

**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 of the Private Housing (Tenancies) (Scotland) Act 2016**

**Chamber Ref: FTS/HPC/CV/22/2084**

**Property : 28 Hillcrest, Dalmellington, East Ayrshire KA6 7ST (“Property”)**

**Parties:**

**Gary Power, 46 Drummond Street, Greenvale, Melbourne, Australia, Vic 3059 (“Applicant”)**

**Mr Allan Hutton, 5 Burnbrae, Drongan, East Ayrshire KA6 7FF and Mrs Jenny Anne Hutton, 39 Hillhead, Coylton, Ayrshire KA6 6JT (“Respondent”)**

**Ayr Housing Aid Centre, 7 York Street, Ayr KA8 8AN (“Second Respondent’s Representative”)**

**Tribunal Members:**

**Joan Devine (Legal Member)**

**Gordon Laurie (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“Tribunal”) determined that an order for payment of £5847.50 plus interest thereon at the rate of 8% per annum should be made.**

**Background**

The Applicant sought an order for payment in respect of arrears of rent. The Applicant had lodged Form F. The documents produced were: a Tenancy Agreement dated 12 February 2018; a schedule of rent arrears as at 22 June 2022 and a copy of a letter to each Respondent dated 12 September 2022 intimating a schedule of rent arrears as 7 September 2022. A Case Management Discussion took place on 4 October 2022 at which the Parties agreed that the tenancy had come to an end and the rent arrears were £6,407.50. The First Respondent accepted liability for the sum claimed. Both Respondents disputed that the Second Respondent had liability for the sum claimed. The Parties agreed that the issue in dispute that required to be resolved at an evidential hearing was the date on which Mrs Hutton was released from her obligations under the private residential tenancy agreement entered into between the Parties.

The Tribunal issued two directions. The first was dated 4 October 2022 and required Parties to lodge, 14 days prior to the Hearing to be fixed, a list of witnesses and a copy of all documents on which they intended to rely. The Second Respondent's Representative responded to the direction stating that the only witness he would call was the Second Respondent.

The second direction was dated 28 November 2022 and required the Second Respondent to lodge a written representation setting out (a) the legal basis upon which, and the date from which, the Second Respondent maintains she was released from her obligations as a joint tenant under the tenancy agreement entered into by the Parties and (b) the detail of any other defence which the Second Respondent intends to rely upon. Reference is made to the terms of the direction. On 12 January 2023 the Second Respondent's Representative lodged a written representation and inventory of productions.

The Applicant emailed the Tribunal on 14 March 2023 to advise that he would be representing himself going forward. On 16 and 23 March 2023 the Applicant lodged a response to the direction dated 4 October 2022. The documents lodged were :

1. Graphs prepared by the Applicant.
2. A statement of rent arrears.
3. A written statement from Emily McWilliam of Urban Let dated 16 March 2023 which included photographs of the Property as at 20 September 2017 and as at 8 March 2022; email exchanges between Emily McWilliam and the Second Respondent at appendix 1; email exchanges between the Applicant and the First Respondent regarding a new lease and repairs to the Property at appendix 2 and copy text messages at appendix 3.
4. A copy of the written representation for the Second Respondent with a response to each numbered paragraph

### **Hearing**

A Hearing took place by teleconference on 6 July 2023. The Applicant was in attendance. The Second Respondent was in attendance as was Gerry Tierney of the Second Respondent's Representative. There was no appearance by the First Respondent.

The Tribunal noted that the issues to be resolved were firstly, whether the Second Respondent, Mrs Hutton, had been released from her obligations as a joint tenant earlier than the date of termination of the tenancy and secondly, if Mrs Hutton had not

been released from her obligations at an earlier date, whether the rent due should be abated as the Applicant had failed to comply with his obligation to keep the Property in an appropriate state of repair during the currency of the tenancy.

The Tribunal noted that the Parties had agreed that the arrears at the end of the tenancy were £6407.50. The Tribunal asked the Applicant if anything had been paid towards the arrears since then. He said that there had been no payments. The Tribunal noted that the First Respondent, Mr Hutton said at the CMD that he had returned the keys to the Property on 22 September 2022. The Tribunal asked if Parties agreed that was the date on which the tenancy ended. They said that was agreed.

