Housing and Property Chamber
First-tier Tribunal for Scotland

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/20/1609

Re: Property at Woodyett, 23 Culbowie Crescent, Buchlyvie, FK8 3NH ("the Property")

Parties:

Mr Edward Good, Grove House, East Worlington, Crediton, Devon, EX17 4SY ("the Applicant")

Mr Peter Sinclair, Mrs Kirstin Sinclair, 6A Hunter Street, Auchterarder, PH3 1PA ("the Respondents")

Tribunal Members:

Rory Cowan (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that a payment order in the sum of £963.50 in favour of the Applicant should be awarded.

- Background

By application dated 25 July 2020, the Applicant sought a payment order against the Respondents arising out of their tenancy for the Property which endured from 27 May 2016 and formally terminated on 26 February 2020. The sums sought related to rent arrears as well as damages for various alleged breaches by the Respondents of their duties to look after the Property. A Case Management Discussion (CMD) was held on 13 October 2020 and the issues for the Hearing were identified and the Applicant's claim clarified as being:

1) Rent Arrears of £725;
2) Repairs as carried out by Longden Homes & Gardens of £2,239.20; and
3) Emergency repairs regarding escaping water of £286.

Following the CMD, a Note of Directions was issued ordering both parties to lodge:

a) A paginated bundle of any reports, photographs or documentation upon which the parties intend to rely; and
b) A list of witnesses each party intends to call.

Both these were to be lodged no later than 14 days before the hearing.

In advance of the Hearing and by email dated 10 November 2020, a document headed "Tribunal Briefing" was lodged on behalf of the Applicant. No witness list was lodged. Nothing was received from the Respondents until 23 November 2020 (the day before the Hearing). Neither party fully complied with the terms of the Direction. No witness list was lodged (even late) and no paginated bundle of documents was lodged (even late). The document headed "Tribunal Briefing" did contain some documents, photographs etc, but was in the form of written submissions with explanations on what the Tribunal should draw from such documents and photographs.

- The Hearing

The Applicant was represented by a Simon Good (his son). Kirsten Sinclair appeared for herself and her husband collectively the Respondents.

Preliminary matters

Both parties indicated they did not intend to lodge witness lists and, whilst the Respondents had considered having a witness from the Applicant's letting agents give evidence, that had not been arranged and they were content to proceed with the hearing without such a witness.

The Tribunal then raised the issue of the late documents that had been sent by the Respondents on 23 November 2020. The main items sought to be lodged by the Respondents were the Check-in inventory and Check-out inventory prepared for the Property by Pinstripe Inventories on behalf of the Applicant. Mr Good indicated that, in relation to those 2 documents he had no objection to them being allowed. That being the case, as the parties were in agreement, the Tribunal allowed the Check-in and Check-out inventories to be lodged by the Respondents, albeit late, but nothing else submitted with the email of 23 November 2020. Beyond that, both parties agreed that the said inventories were an accurate report of the condition of the Property at the date the tenancy commenced and the date the tenancy ended.

In terms of the document headed "Tribunal Briefing" lodged by the Applicant, it was noted that it was incomplete. In the section headed "Appendix" there was reference to a "separate word document", but no such document was produced. Mr Good explained that what was supposed to be attached were the inventories, the deposit dispute documentation (the Applicant had previously successfully claimed the full deposit via adjudication by an approved tenancy deposit scheme with the total so awarded being £1,087.50), the tenancy agreement along with some other

documents. It appeared that most of these had been produced previously or had been produced by the Respondents in their email of 23 November 2020. Whilst not in the required form per the Note of Directions, the Tribunal felt they had the relevant material before them.

Mr Good also indicated that most of the photographs incorporated into this "Briefing" were taken from the Check-out report or had been provided to him by his letting agents. He had not taken any photographs, nor had he attended the Property in many years. He was therefore relying on what he had been told by others. Mr Good was advised that this may limit the evidential value of some documents he sought to rely upon in the event that they were disputed by the Respondents in that there were no witnesses to speak to any such documents. Notwithstanding these issues, Mr Good indicated that he wished the Hearing to proceed.

Staying on this theme, it was noted in the "Briefing" document that the claim sought to be advanced was materially different to that which had been advanced in the Application and that had been confirmed at the CMD. The claim detailed in this "briefing" document included many more heads of claim including a claim for contractual interest, lost items and so on. The Tribunal explained to Mr Good that, all the Tribunal had before it and could therefore consider for the purpose of the Hearing was the claim as set out at the CMD (above). If the Applicant wished to add to this claim, then an application to formally amend the Application would need to have been made in terms of either Rule 14 (new issues) or 14A (existing claims). Neither had been intimated. Notwithstanding, Mr Good indicated that he did not want to seek an adjournment of the Hearing for that purpose and was content to continue with the Hearing on the basis that the claim would be restricted to the heads previously intimated and as detailed in the CMD Note.

Mrs Sinclair, on behalf of the Respondents also confirmed that she was content to proceed on this basis and on the basis of the documents allowed late.

