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 2016.

Chamber Ref: FTS/HPC/CV/18/3145

Re: Property at 15 Morton Road, Stewarton, KA3 3BE ("the Property")

Parties:

Mr Peter Taylor, 10D Kirkford, Stewarton, KA3 5HZ ("the Applicant")

Ms Emma Stewart, 19 Canmore place, Stewarton, KA3 5PS ("the Respondent")

Tribunal Members:

Lesley Ward (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the respondent shall make payment to the applicant the sum of six thousand one hundred and two pounds and fifty pence (£6102.50).

This is an application in terms of s16 of the Housing (Scotland) Act 2016, 'the Act' and rule 70 of the First-tier Tribunal for Scotland Housing and Property Chamber Procedure Regulations 2017 'the rules'. The application has a long procedural history as there have been two previous hearings and a case management discussion since the application was made in November 2018. The applicant and respondent both attended the hearing. Neither were represented.

This is an application to recover rent arrears. The respondent is seeking an abatement of those arrears. The tribunal on the 8 July 2019 adjourned consideration of the application after hearing some evidence in order that the parties could address the tribunal on whether the abatement of rent may be raised as a defence to an application for payment of rent arrears.

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Preliminary matters

Despite the tribunal being furnished with the two previous tribunal decisions and CMD note there were still some matters that the tribunal required to be clarified before the hearing could proceed.

1. The tribunal noted that the CMD note from 29 March 2019 referred to rent arrears as at May 2018 of £3102.50 and November 2018 of £6102.50.The tribunal noted that there was a rent statement which appeared to have been lodged with the application and which is headed ''Emma Stewart – 15 Morton Road, Stewarton' which dates from December 2019 until November 2018 and which refers to rent arrears of £6102.50 in November 2018. The parties agreed that in November 2018 the rent arrears were £6102.50. The applicant's positon was that this was the amount he was seeking from the respondent and the respondent's position was that for the reasons contained in her representations, she was seeking abatements from that sum. It was however agreed that there were arrears of £6102.50 as at November 2018.

2. It was also agreed that the tenancy came to an end in December 2018 when the tenant gave up the keys for the property. (The respondent later gave evidence that she actually moved out of the property around September 2018).

3. The tribunal also sought to establish when the arrears accrued as it was not clear from the rent account that the applicant had lodged. The applicant stated in evidence that the arears accrued from around April 2016. In May 2016 there were arrears of around £700. The respondent agreed in her evidence that that the arrears accrued from around April 2016.

4. The tribunal then went on to invite submissions from the parties regarding whether it was legally competent for the tribunal to entertain a defence to an application of this type based on a common law right to abatement. The tribunal noted at this stage that taking the applicant's claim at its highest level he would be entitled to an order for £6102.50 and taking the respondent's defence to it's highest level, no sum would be due in respect of rent arrears. The tribunal would first have to be satisfied that abatement was a valid defence to an application for arrears before the tribunal could then go on to look at the particular circumstances of the case. Neither party addressed the tribunal on any of the legal authorities referred to in the decision of the 8 July 2019. Ms Stewart's position was that in her view based on the applicant's failure to have regular gas and electrical checks carried out for the length of her 10-year occupation of the property, it was only fair that the abatement applied. The respondent's view was that there should be no abatement. It was his position that no rent was paid from May 2018. The tribunal decided to hear the evidence regarding the condition of the property and the respondent's defence of abatement and reserve consideration of the legal issue until the conclusion of the evidence.

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The tribunal had before it the following copy documents:

1. Application dated 13 November 2018 and received by the tribunal on 14 November 2018.
2. Short assured tenancy agreement dated 24 November 2009.
3. Rent statement detailing rental payments between December 2009 and November 2018.
4. Letter from respondent to applicant dated 4 July 2019.
5. Letter from applicant to respondent dated 30 July 2019.
6. CMD note from 29 March 2019 with directions.
7. Notes on a hearing and directions dated 16 May 2019.
8. Letter from Smith Building Renovations to Stewart Residential dated 30 May 2019.
9. Emails to the tribunal from respondent dated 21 March 2019, 14 June 2019, 16 July 2019, 5 August 2019
10. Photos of the property submitted by applicant.
11. Photos of the property submitted by respondent.
12. Notes on a hearing and directions dated 8 July 2019.

The tribunal invited the respondent to give evidence first on the basis that the applicant had made out his claim for rent arrears. The issue to be resolved was whether abatement was competent and if it was, should any abatement be applied in this case.

