



Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 30 of the First Tier Tribunal for Scotland (Housing and Property Chamber) Rules 2017.

Chamber Ref: FTS/HPC/CV/21/2702

Re: Property at 16 Shaw Street, Dunfermline, KY11 4AX (“the Property”)

Parties:

Dr George Bittar, Gepmadar Ucta 3111/20, Budapest, Hungary, 1106, Hungary (“the Applicant”)

Mr Gordan James Hoggan, 21 Christie Street, Dunfermline, KY12 0AQ (“the Respondent”)

Tribunal Member:

Valerie Bremner (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that it was not appropriate to grant the application for recall of the decision and refused the request for recall of the decision.

Background

1.This application for a payment order to which this application for recall relates, was submitted to the Tribunal on 29 October 2021 and accepted by the Tribunal on 17th November 2021.A case management discussion was fixed for 14th January 2022.Neither party attended or was represented on that date and the case management discussion was continued to 18th March 2022.On that date the Applicant was represented by Mrs Barclay, property lettings manager at Morgan Law and the Respondent attended and represented himself.

2. The Tribunal had sight of the application a tenancy agreement, various letters sent to the Respondent by the Applicant, a rent statement, a report in relation to the property from Peter Cox Preservation and some photographs. The Respondent had also lodged a number of photographs and written representations setting out his position that he did not feel that he should have to pay rent for a period in 2021 as he said the property was damp. He described having to keep the internal door shut at the top of the stairs and said that the whole stairway was affected with water staining and at the back end of the hall. He said it had been suggested he open windows to ventilate the flat whilst having the heating on and he explained that this would have cost him money. He described furniture at the property being smelly and damp and said that he struggled to breathe at night in the property and his young son was not allowed to stay at the property because of its condition. He said that at the start of 2021 he had started living with his partner and coming back and forward to the property every week. He indicated that he felt the property had been sold rather than fixing the roof. The Respondent further described that he had asked joiners to look at the windows at the property, but vents could not be fitted due to the style of the windows. He said that the walls dried out in summer which explained why when the property was vacated there was no sign of wetness or dampness on the walls. He accepted that some rent was due but not all of it. He had he said kept the rent aside, but he no longer had it as he and his partner were due to have a baby at the time of the case management discussion on 18th March 2022 and the money had been required.

3. The parties had entered into a tenancy agreement at the property with effect from 27th October 2016 which was for a 6-month period and continued monthly after the expiry of the 6-month period. The monthly rent payable was £495. Rent arrears had accrued during 2021 and were still outstanding as of 18th March 2022.

4. Mrs Barclay had attended the property in January 2021 at the request of the Respondent and had seen what she described as a wet patch near wood panels at an internal stair and black mould in the bedroom used by the Respondent at the property. She had arranged for the roof to be checked and had asked the landlord to provide a bigger radiator as she felt that the property seemed cold and the radiator she saw seemed small. The roofer had reported back that there were no obvious problems with the roof. Peter Cox Preservation, damp specialists, had surveyed the property in January 2021 at the request of the Applicant and found evidence of black spot mould on the walls of a bedroom, hallway and staircase which was said to be consistent with high levels of atmospheric moisture and the report gave information as to how to avoid the build-up of condensation in the home. A copy of this report was given to the Respondent at the time.

5. Mrs Barclay indicated that when the property was vacated and an inspection was carried out there was no sign of any wet or mould on the walls and the property was sold without any redecoration by the landlord. The Home report prepared made no mention of any issues relating to dampness.

6. The Respondent had requested a continuation in order that he could consider how much rent he considered was due to be paid by him and to allow him to take legal advice. The case management discussion was continued to 12th May 2022 and on that date Mrs Barclay again represented the Applicant but there was no appearance by or on behalf of the Respondent Mr Hoggan. The Tribunal proceeded in his absence given that it was aware that the date of the continued case management had been sent to the Respondent.

7. Mrs Barclay requested a payment order in the sum of £2900 which was less than the sum she had previously been seeking. She explained that she had contacted the landlord after the previous case management discussion, and he had indicated that the sum being requested could be reduced as a “goodwill gesture”. She explained that that sum now requested was a reduction of just over one month’s rent and the sum being requested was a round figure of £2900 to make this easier for the Respondent. Mrs Barclay explained that it was still the landlord’s position that everything that could have been done regarding the report of wetness and mould had been done. The issue she said was condensation due to lack of heat and ventilation and she said that the property was able to be lived in at all times and that the Respondent had simply stopped paying rent and had also stopped communicating with them.