After discussion, the parties agreed that the process the Tribunal would follow would be to go through each claim and the various parts of same with each party being given the opportunity to state their position in relation to same, refer to any documentary evidence and ask any questions if so required.

The Claim

Rent Arrears

The total sum sought by way of rent arrears is £725. The Respondents agreed that this sum is still due and owing to the Applicant.

Emergency Repairs regarding Escaping Water

Mr Good indicated that the claim under this head had been revised. The Applicant was originally seeking the sum of £286, but that upon considering the matter further, the Applicant accepted that £60 of this (the sum relating to the water escape) was "with hindsight" a matter for the Applicant and not the responsibility of the

Respondents. That left the sum of £225.89. This was the cost of 500 litres of oil that the Applicant had to put into the oil tank on or around 28 February 2020. This was vouched by the invoice dated 5 March 2020 from Longden Home and Gardens Ltd (found on page 7 of the "Briefing" document and "Figure 3"). The rational for this claim was that the tenancy ended formally on 26 February 2020 albeit the Respondents had moved out earlier than that. That the oil tank monitor had been switched off and when it was switched back on the warning light came on and upon visual check was found to be almost empty. Mr Good referred to clause 2.50 in the lease which obliges a tenant to:

"…take such reasonable and prudent precautions expected of a householder as may be required from time to time, but particularly between and including the months of November to March, to prevent damage by frost or freezing occurring to the premises, its fixtures or fittings."

There was no suggestion that any damage had occurred or that the heating had actually stopped, and the Property was unfired. The position was that, due to the time of year, the Respondents should have left sufficient oil in the tank to last for "3 to 4 weeks". Upon questioning by the Tribunal, Mr Good was unable to state how much oil had been provided to the Respondents at the outset, albeit he suggested that it could be inferred that, as the tenancy started on 27 May 2016 and it appeared that no oil had been ordered by the Respondents until 11 August 2016, that the tank had not been empty (see email from James D Bilsland Ltd dated 13 November 2020 which was produced as part of Appendix 2 to the "Briefing" document). Whilst he stated that the claim was for the cost of 500 litres, he stated that he would have thought "300 litres" would be about right and that the minimum delivery was 500 litres.

In response Mrs Sinclair agreed that it seemed that the first oil delivery that had been made was on 11 August 2016. That was not disputed. She pointed to the time of year that the tenancy started (May) and that there had been no cause to use the heating. She also pointed out that 500 litres was not the minimum amount that could be purchased and referred to the 20 litres they had purchased (acknowledged by Mr Good) on 4 February 2020. She indicated that it was not correct to say that the oil tank was empty and that there was oil in the tank when they left the Property. Whilst she indicated it may have been "polite" for them to have left more oil, they did not accept they were legally responsible for 500 litres as claimed by the Applicant. She also indicated that the Respondents moved out the Property on or around 22 February 2020 and that after that the Property was being accessed by the Applicant's estate agents to show the Property with a view to selling same and that the heating would have been left on continuously for that purpose. This was not challenged by Mr Good.

<u>Repairs carried out by Longden Homes & Gardens Ltd</u>

Mr Good referred to the invoiced dated 15 July 2020 and the separate note providing a breakdown provided by Longden which was produced as part of the "Briefing" document on page 4 of same. There were various parts to same as follows:

a) The claim for damaged radiators

Notwithstanding the sums detailed in the CMD Note (£452.40) Mr Good confirmed that the claim was now restricted to £56.47. Mr Good explained that he had made the restriction (75%) to take account of fair wear and tear due to the age of the radiators. Mr Good confirmed that the claim related to 2 radiators. One in the living room and the heated towel rail in the bathroom. Both, it was claimed, had to be replaced as repair was not possible or "uneconomic". It was claimed that the grill on top of the living room radiator was bent. It was also claimed that the towel rail had been scratched. He referred to the invoice dated 26 May 2020 for a replacement radiator for the living room. This was produced as "figure 5" on page 9 of the "Briefing" document. No separate vouching was produced for the cost of replacement of the heated towel rail in the bathroom. Mr Good referred to photographs produced before the CMD (undated and unattributed) of both the radiator and the heated towel rail showing the damage complained of. He acknowledged that neither issue had been detailed in the Check-out inventory produced by Pinstripe Inventories. He indicated that he would leave what inference could be drawn from that to the Tribunal to judge.

Mrs Sinclair denied that there had been damage to the living room radiator when they left the Property. She pointed to the Check-out inventory and the lack of reference to either claim therein. She did accept there was a small surface scratch to the heated towel rail which had been caused by a plastic part of her daughter's swim suit, but this was relatively minor and could have been repainted easily without the need for replacement of the whole rail.

