



**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/18/2329

Re: Property at 46 Fort Street, Ayr, KA7 1DE (“the Property”)

Parties:

Mrs Sally Ward, Allestree, Southwood Road, Troon, KA10 7EL (“the Applicant”)

Mr Douglas Swan, 46 Fort Street, Ayr, KA7 1DE (“the Respondent ”)

Tribunal Members:

Melanie Barbour (Legal Member)

Decision (in absence of the Respondent)

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

Background

1. An application was received under rule 70 of the First-tier Tribunal for Scotland (Housing and Property Chamber) (Rules of Procedure) Regulations 2017 (“the 2017 Rules”) the application sought recovery of rent arrears amounting to £5000 together with rent arrears accrued until the final decision of the tribunal.
2. The application contained a copy of
 - a. the tenancy agreement, and
 - b. rent receipt book.
3. This application first called on 31 October 2018, when an order was granted. Reference is made to that decision and statement of reasons. On 8 January 2019 however the decision was reviewed, as it had come to the attention of the legal member that the Respondent had in fact sent to the tribunal (prior to

the 31 October 2018) written representations dated 29 October 2018 opposing the application. These had not been before the legal member on 31 October 2018. Accordingly, the review decision was to recall the order and to continue to the case to a further case management discussion.

4. A case management discussion was therefore fixed for 19 March 2019.
5. At the case management discussion the Applicant's agent, Mr Duck, from Messrs McKinstry Company Solicitors, appeared on behalf of their client, Mrs Sally Ward. There was no appearance on behalf of the Respondent .
6. Notice of the hearing had been served on the parties by recorded delivery post, dated 27 February 2019. There was no ability to confirm postal delivery by the track and trace; however I was advised that the tribunal office that the letters had not been returned as undelivered.
7. Having regard to the absence of the Respondent, the Applicant's agent asked me to proceed to deal with the case. The Applicant's agent provided me with an email which they had received from the Respondent dated 14 March 2019, wherein the Respondent advised that he would be unavailable to allow repairs to be completed to his property on 19 March 2019, due to having been given notice to attend a case management discussion re the property. He lodged a copy of the email from the Respondent dated 14 March 2019 and the agents' emailed response to the Respondent dated 15 March 2019.
8. It appeared to me therefore that the Respondent had been given notice of the hearing and was aware of it, and I was therefore prepared to proceed with the hearing in the absence of the Respondent .

The Case Management Discussion

9. The Applicant's agent advised that the rent arrears were still outstanding as at today's date. He advised that there had been no other payments by the Respondent since the application had been made to the tribunal and the Respondent now owed the Applicant a sum of £8000. He confirmed, however that he was only looking for an order for rent arrears in relation to the period from December 2017 until 28 August 2018.
10. He advised that the last payment made by the Respondent towards rent was in November 2017.
11. He then proceeded to make a submission in response to the written submission lodged by the Respondent . Following the numbering used by the Respondent in his letter of 29 October 2018, the Applicant's agent submitted as follows:-
12. Point 1, while not explicitly stated, he presumed that the Respondent was alleging that he was withholding rent due to outstanding repairs requiring to

- be carried out to the property. He submitted that this issue has however already been dealt with under case reference RP/HPC/RP/18/0231. He advised that the Respondent had already requested a rent restriction order and in this regard he lodged a copy of the Tribunal Decision of 23 October 2018 reference RP/HPC/RP/18/0231. He referred me to Para 6 of the decision dated 23 October 2018 and he noted that this was not granted by the tribunal. He advised that an application had required to be made to extend the compliance period of the order; he suggested that the tribunal had accepted that the landlord had made efforts to carry out the repair works and he referred me to Paras 6-27 and 35 in support of this position. He submitted that the tribunal had decided that the landlord had done what she had to do and broadly accepted her efforts. There no breach of failure by landlord and she had made efforts to carryout out repairs. He submitted that the tribunal had not therefore granted a rent restriction order in favour of the Respondent.
13. He submitted that this was the first time that the Respondent had hinted at retention of rent. In respect of any argument for retention of rent he submitted that there had not been a material breach by the landlord which would entitle all rent to have been withheld even if it was competent to do so. Further, that there was in fact no breach at all by the landlord as she has tried to have repairs carried out, but these attempts had been frustrated by the Respondent. He submitted that the Respondent is not entitled to benefit from his actions in not allowing the repairs to be carried out.
 14. The Applicant's agent advised that the first intimation by the Respondent that repairs required to be carried out to the property was on 31 January 2018. Rent had however not been paid in December 2017 and January 2018. There would have been no reason to retain rent these two rent months if this was the Respondent's reasoning.
 15. Since 31 January 2018 the landlord had made attempts to have the works to the property completed, however the Respondent had frustrated access to the property to allow those works to be carried out. He further submitted that any restriction of the enjoyment of his property was minimal. The windows were wind and watertight. The only area was the upstairs front bedroom which he could not use, however he has frustrated the workers by not allowing them in to repair the ceiling. Further he can still use the second and third bedrooms upstairs and the rest of the downstairs.
 16. He referred to the four repairs issued in the RSEO application, he advised that two had been dealt with, the other two were outstanding, the windows and the upstairs bedroom ceiling, he noted that any withholding of rent was at odds with the position of the tribunal in relation to the RSEO variation order and he referred me to Para 35 of the variation decision in October 2018. He submitted that to the best of his recollection he had no knowledge of the Respondent ever advising that he was withholding rent for the property and as already submitted he had in fact stopped paying rent two months before he had intimated that there were repairs required.