8. The Tribunal granted a payment order in the reduced sum of £2900 which was reduced from the sum originally requested as the deposit paid by the Respondent was deducted and a sum of just over a month’s rent was deducted as a goodwill gesture on the part of the Applicant.

Application for Recall

9. On the date of the case management discussion when a payment order against the Respondent was made, i.e., 12th May 2022, the Respondent Mr Hoggan e-mailed the Tribunal around 1137 am advising why he had been unable to attend at 10am for the case management discussion by teleconference. He explained he was having difficulties at home with a newborn baby and that he and his partner were having difficulties with their own health. The Tribunal sent the Respondent further copies of guidance on appeals, review and recall of decision which had already been issued to him with the Tribunal decision. On 25th May 2022 within 14 days of the decision being made, the Respondent requested a recall of the decision, setting out why he believed the decision should be recalled. He had referred to health issues suffered by his baby daughter and both he and his partner. He also stated that he wished the matter to be recalled on the following grounds :-

“I would like to recall the case to be discussed as I have managed to seek advice on this matter and feel it’s very unfair if I would have to pay full payment back giving the poor circumstances of the property not being liveable for several months and my own belongings being damaged including my sofa, clothes and rugs which has put me at a loss to date as I had to replace everything and find a new home. Ms Barclay admitted herself she felt I shouldn’t have had to pay full rent for certain months of this period when I signed the contract it was for the liveable condition when I moved in and it was not kept up to standard by the landlord”.

10. The Tribunal fixed a case management discussion for 25th August 2022 to discuss the application for recall. On that date the Applicant was again represented by Mrs Barclay and the Respondent Mr Hoggan attended and represented himself. He explained that further to his e-mails his baby daughter had been unwell the night before the case management discussion on 12th May 2022 and had required hospital treatment. This had not been the first time this had occurred and there had been health

issues for her and both Mr Hoggan and his partner also which he had described to the Tribunal. He had prepared and planned to attend the case management discussion, but his baby's health problems had prevented his attendance. He had received guidance notes on how to recall or appeal a tribunal decision from the Tribunal. He had not understood that he required to intimate his recall request to the other party and had not done this. He thought the Tribunal would intimate the recall request. He explained that his position on the payment order was that he was not suggesting that rent retention or abatement applied but that he was seeking to claim against the rent for the dampness he had had to endure at the property during the tenancy and the fact that the property had been unliveable for a period and some of his belongings had been ruined.

11. The Tribunal member explained the recall provisions to the Respondent which state in terms of Rule 30(3) that an application for recall may not be made without a copy of the application being sent to the other parties at the same time. Mr Hoggan accepted that he had not sent a copy of the application to the Applicant's representative and said he had not understood that he had required to do that and thought that the Tribunal would do that for him. Mrs Barclay confirmed that she had received a copy of the recall application, but this had come from the Tribunal in July 2022. She had not understood why the application was calling again and wanted to take instructions from the Applicant.

12. The Tribunal chair further explained to the Respondent Mr Hoggan that the full payment order which had been requested initially had not been granted and a sum reduced by over a month's rent as a goodwill gesture had been sought and granted.

13. The Tribunal allowed the case management discussion to be continued to a later date for the Applicant's Representative to take instructions from the Applicant and noted that Mrs Barclay expressed a willingness to discuss matters with Mr Hoggan if he made an appointment to speak with her. He indicated that he was prepared to do that. A further case management discussion was set down for 7th October 2022, but this was adjourned at the request of the Respondent Mr Hoggan due to a family emergency.

14. The application for recall called again on 26th January 2023 and both Mrs Barclay for the Applicant and the Respondent Mr Hoggan were present. There was further discussion around the issues. Mr Hoggan had not been able to contact Mrs Barclay to discuss matters due to family problems. He wished to proceed with his recall application and suggested that the payment order should have reflected a rent reduction for three months and not just over one. He referred to the photographs he had lodged which showed the condition of the property. The Tribunal Legal member referred to two photographs of the internal stairway and these were the photographs which Mrs Barclay recollected. Mr Hoggan suggested there had been further photographs lodged by him and this was correct. These had been seen by the Tribunal member and considered before the decision to issue a payment order was made. Mrs Barclay indicated that the Applicant did not wish the payment order to be recalled and she said they had done everything they could regarding the condensation problem at the property and she was willing to discuss payment options with Mr Hoggan given his situation.

