 for stress and inconvenience and reimbursement of legal fees incurred in connection with this matter".

18. The more recent Submissions submitted referred to the separate application which had been submitted to the Tribunal in which abatement of rent in the sum of £10,343 was sought plus damages for stress and inconvenience in the sum of £5,000,

"or such other amount as the Tribunal deems fit"

It was further suggested that this amounted to a liquid claim in the sum of £15,343 and, on that basis, could be set off against the claim for payment of rent in this case. This was under reference to certain dicta in the case Lamont and Ors .v. Chattisham. It was, essentially, being asserted that this claim amounted to a defence to the present application;

19. Mr Forsyth requested an adjournment to enable both cases to be dealt with together. That was opposed by the Applicants;

20. The Tribunal refused the request for a postponement and thereafter granted an order for payment against the respondent;

FINDINGS IN FACT

21. The Tribunal found the following facts to be admitted or proved:-

a. That the parties entered into a Tenancy Agreement on 28 January 2016. The Tenancy Agreement ended during October 2018;

b. As at the date of termination of the Tenancy Agreement, an amount in the sum of £10,343.70 was outstanding in relation to rental payments due;

c. An application for payment of that amount was presented to the Tribunal on 15 February 2019;

d. As at the date of the application to the Tribunal and as at the date of the Case management Discussion on 28 August 2020, the sum of £10,343.70 was due to the Applicants by the Respondent;

REASONS FOR DECISION

22. The Tribunal refused the Motion to further adjourn the Case Management Discussion having regard to:-

a. The history of the case.

b. There being no Defence to the claim before the Tribunal.

23. In relation to the history of the case, as indicated above, this case has a long history. This was now the 5th Case Management

Discussion which had been conducted. The case was now more than 18 months old;

24. In terms of the First Tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, (the "FTT Rules") Regulation 2 provides as follows:-

> ***2(1). The overriding objective of the First Tier Tribunal is to deal with the proceedings justly.***
>
> ***(2). Dealing with the proceedings justly includes –***
>
> ***(e) Avoiding delay, so far as compatible with the proper consideration of the issues;***

25. In this case, following the initial grant of an Order for a payment on 13 June 2019, a further Case Management Discussion was held on 28 October 2019. Prior to that, in the application for recall, details of a purported defence were advanced by the Respondent; at the Case Management Discussion on 6 December 2019 the Tribunal specifically focused upon case law which applied which, in the view of the Tribunal, was directly relevant and an adjournment was allowed to enable parties to consider that case law;

26. After sundry procedure a further Case Management Discussion called on 10 July 2020. Further submissions had been submitted in advance of that. Again, an adjournment was allowed to enable further consideration of the issues arising;

27. Prior to the Case Management Discussion on 28 August 2020 further submissions were provided by the Respondent. Against that history, the Tribunal did not consider it appropriate to further adjourn the Case Management Discussion;

28. Separately, while an application had now been presented to the Tribunal by the Respondent seeking an order for payment against the Applicants, that was not done in sufficient time to enable both cases to be called together on 28 August 2020. Mr Forsyth referred to an e mail he had received from the Tribunal administration indicating that the applications had been "linked". As a matter of fact, they were unable to call together on 28 August 2020. As previously detailed, the application was not submitted in sufficient time to enable it to be fully considered for acceptance by the Tribunal with a view to a Case Management Discussion being assigned. There was insufficient time

to intimate the application upon the Respondents in that application – the current Applicants – to enable it to call on 28 August 2020 either;

29. The e mail suggesting that the applications had been linked contained further information. It stated:-

"The Application CV/20/1692 has been accepted for determination and linked with ongoing application CV/19/0512, which has an adjourned Case Management Discussion teleconference ("CMD") scheduled for 28 August 2020. There is insufficient time within the tribunal's rules for the application CV/20/1692 to be scheduled to the same CMD.

If either party wishes to request a postponement of the scheduled CMD in CV/19/0512, in order that the applications can be dealt with together, this request should be submitted to the tribunal's administration as soon as possible and will be considered by the legal member who has been assigned the case for a determination in relation to the request.

This made it clear that any application for a postponement would need to be considered by the Legal Member assigned to the present case. As it happens, there was no application for a postponement. Instead there was a request for an adjournment wen the case next called;

30. In accordance with Regulation 12 of the FTT Rules, the Tribunal can hear two or more applications together but that requires that the Tribunal

"direct two or more applications to be heard together....".

While an e-mail had been forwarded indicating that the applications had been "linked" by the administration of the Tribunal, there had been no direction by the Tribunal that both applications were to be heard together. For the reasons stated, the Tribunal did not consider it appropriate to delay this application further to enable that;

31. Having regard to the law applying, the Tribunal formed the view that, having regard to the cases of Pacitti .v. Manganiello and Lamont and Ors .v. Chattisham, and considering that it was a matter of agreement that the tenancy had come to an end, there was no stateable defence to the claim by the Applicants for payment of rent. Even if rent had been retained to enforce obligations of the tenancy by the landlord (although that appears not to have been the case), given that the contractual agreement between the parties was no longer in force, the right of retention for those purposes no longer applied and any withheld rent required to be paid;

32. While the Respondent maintained that there was a stateable defence, the Tribunal took the view that any claim that the Respondent may have would require to be dealt with by way of a separate application. That had now been submitted. That application will no doubt progress through the Tribunal system and can be dealt with in due course;

33. The Tribunal did not consider the claim now being made by the respondent to be a liquid claim. It remained an inspecific claim for an undetermined amount;

34. The Tribunal had, at the Case Management Discussion on 6 December 2019, queried whether or not, in the absence of any application having been made under Repairing Standards provisions of the Housing (Scotland) Act 2006, it was now open to the Respondent to make a common law claim for reduction of rent as a result of alleged repairs/defects. Reference was made to the case Stobbs and Sons .v. Hislop and it was queried whether the existence of a statutory remedy displaced common law claims. Mr Forsyth had lodged submissions addressing that point. Given the decision made by the Tribunal in the present case, the Tribunal did not require to consider that matter further. That may become a live issue in relation to the separate application now lodged;

DECISION

The Tribunal granted an Order for payment of the sum of £10,343.70 by the Respondent to the Applicants.

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.

Virgil Crawford

28 August 2020

Legal Member/Chair **Date**