17. In respect of Point 2 the assertion that the landlord's husband had waived rent of the subjects for a set period, the Applicant's agent submitted that the landlord was Mrs Ward and her husband was not a party to the lease contract, therefore even if Mr Ward had offered the Respondent a waiver of rent, he submitted it was not clear how this would bind the landlord, Mrs Ward.
18. Further, he submitted that the Applicant denied that there was any agreement to waive rent on her part. The Applicant's agent also submitted that the landlord states this is not an agreement she was aware of.
19. He further submitted that it was not acceptable for the Respondent to state that there was a reason for payment and waiver, but then indicate that he was not going to divulge what that reason was, the Respondent's submission was merely a vague averment. The Applicant's agent advised his client was unaware what "the fees" referred to were for. The Respondent had failed to give any specification of matters. Further this was the first time that he had been made aware of this point by the Respondent; he had never raised this issue of waiver in any previous correspondence.
20. Turning to Point 3 the rental note book, he submitted that rent is paid in cash, and the point being made by the Respondent was a "red herring", as he appears to admit in Point 1 that he has not been paying rent. He submitted that this book, was the book which recorded what rent paid or not paid.
21. In response to the issues the Respondent raised regarding the rent book, February 2017 no rent was paid as the Respondent had carried out repairs to the property and then submitted an invoice for £600, and so did not pay rent in lieu of the invoice. The payments in July and August 2017 the £450 and £556, he could not explain the different payments but noted that they equalled out to the full rent excepting for an additional £6. He advised that the Respondent had made late rental payments and it was at first thought that the December 2017 and January 2018 payments were merely late.
22. The Respondent had lodged the repairs application with the tribunal on the same day that he had notified the landlord about the repairs, he had not previously notified them of the repairs accordingly to his client.
23. Point 4 the Applicant's agent confirmed that rent was paid by the Respondent in November 2017.
24. Point 5 he submitted that there had been email communication to him as the landlord's solicitors; the Respondent had sent an email to him which said various things and included in that was that he could not see why matters could not be resolved with a handshake or signing a written agreement. After some discussion with the landlord, they had thought that the Respondent had wished to open the door to a negotiation and so the landlord had instructed him to send a without prejudice communication making a proposal to offer recovery of the property, and in such event the landlord would not pursue

outstanding rent. There was no concession that rent was not due. There was no response to this email. It was not in any way a threat to leave, but was sent in response to the email from the Respondent .

25. Finally the Applicant's Agent moved for expenses to be awarded against the Tribunal as he submitted that there had been further procedure due to the original hearing not having before it the letter from the Respondent, he submitted that this had led to further expenditure for the Applicant in terms of preparation for the hearing.

Findings in Fact

26. That a tenancy existed between the parties.
27. That the tenancy agreement had been entered into on 12 May 2016.
28. That the tenancy agreement commenced on 1 June 2016.
29. That in terms of the tenancy agreement there was a monthly rental due in advance of £500 by the Respondent .
30. That there was a book showing a list of numbers which appeared to be rent payment details.
31. That rent arrears appeared to have accrued between 1 December 2017 and 28 August 2018 amounting to £4500.

Reasons for Decision

32. Section 16 of the Housing (Scotland) Act 2014 provides that the tribunal has jurisdiction in relation to the actions arising following from a number of tenancies, including those arising under an assured tenancy within the meaning of section 12 of the Housing (Scotland) 1988.
33. As this tenancy is an assured tenancy. I am content that I have jurisdiction to deal with this matter.
34. While there was no appearance by the Respondent at the case management discussion, it appeared that he had had notice of the hearing and was aware of it. I consider that I was therefore entitled to proceed with the hearing in his absence as allowed for in terms of rule 29 of the Tribunal Rules.
35. In coming to my decision I considered the application, the written objection by the Respondent dated 29 October 2018, the verbal submission by the Applicant's agent at the case management discussion in response to the Respondent's written objection, and the further documents which he lodged at the case management discussion as narrated above.