The respondent's evidence

The respondent was invited to speak to the letter she had sent to the applicant as a starting point of her evidence. Her evidence was that the letter sets out the issues she had with the property. Before July 2018 when the letter was sent, it was her evidence that she had spoken to the applicant and raised the issues with him either by text message or in person. Her evidence was that there were issues with dampness in several locations; the front door lock was faulty; the electrics were faulty, and the landlord had failed to arrange regular gas or electrical check. The respondent's evidence was that she had raised the door, the electrics and the dampness problems on various occasions since 2016. She did not raise the gas or electrical inspections with the applicant because she was not aware at that time that the applicant had a legal obligation to ensure the inspections were done. Nevertheless, it was her evidence that inspections were not done and consequently she was entitled to an abatement of rent.

Before the summer of 2017 she invited the applicant to look at the dampness in her house. She gave evidence that there were a number of issues with damp: damp in

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the hall and kitchen downstairs; damp in one of the bedrooms upstairs at the party wall; a damp patch in the main bedroom. She was told by the applicant that the damp patch in the main bedroom was due to a chimney and may need repointed. The respondent's evidence was that the lock to the front door was faulty and the respondent sent someone to have a look at it. She was told it would cost £200 to replace the lock or £20 to remove part of the mechanism. It was the respondent's evidence that she did not want the respondent to have to incur £200 and instead she agreed to the minor repair. The lock gradually deteriorated to the extent that the front door to the property had to remain locked as it was very difficult to lock or unlock. She then had to use the other door at the front of the terraced property (referred to by the respondent as the side door – the property having two doors at front and one at back.)

The respondent was asked about the last paragraph of her letter of 4 July 2018 which reads:

If you were to correct outstanding building matters and we were to come to an agreement regarding arrears taking in to account any compensatory retention by myself then I will be willing to end my search for alternative accommodation.

Initially the respondent had no recollection of that part of the letter and what it could mean. She then gave evidence that she was seeking a reduction in rent from the applicant to reflect the matters she raised in the letter. She was also looking for him to confirm the arrears at that point were £3000 and not £4500. (It had been agreed at an earlier hearing that the respondent was correct in her calculation of the arrears at that point). Her evidence was that when she sent the letter, she was seeking to have the problems rectified so she could continue to reside in the property.

The respondent was asked about the letter from the applicant dated 26 June 2018 which she refers to in her letter of 4 July 2018. (The applicant produced a copy of that letter at the hearing). It largely related to the final matters arising on the conclusion of a tenancy such as a final inspection and hand over of the keys.

Ms Stewart's evidence was that she had not contacted the applicant in writing before 4 July 2018 to raise any concerns regarding the property or to seek any abatement of rent but that she had spoken to him in person and he was aware of the issues.

When asked about the right to seek an order from the tribunal in terms of the repairing standard, the respondent's evidence was that she only became aware of her right to do so after the current application was made. She was not sure whether she would have made such an application in any event as she would not have wanted to jeopardize her right to remain in the property.

Regarding the photographs lodged by the applicant, it was the respondent's position that the photographs lodged add weight to her view that the property was damp. She also lodged her own photographs and it was her evidence that the photos clearly showed that the property had damp in the hall, bedrooms and inside one of the kitchen cabinets. The respondent was asked about the applicant's position that the windows in the property were not able to be opened as all of the keys were missing

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except one which was broken in the lock. The respondent did not accept that the windows were broken or that any of the 'damp 'problems were due to condensation arising from not ventilating the house. When asked, the respondent was not aware of whether the windows were fitted with trickle vents, and neither was the applicant.

The applicant's evidence

The applicant's evidence was that he was notified in 2016 or 2017 that there was a problem with damp. He went out to inspect and came to the conclusion that there may have been repointing needed in the chimney. There was also a problem with the gutter which caused discoloration to the wall at the front door around that time but he arranged for that to be fixed. He asked a roofer to look at the chimney and their advice was that there was no problem visible from the front of the property. The roofer was unable to get access from the respondent to see round the back. His evidence was that the 'damp' was due to lack of ventilation and he made reference to a letter lodged with the tribunal (item 8 above) which stated:

As per your instructions we visited the above noted property. Our moisture meter indicated a normal moisture reading throughout. The property has been partly repaired and re-decorated and there was no evidence of condensation or mildew..

