Housing and Property Chamber
First-tier Tribunal for Scotland

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

Decision: Section 43 Tribunals (Scotland) Act 2014 and Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Ref: FTS/HPC/CV/20/1332

Re: Property at 203 Copland Road, Flat 1/1, Glasgow, G51 2UR ("the Property")

Parties:

Miss Serena Valeruz, Flat 1/1, 203 Copland Road, Glasgow, G51 2UR ("the Applicant")

Mrs Sara Matheson, [redacted] ("the Respondent")

Tribunal Members:

Ms H Forbes (Legal Member) and Mr M Scott (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") reviewed its decision following an application by the Respondent and found there was no basis on which to change its original decision.

The Decision under Review

1. Following a hearing on 7th June 2021, the Tribunal issued a decision on 14th June 2021 granting an order for payment in favour of the Applicant in the sum of £2039.25.

2. By email dated 25th June 2021, the Respondent applied for review of the decision. The application for review fell within the time limits for review under section 43 of the Tribunals (Scotland) Act 2014 and Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended ("the Rules").

Application for Review

3. The application for review was made in the following terms:

A. The Applicant's breach of contract

The Applicant admitted breaching the terms of her tenancy agreement by having a sub-tenant in the premises for a period of at least eight months. The tenancy agreement was available to the Tribunal. The tenancy agreement did not permit sub-letting. It did not permit the Applicant to have anyone living with her without the permission of the Respondent. She accepted that she did not have permission. Accordingly, the Applicant's actions were in breach of her tenancy agreement. The Tribunal elicited oral evidence that the Applicant had received income of £1600 as a result. The Respondent's position is that the breach of tenancy ought to mitigate any award made to the Applicant. The Tribunal clearly thought this was a relevant matter as they elicited the oral evidence referred to. The decision makes no reference to or confirms the Tribunal's approach to the fact that the Applicant secured at least £1600 as a direct result of her breach of tenancy. It is submitted that the award now made ought to be reduced by the £1600 received by the Applicant.

B. The Repairing Standard

The Tribunal have made an award in terms of s13(1)(b) of the Housing (S) Act 2006, not in terms of s13(1)(a). That section requires regard to be had to s13(3) of the Act. "In determining whether a house meets the standard of repair mentioned in subsection (1)(b), regard is to be had to—(a)the age, character and prospective life of the house, and (b)the locality in which the house is situated." *The Tribunal's decision does not make any reference to this provision, despite submissions being made and despite Mr McGrath's evidence that the sash windows were more in keeping with the character of the house. It appears from the decision that Mr McGrath's evidence was accepted by the hearing. He stated that the property was wind and water tight, and there was no evidence that bits of wood had been falling from the windows nor of water ingress as suggested by the Applicant (excepting always the window which required and had the emergency repair in September). The qualified joiner was not asked whether a conclusion could be reached from the nature of the works he carried out, that the windows did not meet the repeating standard. No evidence was available to allow such a conclusion to be reached and a submission was made on behalf of the Respondent to that effect. It is submitted that when regard is had to Mr McGrath's evidence, to the terms of s13(3) and to the actual evidence available to the hearing the repairing standard was not breached in respect of the windows.*

The decision made by the Tribunal to order payment is not an excluded decision, as defined. It is in the interest of justice that the decision be reviewed,

