

Housing and Property Chamber First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: in respect of an application in terms of Rule 70 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 (“the Rules”) for an Order for Payment

Chamber Ref: FTS/HPC/CV/19/0453

Property: 143, Hayburn Lane, Flat 3/3, Glasgow, G12 9FD (“the Property”)

The Parties:- Mr. Jonathan Bennett, c/o DJ Alexander Lettings Ltd., 1 Wemyss Place, Edinburgh EH3 6DH (“the Applicant”) per his agents DJ Alexander Lettings Ltd., 1 Wemyss Place, Edinburgh EH3 6DH (“the Applicant’s Agents)

And

Mr. Nicholas Gordon McKay having an address at McKays Hardware, 316, Crow Road, Glasgow, G11 7HS (“the Respondent”)

hereinafter together referred to as “the Parties”

Tribunal Members

Karen Moore (Chairperson)

Mary Lyden (Ordinary Member)

Decision

The Tribunal refused the Application and so determined not to make an Order for Payment.

Background

1. By application received on 12 February 2019 (“the Application”), the Applicant’s Agents on behalf of the Applicant applied to the Tribunal for an Order for Payment against the Respondent in terms of Rule 70 of the Rules on the grounds that the Respondent owed rent amounting to £2,800.00, was liable for damages amounting to £110.00 and was liable for cleaning costs amounting to £280.00. The Application also sought interest in terms of the tenancy agreement between the Parties. A copy of a tenancy agreement between the Parties, a statement of rent due and owing and a tenancy check-out report were lodged as part of the Application.

2. The Application was accepted by the Tribunal and a Case Management Discussion ("CMD") was fixed for 5 April 2019 after which a Hearing was fixed and a Direction was issued. The Direction directed the Respondent to submit a written statement of his defence and directed the Applicant to submit a rental account. Both Parties were directed to provide a list of witnesses with a brief of note of what the witnesses would speak to and both Parties were directed to submit a numbered inventory of productions by 29 April 2019.
3. A hearing was fixed for and held on 15 May 2019 at 14.00 at the Glasgow Tribunal Centre, 20 York Street, Glasgow, G2 8GT. The Applicant was not present and was represented by Ms Gill Cartwright of the Applicant's Agents. The Respondent was present and unrepresented. Neither party had brought along witnesses and neither party was sufficiently prepared to proceed. Therefore, the Tribunal of its own accord adjourned the Hearing to a later date.

Hearing

4. A Hearing took place on 26 June 2019 at 10.00 am at the said Glasgow Tribunal Centre. The Applicant was not present and was represented by Ms Gill Cartwright of the Applicant's Agents. The Respondent was present and unrepresented. Both Parties submitted documents ahead of the Hearing and broadly in line with the Direction referred to in paragraph 2 above. The Respondent had one witness. Ms Cartwright on behalf of the Applicant had no witnesses and explained that the individuals in the Applicant's Agents organisation who had been involved in the matter were no longer employed by Applicant's Agents and that it had not been possible to have anyone from the Applicant's insurers attend to speak to their involvement.
5. The Tribunal outlined the procedure it would adopt which was that the Ms Cartwright on behalf of the Applicant would present Applicant's case, the Respondent would be given an opportunity to test that case and, then, the Respondent would present his case which the Ms Cartwright on behalf of the Applicant would be given an opportunity to test. The Tribunal explained that, unlike a court, the Tribunal's role is inquisitory and not adversarial and that the Tribunal members would ask questions where they saw fit. The Tribunal further explained that as there were no witnesses for the Applicant, the testing of the Applicant's case could prove difficult. The Tribunal advised the Parties that the standard of proof against which the Tribunal would assess the evidence is the balance of probabilities.

Applicant's Evidence in Chief.

6. The Tribunal invited Ms. Cartwright to take it through that part of the Application which related to the damages and cleaning costs. Ms. Cartwright, in response to the Tribunal's questions, fairly admitted that the evidence which she referred to, being photographic records of the Property before the tenancy began and after the tenancy ended and an invoice for £280.00 from a "Transformers", a cleaning company, had not been prepared by her and that she had not visited the Property at any time and

so could not give evidence from her own knowledge but could only refer the Tribunal to those parts of the photographic records which, in her opinion, showed that damage had been caused or cleaning was required.

