

Decision 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/18/0305

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

Parties:

Miss Chiara Louise Cacioppo, 7 Gleneagles Drive, Gourock, PA19 1HX (“the Applicant”)

Miss Natalie Stewart, 163 Newark Street, Greenock, PA16 7QW (“the Respondent”)

Tribunal Members:

**Virgil Crawford, Legal Member
Gordon Laurie, Ordinary Member**

Representation:-

**Applicant: Giaocchina Cacioppo
Respondent: Mr P Harvey, Solicitor, Greenock**

BACKGROUND

1. The Applicant presented an application to the Tribunal seeking payment of, amongst other things, rent arrears;
2. A previous Hearing took place on 6th August 2018;
3. At that Hearing the Respondent accepted that 2 months' rent had not been paid but claimed that rent was not due for the relevant period due to the condition of the property and, in particular, alleged water ingress and a defect with a gas fire;
4. The Applicant did not accept that these defects existed;
5. Written representations had been submitted on behalf of the Respondent intimating that the rent claimed was not due, and was lawfully retained by the Respondent, as a result of these alleged defects;

HEARING ON 6TH AUGUST 2018

6. The case had previously called at a case management discussion and, subsequent to that, a note was prepared by the Tribunal and distributed to parties. For the purposes of the Hearing on 6th August 2018 the note indicated that the issues to be determined at the Hearing were:-
 - a) Whether the property was wind and watertight and in particular whether there was water ingress which was not repaired;

- b) Whether the gas fire at the property was working, whether it leaked, whether it was safe and whether it had a gas safety certificate, all during the period of the tenancy;
 - c) Whether the Respondent advised the Applicant that rent was being withheld due to these defects;
 - d) Whether rent of 2 months is lawfully due to the Applicant or whether the Respondent is entitled to withhold it;
- 7. Prior to the Hearing on 6th August 2018 the Tribunal requested the Respondent to provide a list of authorities in support of the legal proposition that the Respondent was entitled to withhold payment of rent. The Respondent's solicitors provided a list which referred to the following:-
 - a) Evictions in Scotland by Adrian Stalker (2007) pages 127 – 129
 - b) Renfrew District Council v Gray 1987 S.L.T. (Sh. Ct.) 70
- 8. The Parties agreed the following facts at the Hearing on 6th August 2018:-
 - a) That a lease was entered in to between the Applicant and the Respondent in relation to the Property. The initial period of let was from 1st February 2016 until 1st August 2016;
 - b) The lease was, in fact, between the Applicant, the Respondent and the Respondent's former partner. His whereabouts were unknown to the Applicant and, therefore, the application for payment was made against the Respondent alone;
 - c) The lease ended on 1st October 2016. There was some dispute as to when the Respondent removed herself from the Property, it being indicated that she moved out and her former partner continued in occupation. It was accepted, however, that the lease provided for joint and several liability and that the application was competently directed against the Respondent;
 - d) Rent was not paid for the months of May, August and September 2016. In relation to the rent due in May 2016 the Applicant previously raised proceedings at Greenock Sheriff Court. Following a court hearing the Parties agreed that the rent due for that month should be deducted from the rent deposit paid at the commencement of the lease;
 - e) The rent deposit of £500 had been lodged with an approved scheme. The Landlord applied for it to be uplifted and paid towards the rent due for May 2016 (£495). The Respondent consented to the same;
 - f) No claim was made on the deposit by the tenants in relation to any right of retention arising from alleged defects in the property;
 - g) Rental payments for August and September 2016 were not made. The rent was £495 per month and, therefore, £990 has been retained by the Respondent.
- 9. The Tribunal advised parties that it considered that a fundamental matter of law arose in this case on which the Tribunal would wish to be addressed. This was as follows:-
 - a) The Respondent accepted rent payments for August and September 2016 were not paid but asserted a legal right to withhold payment due to the alleged defects within the property;
 - b) Reliance was being placed on the authorities referred to at paragraph 7 above;
 - c) Neither of the authorities relied upon make reference to The Housing (Scotland) Act 2006 ("the 2006 Act") and in particular the repairing

standards provisions contained within sections 12 – 28 of that Act; (it was noted that in “Evictions in Scotland by Adrian Stalker (2007)” the 2006 Act is referred to by the author in footnote No15 on page 127 but states the provisions of the Act are beyond the scope of the book)