4. By email dated 9th July 2021, the representative for the Applicant responded in the following terms:

A. The Applicant's Breach of Contract

The Respondent does not suggest that the Applicant's breach of contract resulted in the Respondent sustaining losses of £1,600 and it is therefore entirely unclear on what legal basis that sum should be offset against the award made to the Applicant. During the hearing the Respondent's representative made submissions that the presence of a flatmate was relevant to the determination of whether the Applicant was entitled to compensation in respect of increased heating costs. No award was made in respect of increased heating costs, so the Tribunal was not ultimately required to make a finding in relation to the effect which the existence of a subtenant may have had on the level of any such award. No submissions were made for the Respondent that the rental income received by the Applicant should be offset against any award. The landlord's remedy in respect of the Applicant's alleged breach of contract in having a flatmate would be to raise proceedings for eviction. Indeed, on 18 January 2021 the Respondent served the Applicant with a Notice to Leave which lists the alleged breach as a reason for eviction. The Respondent has not made out any argument or referred to any legal precedent which would entitle her to recover the share of the rent received by the tenant from her flatmate. In any event, the Applicant gave evidence during the hearing that she had emailed the Respondent to say that she was considering getting a flatmate and that no objection was made to this. The Applicant interpreted this as tacit agreement to her proposal to get a flatmate which superseded the standard terms of her tenancy agreement and the Respondent has not led any evidence to the contrary. In summary, the Applicant does not accept that it was a breach of her contract to sublet the property, and in any event the Respondent has not demonstrated that she suffered any loss as a result of the alleged breach. If the Respondent believes that she is entitled to payment of £1,600 as a result of the Applicant's alleged breach of contract then the correct procedure would be for her to make a separate claim for this sum. It is not a defence to a claim for damages for disrepair that a tenant had an unauthorised flatmate, and indeed the Respondent did not set out any such defence. There is no basis on which the sum received by the Applicant as a contribution to the rent (all of which was paid to the Respondent) should be offset against the sum awarded in these proceedings in respect of the abatement of rent and solatium for distress and inconvenience.

B. The Repairing Standard

It is submitted that Mr McGrath's comment that "sash windows were more in keeping with the character of the house" has no bearing on the question of whether the windows met the repairing standard with regard to the age, character and prospective life of the house and the locality in which the house is situated. Mr McGrath's full comment in his written statement of 13th May 2021 was: "I did not favour replacing the windows as sash and case windows are far more in keeping with these old tenement buildings, in my view." The context in which this comment had been made was that the Applicant had argued that the sash windows required to be replaced with double glazed

windows, and the Respondent had asked Mr McGrath whether he considered that the windows required to be replaced. Mr McGrath's statement is an indication that he did not consider that replacement of the windows was required, rather than a comment on the condition of the sash windows themselves at the time when he attended the property to carry out the emergency repair and inspect the other windows. The Tribunal made no finding that sash windows were inappropriate or that the windows required to be replaced, and the question of whether sash windows in general met the repairing standard with regard to the age, character and prospective life of the house and the locality in which the house is situated did not require to be explicitly addressed in the judgment. Rather, the Tribunal found that the condition of the sash windows was not sufficient to meet the repairing standard prior to the extensive repair works carried out by Mr McGrath. Mr McGrath stated that he was asked to report back to the Respondent on whether the windows needed to be replaced or if they could be renovated. There was no suggestion by the Respondent, Mr McGrath or the Respondent's agent that the works which Mr McGrath carried out went beyond what was required to ensure that the windows were in working order. Mr McGrath stated that the windows "needed overhauled; by that I mean the ropes needed replaced, weights realigned and a general servicing." There was no indication either in Mr McGrath's evidence or in the submissions for the Respondent that these works were in any way superfluous or for purely aesthetic purposes. The works were "needed" in order to ensure that the windows could be opened and closed properly. The Tribunal was therefore entitled to find that the extent of the works which were required to the windows indicated that they were not in a reasonable state of repair and in proper working order and therefore did not meet the repairing standard. The Tribunal was entitled to accept the evidence of the Applicant that the windows had been in a poor state of repair from the outset of the tenancy until the repair works were completed in September 2020.

The Applicant is of the view that these matters can be dealt with without a further hearing.

5. By email dated 9th July 2021, the Respondent's representative made the following representations:

> *We have had sight of the Applicants response. We take issue with elements of the submission – not least assertions made about the evidence of the Applicant regarding the flatmate and submissions made in the case as a whole regarding the offsetting of "rent". We consider that a hearing will be required*

6. The Tribunal decided to fix a hearing on the review.

7. By email dated 26th August 2021, the Respondent's representative lodged written representations and a production.

The hearing

8. A review hearing took place by telephone conference on 10th September 2021. The parties were not in attendance. The Applicant was represented by Ms Claire Cochrane, Solicitor. The Respondent was represented by Ms Lorna Anderson, Solicitor.