7. The Respondent, in order to assist, accepted that he had not carried out an end of tenancy clean of the Property and so accepted that cleaning would be required but stated that the hob had "been condemned". The Tribunal, therefore, agreed that it would rely on the documentary evidence in respect of the part of the Application which related to the damages and cleaning costs.
8. Ms. Cartwright continued in evidence with reference to the rent statement which had been lodged as part of the Application and explained that the tenancy began on 28 February 2018 at a monthly rent of £1,400.00 payable six months in advance. She confirmed that the Respondent had paid the first six months in advance and that, from the rent record, it appeared the rent term changed to monthly payments in February 2019, and the Respondent then paid rent monthly by standing order for the months February 2019 and March 2019. The tenancy ended on 31 May 2019 and so the Respondent owed rent amounting to £2,800.00 for those months. Ms. Cartwright could not say exactly when the Respondent had given notice to end the tenancy but was aware from the Applicant's Agents' records that he had done so.

Applicant's evidence in cross-examination.

9. The Respondent, with the assistance of the Tribunal at times, cross-examined Ms. Cartwright and asked if she was aware that he had advised the Applicant's Agents that he was withholding rent and had asked for a rent reduction because of the issue with toilet in the main bathroom in the Property. Ms. Cartwright said she was aware of this from the records but not from her own knowledge as the matter had not been dealt with by her at that time but matter had been dealt with by Mr. Connelly of the Applicant's Agents' maintenance team, She advised that Mr Connelly was not present as a witness as he is no longer employed by the Applicant's Agents.
10. With reference to the timeline of communications and actions taken from the Applicant's Agent records and lodged as part of Applicant's case, although she could not give evidence from her own knowledge, Ms. Cartwright, accepted that there had been a repair issue with the main toilet in the Property which was notified to the Applicant's Agents by the Respondent at the end of February 2019 and which resulted in a buildings' insurance claim being made by the Applicant. The claim was made via the property factors for the development of which the Property forms part. She accepted that the extent of the disrepair was such that the toilet and the bathroom was unusable and explained that, as the repair was being dealt with by the Applicant's insurers, the Applicant's Agent were not directly involved. She accepted that the repair was not completed until around the end of April 2019.
11. With reference to the timeline of communications and actions taken from the Applicant's Agent records and lodged as part of Applicant's case, although she could not give evidence from her own knowledge, Ms. Cartwright stated that as far as she

knew the Respondent had not been offered alternative accommodation as the Applicant's insurers had not approved this expense. She was unsure if the Applicant had been asked directly if he would agree to providing alternative accommodation.

12. With regard to a rent reduction, Ms. Cartwright stated that the Applicant had not agreed to this and had offered £350.00 in compensation which offer had been rejected by the Respondent and later withdrawn by the Applicant.
13. In response to questions from the Tribunal, Ms. Cartwright advised the Tribunal that the Applicant's Agents would have treated a repair of no toilet facilities as an emergency but stated that there was another toilet in the Property. She advised that the Applicant's Agents had not visited the Property to inspect the disrepair of the toilet but had left this to the Applicant's insurers. Ms. Cartwright was unsure if the Applicant's Agents had advised the Applicant of his statutory responsibilities in respect of the repairing standard.
14. In response to questions from the Respondent, Ms. Cartwright confirmed that she was aware from the Applicant's Agents' records that around the same time as the toilet disrepair there had been a period when there was no hot water and heating in the Property and that she was aware that the Respondent had vacated the Property. She was also aware that the Respondent had been told by Mr. Connelly of the Applicant's Agents' maintenance team that he should contact the Applicant's insurers direct but had no further knowledge in this regard. Ms. Cartwright did not accept that the Respondent had advised the Applicant's Agents that he required the use of a bath because of a medical condition.

Applicant's evidence in re-examination.

15. The Tribunal asked Ms. Cartwright if there were any points she wished to clarify in respect of the cross-examination of her evidence. She confirmed that's he was content with what she had said.