- d) Neither authority makes any reference to the case of *Stobbs & Sons v Hislop* 1948 S.C. 216, a case decided by the Inner House of the Court of Session, which casts doubt on the right of a tenant to assert a common law right to retention of rent when a statutory provision exists to regulate the matter;
- e) In the circumstances, the Tribunal wished to be addressed on the law and, in particular:-
 - i. Could the Respondent rely on a common law right or remedy to withhold rent due to alleged defects when a statutory framework for dealing with such matters exists within the 2006 Act?
 - ii. If so, what is the lawful authority for that proposition?
 - iii. If so, what is the exact nature of the legal right being asserted? Is it an implied term of the contract of lease or is it an equitable remedy available at common law?
 - iv. If a right to retain rent as a result of alleged defects was being maintained, why was the case of *Stobbs & Sons v Hislop* 1948 S.C. 216 not binding, or on what basis was it to be distinguished?
 - v. To what extent is the case of *Renfrew District Council v Gray* 1987 1987 (Sh. Ct.) 70 binding, or is it authoritative at all considering it was determined prior to the 2006 Act and without reference to the case of *Stobbs & Sons v Hislop* 1948 S.C. 216?

10. The Tribunal also indicated that it wished to be addressed on

- a) The Respondent's assertion, contained within her written representations that, in the event of an order for payment being made, the Applicant was not entitled to interest as sought (the application asking for interest at 8% per annum to be awarded), particularly having regard to the fact that provision was specifically made in the lease for interest to be applied to late payments;
- b) The propriety of a Tribunal comprising a legal member and an ordinary (housing) member considering and determining issues relating to defects in the property and issues relating to retention or abatement of rent, rather than a Tribunal considering a repairing standards application which would consist of a legal member and an ordinary (surveyor) member who would have inspected the property prior to consideration and determination of the case.

11. The Tribunal appreciated that these issues were of legal significance in the case and also that the Parties had no opportunity in advance of the Hearing to consider these points. Accordingly, the Tribunal adjourned for a period to allow parties to consider the points raised. The Tribunal provided parties with a copy of sections 12 – 28 of the 2006 Act and also a copy of the case of *Stobbs & Sons v Hislop* 1948 S.C. 216.

12. When the Hearing on 6th August 2018 reconvened the solicitor for the Respondent requested an adjournment of the Hearing. He indicated that the case of *Stobbs & Sons v Hislop* 1948 S.C. 216 raised important issues and he

- wished an opportunity to consider the legal matters fully before addressing the Tribunal;
13. The Applicant opposed the request for an adjournment, indicating that the case has been proceeding for some time, that there were no defects in the property anyway and he wished the matter to proceed;
 14. The Tribunal considered that the legal points raised were of considerable significance and may have implications beyond this particular case. The legal points arising may be destructive of the Respondent's claim to retain rent due to alleged defects. The legal points do not appear to have been ventilated before any court nor the Tribunal since the introduction of the 2006 Act.
 15. In the circumstances, despite opposition by the Applicant, the Tribunal adjourned the Hearing on 6th August 2018. The Tribunal considered that it was appropriate that the Parties had a proper opportunity to fully consider the legal issues arising and to address the Tribunal on them at a later date. The Applicant intimated an intention to seek legal advice prior to the adjourned Hearing;
 16. A further Hearing was fixed for Friday 15th October 2018 at 10am within Gamble Halls, 44 Shore Street, Gourock PA19 1RG;