The applicant spoke to his letter of 30 July 2018 (item 5 above) which he sent to the respondent in response to her letter of 4 July 2018. This set out the applicant's position regarding the various maters raised by the respondent: the damp, electrical problems and the front door. The application's evidence, as set out in the letter was that with the exception of the damp that has been brought to his attention, the other matters only came to light when he received the respondent's letter. It was also his evidence that the respondent was only raising these complaints at that stage because she was planning to move to another property and wanted him to provide a reference which did not mention the rent arrears.

The respondent's written submission made reference to a letter from Annandale Plumbing which the application had lodged with the tribunal at an earlier point in the process, but which had been withdrawn. The applicant produced a copy of the letter which the tribunal allowed to be lodged, given the matter had been raised by the respondent. The respondent alleged in her written submission that the letter was unlikely to be from the purported author, Mr Iain Furness, because the spelling of 'Iain Furness' in the signature was different from the typed name of 'Ian Furness'. The evidence of the applicant was that letter had been typed by as member of his staff as Mr Furness does not have any secretarial support and that is why there is a discrepancy with the spelling. The letter stated that Mr Furness had tried to gain entry to the property to carry out a gas inspection in 2017 and was unable to gain entry because the respondent cancelled the appointment and did not contact him to rearrange.

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Findings in fact and law

1. The applicant is the landlord and owner of the property.
2. The parties entered into a short-assured tenancy in November 2009 for let of the property for the initial period of 6 months from 1 December 2009 and month to month thereafter.
3. The agreed rent was £500 per month.
4. Arrears began to accrue in May 2016.
5. As at 27 November 2018 the arrears were £6102.50.
6. The respondent left the property around September 2018 and the tenancy came to an end in December 2018.
7. The sum of £6102.50 remains outstanding.

Reasons

The tribunal was satisfied that the sum of £6102.50 of rent arrears had accrued for the property. The respondent was not disputing the level of the arrears. It was her position that the tribunal should allow an abatement of all or part of the arrears due to the condition of the property and the lack of a regular gas and electricity inspection.

The respondent's evidence was that she was not aware that she was entitled to make an application to the tribunal in connection with the repairing standard until she gave up the tenancy.

The tribunal considered firstly if it was legally possible to allow an abatement of rent and secondly if it was, whether an abatement was appropriate in these circumstances.

The tribunal's view was that an abatement of rent is legally competent. The Housing (Scotland) Act 2006 sets out a statutory framework for applications to the tribunal in connection with the repairing and the tolerable standard but s22 of the Housing (Scotland) Act 2016 provides "A tenant **may** apply to the First-tier Tribunal for determination of whether the landlord has failed to comply with the duty imposed by section 14(1)(b) (the duty to repair and maintain). That remedy is only available in cases where the tenant is still in occupying the property.

Rennie on Leases at page 265 sets out the common law position regarding abatement of rent and Stalker on Evictions at page 128 discusses abatement in the context of defence to a claim for rent arrears.

The case of Renfrew District Council -v- Gray1987 SLT (Sh.Ct)70 also appeared to be authority for the proposition that a tenant can be entitled to an abatement of rent whilst remaining in possession of a property.

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The tribunal's conclusion was that abatement of rent as a common law remedy has not been removed by the introduction of a statutory remedy in terms of the Housing (Scotland) Act, part of which could be a rent relief order.

Turning to whether the abatement is applicable in this case, the tribunal was not satisfied that the problems which the respondent set out, even if her evidence was accepted in full, were serious enough to merit an abatement of rent. The respondent had full use of the property and the rooms which she contended were damp were lived in by the respondent and her two daughters. The tribunal did not consider that the problems raised by the respondent would have been serious enough to breach the repairing standard if such an application had been made by her. There was no suggestion that the property was not wind and watertight and the applicant had taken steps to address the respondent's complaints regarding damp upstairs. The applicant's evidence that the 'damp' was caused by poor ventilation and he produced a letter from a builder which appeared to confirm that the property was not damp. Clearly the applicant should be instructing regular gas and electrical checks on the property, but the respondent does not appear to have raised this as an issue until her letter of 4 July 2018 and she also appears to have obstructed the inspections according to the plumbing letter lodged by the applicant, and not co-operated in the re-arrangement of appointments. The front door did appear to be a problem for the respondent but the application's evidence was that he was not aware of any problem and the lock worked with no difficulty when he used the keys to let himself into the property at the end of the tenancy. The tribunal on the balance of probability accepted the evidence of the applicant regarding the condition of the property as being more likely than that of the respondent. The applicant's letter of 30 July 2018 was consistent with the evidence he gave at the hearing and with the documents he produced in support of his position.

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.

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15 November 2019

Lesley A Ward Legal Member **Date**