Respondents' Evidence in Chief.

16. The Respondent gave evidence to the Tribunal by statements and in response to direct questions from the Tribunal. He advised the Tribunal that the extent of the disrepair to the toilet was such that the bathroom was unusable. With reference to a photograph of the bathroom at the toilet bowl, the Respondent's evidence was that there was mould on the underneath of the floor covering and on the floorboards which were rotten. He stated that the neither the flooring nor the floorboards had been lifted but had remained in situ causing a stench throughout the Property which got progressively worse as time went on. In his opinion, this was a health and safety hazard.
17. The Respondent's evidence was that he had notified the toilet disrepair to Mr. Connelly of the Applicant's Agents' maintenance team on several occasions and had explained to Mr. Connelly that it was not acceptable that he was paying a high rent for a Property in this condition. The Respondent stated that he had been told by Mr.

Connelly that he should contact the Applicant's insurers directly with regard to the time frame for the repair to be rectified but that the insurers would not speak to him as he was not the Applicant. The Respondent stated that, although the repair took two days to carry out, there was a lapse of around sixty days from the repair being notified until it was carried out and that, during that time, he did not have use of the bathroom and toilet. He confirmed that he required a daily bath to ease his medical condition. He advised that, although there was an en-suite toilet, it had no bath and that it was inconvenient for visitors to access it as it was adjacent to the bedroom, and, in any event the smell from the bathroom was intolerable.

Respondent's evidence in cross-examination

18. Ms. Cartwright asked the Respondent if he had any medical proof in respect of his condition and he agreed that he did not. She asked the Respondent why he had said at one point in his written statement that he had removed from the Property to a hotel and at another had stated that he removed to his parent's home. The Respondent replied that he had been in a hotel for two days and then moved in with his parents.

Respondent's evidence in re-examination.

19. The Tribunal asked the Respondent if there were any points he wished to clarify and he confirmed that his point was that he did not have full use of the Property.

Evidence in chief of Anthony Gogol, witness for the Respondent

20. Mr. Gogol stated in evidence to the Tribunal that he resides at 310, Crow Road, Glasgow and that he is a friend of the Respondent. In response to questions from the Respondent, Mr Gogol stated in evidence to the Tribunal that he had visited the property several times and that he had seen the disrepair to the toilet. He agreed with the Respondent that there was a strong smell of mould in the Property which appeared to be coming from the toilet and that he had seen the mould in the bathroom. Mr Gogol stated that, in his opinion, the Property was not habitable because of the condition of the bathroom and that, in his opinion, the flooring in the bathroom was saturated and rotting leaving it unusable or irreparable.
21. In response to direct questions from the Tribunal, Mr. Gogol stated that his opinion was based on his experience in renovating properties with his father and in his profession as a marine engineer in dealing with repairs to boats and yachts and that he knew the smell of damp and mould.
22. In response to further questions from the Respondent, Mr Gogol stated in evidence that he was aware of the Respondent's medical condition, was aware that the Respondent had had surgery and that he understood that a bath soothed the condition.

23. With regard to the heating in the Property, in response to questions from the Respondent, Mr Gogol stated that he was at the Property when the heating was being fixed and so knew that it had been faulty.

Cross – examination of evidence of Anthony Gogol, witness for the Respondent

24. Ms. Cartwright asked Mr. Gogol if he had any qualifications in respect of property. Mr. Gogol confirmed that his knowledge came from renovating properties with his father and in his profession and studies as a marine engineer. In response to Ms. Cartwright's questions, Mr. Gogol could not confirm exact dates of when he visited the Property, he confirmed that he had not taken any photos of the bathroom in the Property and that the smell in the Property was similar to that of a damp cellar.

Re – examination of evidence of Anthony Gogol, witness for the Respondent

25. There were no questions from the Respondent and Mr. Gogol confirmed to the Tribunal that he was not making up a story to support his friend. He stated that the black mould was visible.