HEARING ON 15TH OCTOBER 2018

17. By letter dated 27th September 2018, received by the Tribunal on 28th September 2018, the Respondent lodged an further list of authorities. This made reference to the following:-
 - a) Scottish Law of Leases by Angus McAllister [1993]
 - b) G H & W Lamont of Heathfield Farm and Others v Chattisham Ltd [2018] CSIH 33
 - c) Valentino Adolpho Pacitti v Tomasso Manganiello [1995] SCLR 557
18. The Respondent also, at the same time, lodged a separate application with the Tribunal seeking damages against the Applicant. The basis of this claim was the alleged failure of the Applicant to maintain the Property in a wind and watertight and tenable condition during the period of let. The Respondent sought to have this claim dealt with "as part of the current proceedings". The Tribunal declined to accept the application for damages at that stage. The application for damages required to be dealt with in the same manner as all other applications to the Tribunal. It required to be lodged with relevant supporting documents, considered by a legal member of the Tribunal and, if accepted, intimated to the other party affording an opportunity for representations to be made in response. Insufficient time was available for that to be done prior to the Hearing on 15th October 2018;
19. Thereafter, by email dated 10th October 2018, the Respondent moved the Tribunal to postpone the Hearing assigned for 15th October 2018 to enable the separate application for damages to be made and considered at the same time as the current application seeking payment of rent arrears. It was submitted that it was in the interest of justice that both applications be considered together as they arise out of the same factual circumstances and, if they were to be considered separately, there would be a duplication of evidence. The Applicant objected to the proposed postponement of the Tribunal. The Tribunal thereafter considered the motion and refused it.

20. At the Hearing on 15th October 2018 the Solicitor for the Respondent renewed his motion, seeking an adjournment of the Hearing on that date. In support of that motion, the following was asserted:-

- a) There were significant legal issues as identified at the Hearing on 6th August 2018 and in the further authorities referred to by the Respondent at Paragraph 17 above;
- b) Expanding upon that matter, the following issues arose:-
 - i. Whether the Respondent is prevented from presenting an argument that she is entitled to withhold rent for alleged damages where there is a statutory framework for dealing with such matters;
 - ii. Whether the cases of Pacitti and Lamont referred to at paragraph 17 above provide authority that the Respondent has a remedy by way of damages;
 - iii. Whether the repairing standard provisions within the 2006 Act are the only method by which the Respondent is entitled to assert a claim for repairs and/or reduction in rent, particularly having regard to the fact that the relevant provisions indicate that the tenant "*may*" (emphasis added) apply for a repairing standards order;
 - iv. In the circumstances, it was arguable that the jurisdiction of the Tribunal to determine a claim for damages remained;
- c) The Respondent sought to argue that she was entitled to damages following the termination of the Lease. If so, any such claim, once determined by the Tribunal, may significantly reduce any amount claimed by the Applicant in the current application or, indeed, may even exceed the amount claimed in the current proceedings. In those circumstances, it was in the interest of justice that both applications be considered together;
- d) Failure to adjourn the current proceedings would give rise to prejudice to the Respondent as, otherwise, the Tribunal may make an order for payment in favour of the Applicant in the current proceedings which would thereafter be able to be enforced by the Applicant. In the event, however, that the Tribunal subsequently made an order for payment in favour of the Respondent in relation to her separate application for damages, prejudice would arise, particularly if any order for payment made today had been enforced;
- e) A plea of *res judicata* may arise at any subsequent Hearing in relation to the Respondent's application for damages as the same facts and circumstances arise in relation to the claims by each party.

21. The Tribunal enquired in relation to the matter of prejudice. In particular, the Tribunal enquired as to whether or not there would be any prejudice to the Respondent in any subsequent proceedings. In the event that the Motion to adjourn the Hearing was refused, in what circumstances would the Respondent's ability to present evidence or any legal argument be affected? The Respondent's Solicitor intimated that there may be duplication of evidence. He did not, however, identify any actual prejudice in relation to the conduct of any subsequent proceedings which would arise as a result of any decision by the Tribunal to refuse the Motion for an adjournment;