### **Was the Second Respondent released from her obligations as a tenant earlier than 22 September 2022?**

Mr Tierney submitted that Mrs Hutton removed from the Property in late 2018. She told the letting agent she had moved out and regarded her involvement with the tenancy as being at an end. He said that she was given to understand that she had been relieved of her liabilities. He referred to the emails lodged dated 7 December 2021 and 9 June 2022. He referred to emails lodged by the Applicant which made clear that negotiations for a new lease between the Applicant and Mr Hutton alone were underway although he agreed that no new lease was actually put in place.

The Applicant, Mr Power, said that his understanding was that no new lease was signed. He said that the letting agent emailed Mrs Hutton on 7 August 2019 and said that she remained liable for the rent. Mrs Hutton replied on 9 August 2019. He said that he emailed Mr Hutton on 12 August 2019 and said that Mrs Hutton remained equally liable for the rent. Mr Power said that a new lease was issued to Mr Hutton along with a tenancy application form which required to be completed before a new lease could be entered into. He said that the application form had to be filled out for every tenancy to ensure the tenant was suitable and capable of paying the rent. He said that he would expect such an application to be completed even when the proposed tenant had previously been a joint tenant of the same landlord. He said that Mr Hutton did not complete the application process or the new lease.

The Tribunal noted that Mrs Hutton paid the rent twice in 2019 after she had left the Property. Mrs Hutton said that she paid the rent to help out Mr Hutton.

### **Is the Second Respondent entitled to an abatement of rent?**

The Tribunal asked Mr Tierney to take them through each of the items of disrepair referred to in his written submission. The Tribunal said that they wanted to understand the nature of the disrepair, when it became apparent, when it was reported to the letting agent, what was done and how the repair interfered with the use and enjoyment of the Property. Mr Tierney lead evidence from Mrs Hutton in this regard.

Hole in the roof – Mrs Hutton said that there was a hole in the side of the roof which became apparent while she was living there. She said it caused damp in the attic. She

said she had items stored in the attic such as photographs. She said that the damp did not require her to dispose of any of the items. She said she moved them out of the way to another part of the attic. She said she did not tell the letting agent as she was moving out.

Gas boiler – Mrs Hutton said that the boiler was replaced while she was living in the Property but the new boiler leaked which would cause the boiler to shut down. She said this made the house cold. She said she had moved out of the Property by that stage so it didn't affect her. She had, however, been unwilling to allow her two sons, who had been aged about 4 years old at that time, to stay overnight in the property with their father due to the heating problems.

Leaking pipe under kitchen sink – Mrs Hutton said the leak was present since she moved into the Property. She said a bucket had to be put in the cupboard below the sink to catch the water.

Kitchen units – Mrs Hutton said that the kitchen units were very old, dirty and peeling inside from the time she moved into the Property. She said she could not store food in the cupboards as a result. She said that she had not seen the photographs of the kitchen lodged by the Applicant.

Gas hob – Mrs Hutton said that the gas hob was condemned while she was living in the Property. She said the flame was not constant. The letting agent was told and they sent someone out who condemned the hob.

Gas fire - Mrs Hutton said that the gas fire was condemned while she was living in the Property. She said that both the hob and the fire could not be used after they were condemned. She said that she had not seen the copy gas safety certificates lodged by the Applicant.

Carbon monoxide monitor – Mrs Hutton said that the Carbon monoxide monitor was wrongly place right at the top of the ceiling.

Damp under the floor causing insect infestation – Mrs Hutton said that the insect infestation occurred while she was living in the Property and became worse after she moved out. She said this was on the ground and upper floor of the Property. She said she had been bitten by a spider. She said that Mr Hutton reported this to the letting agent.

The Tribunal asked Mr Power to comment on each of the items of disrepair referred to by Mrs Hutton.

Hole in the roof – Mr Power said that 3 slates were blown off the roof during a storm. He said this was reported to the letting agent on 20 September 2019 which was more than 9 months after Mrs Hutton left the Property. He said the letting agent had difficulty engaging a roofer but a roofer finally was engaged on 10 December 2019 and fixed the roof on 18 December 2019. Mr Power referred to the photograph he had lodged of the attic space, figure 16. He said this showed that the roof space had a tin lining under the slates which meant there would not have been any damp. He said he understood the importance of keeping the Property in good condition.

Gas boiler – Mr Power said this was replaced 3 months after Mrs Hutton left the Property. The Tribunal noted the invoice produced from McCall Heating and Plumbing solutions for £1800 was dated 10 February 2018 which was just before the tenancy started. Mr Power said that as soon as the boiler was not working he arranged to have it fixed. He said the leak was fixed in February 2019.