Summing Up by Parties

26. Ms. Cartwright stated that there was no dispute that the Respondent had been inconvenienced and that Applicant, and so the Applicant's Agents, had been guided by the Applicant's insurers in respect of dealing with the repair and dealing with compensation. Ms. Cartwright stated that, if it had been the Applicant's Agents' own contractors, compensation would have been offered on a daily basis and pointed out that the Applicant had offered £350.00 which the Respondent had refused.
27. The Respondent stated that he felt that the "buck had been passed" to the Applicant's insurers and that the offer of compensation had been derisory. He stated that had he known the repair would take 60 days to complete, he would have given notice and would have vacated the Property earlier.

Findings in Fact.

28. The Tribunal found that much of the evidence before it in the Application, the written submissions and the evidence at the Hearing was not in dispute. The Parties were agreed that there was a tenancy between them, that rent amounting to £2,800.00 was unpaid at the end of the tenancy and that there was an issue with the bathroom in the Property which rendered it unusable from the end of February 2019 until the end of April 2019. The Parties also agreed that the Property had not been cleaned by the Respondent at the end of the tenancy and agreed that the end date was 31 May 2019. Therefore, the Tribunal found these facts proved.

Issues for the Tribunal.

29. The issues, therefore, for the Tribunal were (i) had the Applicant proved that he was entitled to the amounts claimed for damages and cleaning and (ii) was the Respondent entitled to withhold rent amounting to £2,800.00?

30. In reaching a determination on these issues the Tribunal had regard to the evidence before it.
31. With regard to the Applicant's claim for damages and cleaning, the Tribunal had regard to the photographic records of the Property before the tenancy began and after the tenancy ended and the invoice for £280.00 from "Transformers". As individuals who prepared these documents were not present to be tested on the accuracy of them, the Tribunal could give limited weight to their worth. The Tribunal noted that the photographic records were not consistent in respect of the views taken and that the evaluation of the costs applied to alleged cleaning and damage had been arbitrarily applied by unnamed persons. The Tribunal had regard to the contractual obligations on the Respondent as Clause 16.5.1 of the tenancy agreement which states "Leave the Property in a clean and tidy condition". From the end of tenancy photographic record, and having regard to the facts that (i) the Respondent had not resided in the property for some months and (ii) work had been carried out to repair the bathroom, it appeared to the Tribunal that the Property had been left in a "clean and tidy condition" and that the amounts claimed were excessive. Notwithstanding, the Respondent's position that he had not carried out an end of tenancy clean, the Tribunal took the view that the Applicant had not proved this element of his claim.
32. With regard to the Respondent's entitlement to withhold rent amounting to £2,800.00, the Tribunal had regard to the written submissions and the evidence at the Hearing. The evidence on behalf of the Applicant was at best third-hand. The Applicant himself was not present and had not visited the Property to see for himself the condition of the toilet and bathroom. No-one from the Applicant's Agents had visited the Property to take a view on the condition of the toilet and bathroom. Ms. Cartwright's evidence and as put forward in her summing up was that the Applicant, and so the Applicant's Agents, had been guided by and relied on the Applicant's insurers. There was no evidence from the insurers or on behalf of the insurers as to how they made their assessments. Although the Tribunal did not doubt the veracity of Ms. Cartwright in presenting the Applicant's evidence, the Tribunal's view is that it could not be relied upon as it could not be tested in any meaningful way. In contrast, both the Respondent and Mr. Gogol gave evidence from their own knowledge and experience and both gave evidence that the condition of the bathroom was such that the Property was not habitable and did so in a manner which was straightforward and without exaggeration. Both gave frank evidence in respect of the Respondent's medical condition and the need for him to have a daily bath. The Tribunal had no hesitation in preferring the Respondent's evidence to that of the evidence put forward on behalf of the Applicant and had no hesitation in finding that the Applicant had failed to prove that the Respondent was not entitled to withhold rent amounting to £2,800.00

Decision and Reasons for Decision

33. Having found that the Applicant had failed to prove that he is entitled to a claim for damages and cleaning costs and had failed to prove that the Respondent is not entitled to withhold rent amounting to £2,800.00, the Tribunal refuses the Application and makes no Order.

34. This Decision is unanimous.

Appeal

In terms of section 46 of the Tribunals (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


Karen Moore

Chairperson

9 July 2019