22. The Tribunal further enquired in relation to whether there would, in fact, be any duplication of evidence in the event that the Motion to adjourn was refused. In particular, under reference to the authorities referred to at paragraph 17 above, the Tribunal enquired as to whether or not, if the Motion to adjourn the Hearing was refused, the Respondent would be intending to present legal arguments at the Hearing today that she was entitled to still retain the rental payments claimed. It was quite properly conceded by the Respondent's solicitor that, having considered the various authorities, there would be no stateable defence to a claim for payment of rent, given that the lease has now come to an end. In those circumstances, any right of retention of rent which may have existed would have ended. The remedy for the Respondent thereafter was a claim for damages. In those circumstances, therefore, in the event that the Tribunal refused the Motion to adjourn, there would be no duplication of evidence arising in any subsequent proceedings as the claim for payment of rent would require to be conceded;
23. The Respondent also intimated that, in relation to the Applicant's claim for interest on the sums claimed, this was now conceded by the Respondent on the basis that provision for interest and late payments was specifically referred to within the lease;
24. The Applicant objected to any adjournment of the Hearing.
25. The Tribunal adjourned for a short period to consider the Motion to adjourn the Hearing. The Tribunal caused enquiry to be made in relation to the application for damages referred to above. It was confirmed that the application had been received by the Tribunal and had been accepted. A Hearing was likely to be assigned although that had not yet occurred and it was not known when the Hearing would be.
26. The Tribunal refused the Motion to adjourn. In doing so, the Tribunal considered the following matters:-
- a) The history of the current proceedings. The application was presented to the Tribunal on 5th February 2018. A case management discussion had been held; a Hearing took place on 6th August 2018. A further Hearing was now taking place on 15th October 2018. It is in the interest of justice that applications to the Tribunal are dealt with promptly and, in the circumstances of the current case, a further delay in the proceedings was not in the interest of justice;
 - b) The application to the Tribunal by the Respondent for damages to be awarded was presented only shortly before the present Hearing. The legal issues arising, which gave rise to the claim for damages, were identified by the Tribunal on 6th August 2018. Had the application been presented at an earlier stage, it may have been possible to conjoin the Hearings. That, however, was not possible at this stage and, again, it was not in the interests of justice that the current Hearing be adjourned further;
 - c) The Tribunal did not consider that there was any prejudice to the Respondent in relation to the conduct of any subsequent Hearing in relation to her claim for damages. While any order made by the Tribunal today may be the subject of enforcement, which the Respondent would rather avoid, that would not amount to prejudice affecting her ability to present or conduct any separate Hearing in relation to her separate claim for damages;

- d) In relation to the argument that the legal doctrine of res judicata may arise, the Tribunal did not accept that argument. The Respondent's Solicitor had previously intimated to the Tribunal that, in the event that the motion to adjourn was refused, there was no legally stateable defence to the claim for payment of rent. In those circumstances, there would be no requirement to hear evidence in relation to any alleged damage to or defects within the property. The Tribunal, therefore, would not be considering the same matters or evidence at any subsequent Hearing as, quite simply, no evidence would be required at today's Hearing.
- e) The date on which the Tribunal might consider the separate application for damages was not known, the outcome of that application was uncertain.

27. Thereafter, the Hearing proceeded.

FINDINGS IN FACT

28. On the basis of issues which had previously been agreed, the Tribunal made the following findings in fact:-

- a) That a lease was entered in to between the Applicant and the Respondent in relation to the Property. The initial period of let was from 1st February 2016 until 1st August 2016;
- b) The lease ended on 1st October 2016;
- c) Rent payments for August and September 2016 were not made. The rent was £495 per month. At the date of termination of the lease £990 was outstanding.
- d) The lease contained a clause providing for interest at the rate of 8% per annum on any payments from the date due until payment was made;

DISCUSSION

29. The Solicitor for the Respondent intimated that, in the circumstances, it was accepted that there was no stateable defence to the claim for payment of rent. In the circumstances, it was accepted that the Tribunal would make an order for payment of £990, being the amount of rent which had not been paid during the currency of the lease;

30. It was also accepted that interest at the rate of 8 per centum per annum was due. The Applicant requested that interest be applied from 1st October 2016, that being a date falling after both monthly rental payments had not been paid;

31. The Tribunal refused to make an Order for payment to the applicant in the sum of £100, as requested in the application, for time spent in attending the property following termination of the lease to attend to matters referred to within the application. The claim for payment in the sum of £100 did not arise as a result of any fault or actions on behalf of the Respondent and, in any event, the attendance by the Applicant at the property following the termination of the lease to ensure that the fixtures and fittings, in particular the gas fire, was in working order, is a step which would ordinarily be expected of a landlord, or her agents, following the termination of a lease.

DECISION

32. In all the circumstances, the Tribunal made an Order for payment by the Respondent to the Applicant in the sum of £990 with interest thereon at the rate of 8 per centum per annum from 1st October 2016 until payment.

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.

V Crawford

15 October 2018

 Legal Member/Chair

Date