Leaking pipe under sink – Mr Power said that a plumber visited the Property twice. He said that the leak was where the dishwasher was connected. He said that this issue was resolved on 14 February 2019. He said the rent was not in arrears at that point.

Kitchen units – Mr Power referred the Tribunal to the photographs lodged. The Tribunal noted that they were dated 20 September 2017 and the tenancy commenced on 12 February 2018. Mr Power said that the Property was not occupied during the period September 2017 to February 2018. He said the Respondents were the first tenant. He said that after he bought the Property he rewired the Property, installed new carpets, installed a new bathroom, painted the Property and installed new blinds and smoke alarms.

Hob and gas fire – Mr Power referred the Tribunal to the gas safety certificate dated 14 February 2019. The Tribunal noted this was a year after the tenancy commenced. Mr Power referred the Tribunal to the picture of the hob, figure 14, taken on 8 March 2022 which showed it was in use. He also referred to the pictures of the fireplace and noted there was no “condemned notice”.

Carbon monoxide monitor – Mr Power referred to the picture of the monitor, figure 21, which showed the monitor 8-10 inches lower than the ceiling. He said this was installed by a certified engineer and that it was at the correct height per the British standard.

Damp under the floor causing insect infestation – Mr Power said that the letting agent had attended the Property and saw no evidence of insect infestation. He said that no photographs were provided. He said he could not instruct a contractor to attend the Property on this issue as there was no evidence to show what needed to be treated. He said that he had visited the Property in October 2022 and January 2023 and saw no evidence of damp or insect infestation.

Mr Power said that every repair required was undertaken. He said that there was no evidence lodged to support the assertion that the hob and fire were condemned or that there had been insect infestation.

Mr Tierney said that if the Tribunal found that Mrs Hutton remained liable for the rent after she left the Property, the Tribunal should allow a partial abatement of the rent at a level for the Tribunal to determine.

### **Findings in Fact**

The Tribunal made the following findings in fact:

1. The Applicant and the Respondent had entered into a Tenancy Agreement dated 12 February 2018 ("Tenancy Agreement").

2. In terms of the Tenancy Agreement the rent was £425 per month.
3. The Tenancy Agreement terminated on 22 September 2022
4. At the date of termination of the Tenancy agreement the sum due to the Applicant in respect of rent arrears was £6,407.50.
5. The Respondents had failed to pay the rent in full for the period 1 January 2019 to 1 September 2022. The unpaid amount was £6,407.50.
6. In terms of the Tenancy Agreement the Applicant was entitled to payment of interest on unpaid rent at the rate of 8% per annum.

### **Findings in Fact and Law**

The Tribunal made the following findings in fact and law:

1. The obligations of the First and Second Respondent as tenants was joint and several.
2. The Second Respondent's obligations as a joint tenant continued until the termination of the tenancy on 22 September 2022.
3. As a result of an ongoing issue with a leaking boiler, the rent due is subject to an abatement of £510.

### **Reasons for the Decision**

As regards the date on which Mrs Hutton was released from her obligations as a joint tenant, the Tribunal considered the terms of the Private Housing (Tenancies) (Scotland) Act 2016 ("the Act"). Section 40 provides that a tenancy, which is a private residential tenancy, may not be brought to an end by the landlord, the tenant, nor by any agreement between them, except in accordance with part 5 of the Act. Section 48 deals with the ability of a "tenant" to end the tenancy. Section 78(3) provides that in a case where two or more persons jointly are the tenant under a tenancy, references in the Act to the tenant are to all of those persons unless stated otherwise. The Tribunal noted that the tenancy agreement refers to the First and Second Respondent having joint and several liability and clause 24(i) states that to end a tenancy all joint tenants must agree and one joint Tenant cannot terminate the joint tenancy on behalf of all Joint Tenants.

Whilst the Tribunal sympathised with Mrs Hutton's position, it determined that her obligations as a joint tenant continued until the tenancy terminated on 22 September

2022. The tenancy had not been terminated in accordance with part 5 of the 2016 Act or the tenancy agreement.

As the Tribunal determined that Mrs Hutton remained liable for the rent until the tenancy terminated, it was necessary to consider whether there should be an abatement of the rent. As stated by Sheriff Principal Caplan in *Renfrewshire District Council v Gray* 1987 SLT (Sh Ct) 70:

*“On my reading of the authorities there are three remedies open to a tenant who does not get the full or effective possession of the subjects leased.....Thirdly the tenant may claim an abatement of the rent on the basis that he has not enjoyed what he contracted to pay rent for.....Abatement of rent as illustrated by the authorities is an equitable right and is essentially based on partial failure of consideration. That is to say, if the tenant does not get what he bargained to pay rent for it is inequitable that he should be contractually bound to pay such rent.”*

With that summary in mind, the Tribunal considered the various repairs discussed at the Hearing.