36. Turning to the Respondent's written objection, I found that in parts it was contradictory, and it was not altogether clear what rent arrears the Respondent objected to and under which point in his letter.
37. Turning to consideration of each point in turn, I consider that,
38. Point 1: the Respondent had a statutory mechanism in which to seek a rent restriction order if he considered that rent should be withheld, and it appeared he had already attempted to use this statutory avenue but had been unsuccessful in his application. I accepted the verbal submission of the Applicant's agent that the RSEO application provided an appropriate route to deal with any rent restriction.
39. There was no evidence before me to show that the Respondent had been withholding rent under common law in relation to outstanding repairs. In my opinion, (even if he was entitled to do so having regard to the fact that there already exists the statutory mechanism which deals with repairs,) he would have had to put the landlord on notice that he was withholding rent; and further he would have to allow access for the repairs to be carried out. There was no evidence before me to support these matters. The Applicant's agents submitted that the Respondent had not notified the Applicant that he was withholding rent subject to the repairs being carried out.
40. There was also no specification from the Respondent as to what amount of rent he was withholding, however he does state in Point 1 that he owes "no rent" and makes reference to the RSEO for the property. I think it reasonable to assume that his assertion that no rent arrears are due must relate to all outstanding rent. Given that there is no evidence before me to support that he withheld rent due to the repairs and further, that he was entitled to do so, then I do not uphold this part of the Respondent's defence of the application against him.
41. In relation to Point 2, the tenancy agreement is in the name of the Applicant and the Respondent only. These therefore are the only parties to the agreement. I did not have any evidence before me to show that the landlord's husband was entitled to act on behalf of the landlord in such a way that he could impose binding obligations upon her in relation to the tenancy. In addition, I note the submission of the Applicant's agent that Applicant disputed that she was aware of any waiver agreement and further, that she disputed that she had instructed her husband to act on her behalf in relation to any waiver. I do not therefore find any evidence to support this part of the Respondent's defence. I would also note that again there was very limited specification, in any event, of what amount of rent and over what period he considered that any waiver was granted.
42. Point 3: the production of the rent book, does not in my opinion demonstrate anything other than rent payments were recorded or not recorded against the months shown. The Respondent's position was that he paid rent direct to the

landlord and other family members, but he provided no time period for these payments and this would appear to be at odds with the first and second points of his submission when he appears to accept that he did not pay rent for certain periods. I note that the submission by the Applicant's agent was that this was the record that the landlord kept of the rental payments. I did not consider the rent book to be a very professional record of rental payments; and it did not appear to record all relevant information about rent; however it did appear to provide a basic record of payments made and not made. It did therefore provide some support for the Applicant's position.

43. The issue at Point 4 appears to be whether rent was paid in November 2017, the Applicant's agent confirmed that they did not dispute that rent had been paid for November 2017.
44. In relation to Point 5, as far as these proceedings for rent arrears are concerned, I do not think that this point provides evidence of rent having been or not paid by the Respondent. I cannot see how it proves what rent arrears are owing or not owing and therefore I do not consider that it offers support to the Respondent in defending this application.
45. Accordingly, after considering the evidence before me, it appears to me that rent has not been paid during the period claimed by the Applicant. The tenancy agreement created contractual obligations between the parties, one of those is to pay rent. Any relationship between the non-payment of rent and repairs should be dealt with under the existing statutory mechanism which the Respondent is aware of and has already made application to. The Respondent was therefore due to pay rent to the landlord in terms of the tenancy agreement and accordingly, I consider that I should make an order for the outstanding rent arrears due from December 2017 until 28 August 2018.
46. The sum sought in the Application was for £5000, however this included the November 2017 rent, which the Applicant's agent confirmed had been paid, on that basis I am prepared to grant an order for payment of £4500.
47. Turning to the motion for expenses which was made by the Applicant's agent against the Tribunal. I was referred to Rule 40 of the tribunal rules which deals with expenses, which states that the Tribunal may make an order against a party where that party through unreasonable behaviour in the conduct of the case has put the other to unnecessary or unreasonable expense. I was also referred to rule 1 in terms of the definition of "party". In considering this matter I consider that "party" does not include the tribunal and on that basis alone I do not consider it would be competent for me to award expenses against the Tribunal. However and further, turning to the terms of rule 40, itself, expenses may be awarded where there has been unreasonable conduct, the Respondent submitted a letter on or after the 29 October prior to a hearing on 31 October, I consider the terms of the letter had information within it which showed that the Respondent would not be in a position to attend the hearing on that date, and I consider that the application

would have had to have been continued to a future date in any event. I do not consider therefore that the Applicant was put to unnecessary expense due to the actions of the Tribunal. Accordingly, I refuse the Applicant's motion for expenses.

Decision

48. I grant an order in favour of the Applicant for FOUR THOUSAND FIVE HUNDRED POUNDS (£4,500) against the Respondent .

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.

Ms Melanie Barbour

Legal Member/Chair

22. 3. 19

Date