The Respondent's position

9. Ms Anderson adopted her written submissions. She submitted that it was in the interests of justice, bearing in mind the overriding objective, to deal with matters justly. Evidence elicited by the Tribunal had established that the Applicant had received 8 months' rent of £200 per month from a sub-tenant. Ms Anderson referred to the production lodged on 26th August 2021, which was a letter from the NHS received at the Property after the tenancy ended, and addressed to the Applicant's flatmate. This suggested the flatmate was not occasional, as had been suggested at a previous case management discussion by the Applicant.

10. No permission to sub-let had been given. This was an issue from the outset but the existence of the flatmate had only been confirmed during the current case. This was a clear breach of the tenancy agreement. It could not be just that the Applicant profited from a breach of the tenancy agreement and from an abatement of rent. The income from the sub-let should be offset against the abatement.

11. Asked for her response as to whether or not the matter of any redress for the rent received from the sub-tenant should be the subject of a different application, Ms Anderson submitted that the Tribunal is entitled to deal with matters informally, flexibly and justly. This is a justice argument, whereby an abatement was awarded when the Applicant was not fulfilling her continuing obligations in terms of the tenancy agreement. There was enough evidence before the Tribunal to conclude that the Applicant did not have permission to sub-let. The Applicant acknowledged this. The flatmate was unauthorised.

12. With regard to the repairing standard, the Tribunal accepted the evidence of Mr McGrath that the windows were sound and there was no evidence of rot or major defects. The windows required to be overhauled. There was no evidence of broken bits of wood. Mr McGrath was not asked if the works required showed disrepair or a breach of the repairing standard. Taken against Mr McGraths' signed statement, it must be a question of law that it was not within the Tribunal's knowledge to conclude that the windows did not meet the repairing standard.

The Applicant's position

13. Ms Cochrane adopted her written submissions. The Applicant had intimated that she might get a flatmate. She expected she would have received an email from the Respondent if it was not acceptable. Whether or not the sub-let

was authorised or the Applicant reasonably believed she had permission does not have a bearing on these proceedings. The Tribunal found that the Applicant was entitled to an abatement. The remedy in regard to any breach of contract in respect of sub-letting is a separate action.

14. With regard to the windows, Mr McGrath gave evidence that the window cords were painted over, one cord was broken and the opening of the windows was affected. There was no argument by the Respondent that the windows were in an appropriate state of repair for the character of the Property. It seems clear that the Tribunal was entitled to find that the windows were not in a reasonable state of repair and in proper working order. It is for the Tribunal to decide this matter rather than the witness.

Decision

15. The Tribunal considered the submissions made. The Tribunal was not persuaded that the sum of £1600 should be offset against the award made by the Tribunal. It is not clear on what legal basis this would be justified. No findings were made by the Tribunal in respect of breach of tenancy agreement by the Applicant, or loss sustained by the Respondent. No submissions were made regarding loss sustained by the Respondent, or the issue of offset, by the Respondent's representative at the hearing on 7th June 2021. It is open to the Respondent to consider raising a separate claim in respect of this matter, should she so wish.

16. The Tribunal took the view that it was entitled to make a finding that the Property did not meet the repairing standard in respect of the windows, based on the evidence of the Applicant that the windows were not in a reasonable state of repair and in proper working order from the start of the tenancy, and the evidence of the witness, Mr McGrath. Although Mr McGrath stated in his written statement that the windows were basically sound, and there was no sign of rot or any major defect, he carried out a significant amount of work to overhaul the windows to ensure they were in a reasonable state of repair and in proper working order. The fact that they were sound, and without rot or major defect, did not mean they met the repairing standard in terms of their operation.

17. In considering that the Property failed in respect of s13(1)(b) of the 2006 Act, the Tribunal had regard to s13(3). However, the issue was one of disrepair, notwithstanding the age, character and prospective life of the Property. The Tribunal made no findings regarding the type of windows. It was their condition that was pertinent, and the Tribunal was entitled to find that, in terms of their condition, they did not meet the repairing standard, notwithstanding that no specific question was asked of the witness in this regard.

18. In all the circumstances, the Tribunal can identify no basis to change the Decision.

19. This Decision is not subject to appeal.

H Forbes

Legal Member/Chair

Date: 10th September 2021