Hole in roof – whilst the Tribunal accepted that there had been an issue with the roof, if any dampness was caused, there was no evidence to indicate that it interfered with the Respondents’ use and enjoyment of the Property.

Gas boiler – Mrs Hutton’s evidence was that the boiler was replaced while she was occupying the Property but a leak developed thereafter. Her evidence was *“I had moved out so it didn’t affect me.”* The Applicant had lodged an invoice for £1800 in respect of installation of a new boiler. The date of the invoice was unclear but appeared to be 10 February 2018. This date was also the date referred to by the letting agent in the written statement lodged. The statement went on to say *“leak reported unable to locate record but circa Jan/Feb 2019. New plumber visited issue resolved 04/02/2019”*. Mrs Hutton had told the Tribunal that she left the Property “late 2018”. Her evidence was that the leak developed after she left the Property. That is consistent with the written statement from the letting agent that the boiler leak was in *“Jan / Feb 2019”*. Mr Power had lodged a number of copy emails few of which referred to the need for repairs. The email from Mr Power to Mr Hutton dated 12 August 2019 does however refer to the boiler as follows :*“The boiler as you know was replaced last year and if its leaking should be easily addressed”*. The evidence therefore suggests that there was an issue with the boiler leaking from January / February 2019 to August 2019, a period of some 6/7 months. The Tribunal considered that a boiler shutting down would interfere with a tenant’s use and enjoyment of a let property.

Leaking Pipe under sink - whilst the Tribunal accepted that there had been an issue with a leak below the sink, there was no evidence to indicate that it interfered with the Respondent's use and enjoyment of the Property.

Kitchen units – Mrs Hutton's evidence was that the kitchen units were very old, dirty and peeling inside. This was not supported by any evidence such as photographs. Whereas the photographs lodged by the Applicant showed kitchen units in a reasonable condition. The Tribunal did not accept that the kitchen units were in need of repair.

Gas hob and gas fire - Mrs Hutton's evidence was that the gas hob and fire had been "condemned" while she lived in the Property and have not been capable of use thereafter. There was no evidence lodged in support of this such as a photograph or paperwork from the contractor who condemned the items. The Applicant however had lodged a gas safety certificate dated 14 February 2019 and a photograph showing the hob in use on 8 March 2022. If there had been any issue with these gas appliances it had been resolved by 14 February 2019.

Carbon monoxide monitor - Mrs Hutton's evidence was that the alarm was wrongly placed on the ceiling. Mr Power had lodged a photograph showing the monitor in the correct location some 8/10 inches below the ceiling. The Tribunal accepted the photographic evidence.

Damp under the floor causing insect infestation – Mrs Hutton's evidence was that there was an insect infestation at the Property. Her evidence in support of this was to say she had been bitten by a spider. The Tribunal did not regard this one incident as evidence of an infestation. There was simply no evidence before the Tribunal of an insect infestation caused by dampness in the Property.

The Tribunal determined to make an Order for payment against both Respondents on a joint and several basis. The Respondents were jointly and severally obliged to pay the rent and had failed to pay the rent in full for the period 1 January 2019 to 1 September 2022. Parties had agreed that the arrears were £6407.50. The Tribunal did however consider that there should be an abatement of the rent due to reflect the difficulties experienced with a leaking boiler over a period of 6/7 months. There was no evidence before the Tribunal to suggest that the issue was raised with the letting agent but not dealt with. Rather the evidence was that the issue was raised in early 2019, the leak was repaired shortly thereafter and then the issue was raised again in August 2019. There was no evidence regarding when the repair was addressed. For these reasons the abatement of rent will be modest. The rent was £425 per month. The Tribunal determined to abate the rent at the rate of 20% for a period of 6 months leading to an abatement of £510.



The Applicant is entitled to interest at the rate of 8% in terms of the Tenancy Agreement. An order will therefore be made including interest at that rate.

### **Decision**

The Tribunal grants an order for payment of £5897.50 plus interest thereon at the rate of 8% per annum.

### **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.**

**Joan Devine**

**Joan Devine  
Legal Member**

**Date : 7 July 2023**