Recall Provisions

Rule 30: (1) In relation to applications mentioned in Chapters 4,6,8,11, and 12 of Part 3 of these Rules, a party may apply to the First Tier Tribunal to have a decision recalled where the First Tier Tribunal made the decision in absence of the party because that party did not take part in proceedings or failed to appear or be represented at a hearing following which the decision was made.

(2) An application by a party to have a decision recalled must be made in writing to the First Tier Tribunal and must state why it would be in the interests of justice for the decision to be recalled.

(3) An application for recall may not be made unless a copy of the application has been sent to the other parties at the same time.

(4) Subject to paragraph (5), an application for recall must be made by a party and received by the First Tier Tribunal within 14 days of the decision.

(5) The First Tier Tribunal may, on cause shown, extend the period of 14 days mentioned in paragraph (4).

(6) A party may apply for recall in the same proceedings on one occasion only.

(7) An application for recall will have the effect of preventing any further action being taken by any other party to enforce the decision for which recall is sought until the application is determined under paragraph (9).

(8) A party may oppose recall of a decision by-

(a) lodging with the first tier Tribunal a statement of objection within 10 days of receiving a copy as required under paragraph (3); and

(b) sending a copy of the statement of objection to any other party, at the same time

(9) After considering the application to recall and any statement of objection, the First Tier Tribunal may-

(a) grant the application and recall the decision

(b) refuse the application

(c) order the parties to appear at a case management discussion where the First Tier Tribunal will consider whether to recall the decision.

15. The Tribunal carefully considered the application for recall by the Respondent. All documents forming part of the original case and the correspondence between the Tribunal and both parties regarding the recall request are referred to for their terms.

16. It was clear that the Application for recall had not complied with the terms of Rule 30(3) and the Respondent Mr Hoggan accepted this was the case. He said he was unaware that he required to do this and thought the Tribunal would do this, but guidance notes were sent to him twice by the Tribunal and this requirement is mentioned in the guidance notes. The language in Rule 30 appears prescriptive in that it states that an application for recall “ may not be made unless a copy of the application is sent to the other parties at the same time.”

17. The Tribunal was therefore satisfied that the Respondent Mr Hoggan when seeking recall did not comply with Rule 30(3) of the Tribunal rules of procedure and

this appears fatal to his application. This is the first ground upon which the application for recall is refused.

18. Even if the Tribunal had the option of allowing the application to progress at this stage, the Tribunal does not consider that the Respondent has provided reasons which the Tribunal considers sufficient for it to be in the interests of justice to allow a recall of the decision.

19. The Respondent was clearly aware of the date of the Case Management Discussion on 12th May 2022 and the Tribunal accepts that he intended to appear but was prevented by his very young baby being unwell and requiring to be taken to hospital the night before as well as health issues affecting both he and his partner. Despite that it has to be noted that the decision to grant a payment order was made in the full knowledge of the Respondent's position and having considered the photographs lodged by him. He suggests that the Applicant's representative had admitted that he should not have paid full rent for certain months of the year. This is not what was said by the Applicant's representative who stated that a reduction in rent might have been considered for January to March 2021 at that time but there had been no communication from the Respondent at that time. This is referred to at paragraph 12 of the Tribunal's decision on this application. The Tribunal accepted the position of the Applicant regarding the condition of the property as well as the Report prepared by Peter Cox Preservation regarding condensation at the property. It must also be noted that the payment order granted was reduced by just over one month's rent as a goodwill gesture on behalf of the Applicant, so the full sum originally claimed was not awarded to the Applicant. Although it is clear that the Respondent considers that the sum awarded should have been lower, the Tribunal considered that nothing put forward in the recall proceedings added to or changed the position which he had put forward to the Tribunal and which had been considered before the decision was made.

20. The Tribunal considered that nothing in the recall application and put forward by the Respondent suggests that the interests of justice would require the Tribunal decision to be recalled. This is the second ground upon which the application is refused.

21. The parties were advised of the Tribunal decision on recall on 26th January 2023 and Mr Hoggan was reminded that he could seek legal advice on his position at this stage and whether it was open to him to lodge a claim for any possessions which he claimed were affected by conditions at the property.

Decision

The Tribunal refuses the application for recall of the decision of 12th May 2022 in terms of Rule 30 of the First Tier Tribunal (Housing and Property Chamber) Procedure Regulations 2017 as amended.

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.

Valerie Bremner

Legal Member/Chair

Date 26.1.23