In response Mr Good indicated that, in addition to the cost of any paint, there would be a tradesman's cost too. He also suggested the colour (white) was difficult to match.

b) The Stove

Notwithstanding the sums detailed in the CMD Note (£351.60), Mr Good confirmed that he was restricting the claim to reflect wear and tear (75%) to reflect the age of the item. The revised claim was £65.40. There was an ancillary claim for sweeping of the chimney which it was stated formed part of the full claim for £351.60. In support of that claim, Mr Good referred to the invoice dated 15 July 2020. It was noted and accepted by Mr Good that this contained no breakdown of the costs or how they had been attributed. Mr Good explained that the full costs contained an element for "crazed" glass, a new seal (which was not working) as well as the cost of repainting the stove. He accepted that the stove had been used only a few times by the Respondents but stated that they should be liable for the costs of sweeping the chimney. When asked by the Tribunal if the chimney had been swept prior to the tenancy, he was only able to say that he would have thought that it had been and that this would have been done by the previous tenant who should do so under the tenancy agreement. He referred to the Check-out inventory and the pictures of the stove, which showed some white paint marks on the top of the stove. He also

referred to clause 2.36 of the lease in relation to the obligation to sweep the chimney.

In response Mrs Sinclair indicated that she could see there was a small white mark on the stove in the check-out pictures but questioned whether this was “chalk” rather than paint. She indicated that the stove had hardly been used by them, perhaps 2 Christmases and perhaps on one other occasion. They had 2 small children and having the stove on would present a danger to them. She also indicated that they had not used paint in the Property or near the stove. She indicated that she did not accept the stove needed refurbished due to anything the Respondents had done to it and that all it would need would be a clean.

Mr Good then referred to page 33 of the “Briefing” document and figure 39, which he stated was an enlarged photograph of one of the pictures of the stove from the Check-out inventory (item Ref #12). He also referred to pictures in the said Check-out inventory (Ref #13.4 and #14.1 which showed similar paint marks on a kitchen worktop and the utility room floor. Mrs Sinclair responded indicating that the Respondents had not used paint in the Property and she was not sure the pictures referred to of the stove were the same as those in the Check-out inventory or showed anything other than the white mark on the top of the stove (the enlarged photograph showed some additional marks on the front of the stove). She reiterated that all it would have needed was a clean. She also stated that she was not sure that this type of stove could be repainted. Mr Good responded by indicating that the stove was refurbished, the work was done and paid for by the Applicant.

c) Garden Works

Mr Good referred to the invoice dated 15 July 2020 and the associated breakdown. The breakdown related only to the works associated with the garden. Mr Good confirmed that he wished to restrict the claim relative to the garden by removing the following items detailed in the breakdown from the claim:

1) Gate Repairs - £46.20
2) Cutting down of overgrown tree and pruning of fruit trees and bushes - £150
3) Clearing, cleaning and repair of the gutters - £140

These restrictions resulted in a total claim relative to the garden amounting to £1,099. Included in this claim was the cost of the hire of a skip between 26 and 28 May 2020. It was claimed this was required to remove rubbish from the Property left by the Respondents (including unsorted rubbish in the refuse bins that the local authority had refused to collect, garden waste, a child’s swing and a “large water logged dog bed”) and that the only method of authorised removal was by this method. Mr Good referred to page 8 of the “Briefing” document and figure 5 to vouch, in addition to the Longden invoice, that a skip had been rented.

Mrs Sinclair responded that she had attended the Property on 20 May 2020 and cleared the garden shed and the garage for the Property as well as removing the dog toys. She accepted the swing and the dog bed had been left in the garden of the Property. She accepted that the garden needed a “bit of a tidy up”, but she disagreed

with the costs. She also indicated she had not seen the skip whilst she was at the Property.

Upon questioning by the Ordinary member as to the breakdown of the costs, Mr Good was unable to advise what hourly rate had been applied to the claimed work, and in particular the 2 items specified at £60 (overgrown hedge) and £420 (garden work and weeding paths etc). Mr Good was also unable to confirm when the work was carried out although it was noted that the invoice was dated 15 July 2020 and the skip was at the Property from 26 May 2020 or whether any work had been carried out to the garden between the date the Respondents had vacated (22 February 2020) the end date of the tenancy (26 February 2020) and 26 to 28 May 2020 Mr Good also indicated that it had been the Applicant's wish that the garden be "reinstated to the condition it was in at the start of the tenancy".

Mrs Sinclair took issue with the claimed costs and indicated that no allowance appeared to be made of the date of the check-out being winter. She indicated that, as a result of the time of year the garden "probably wasn't in the best condition". She indicated that a skip was not required for 2 bins full of rubbish and that she did not see why the local authority would not take the rubbish in them away. She indicated that the garden was in a good condition at check-out considering the time of year which could be evidenced by the check-out inventory. It was also noted that the Respondents lived at the Property with young children and consent had been given for them to have a pet dog in the Property.

The Check-in and Check-out inventories and the sections relating to the garden were then reviewed and any differences were noted. Mr Good referred to the "Briefing" document and figures 17 to 20 to demonstrate the condition of the grass. His position being that, even taking into account the time of year, the Respondents' breaches of the terms of the lease had necessitated the works to the garden.

The parties confirmed that they did not wish to lead any more evidence or make any further submissions and the Tribunal adjourned the Hearing to consider the claim and the matters before it.

- Findings in Fact and Law

1) That the Respondents entered into a lease with the Applicant for the Property.
2) That the lease commenced on 27 May 2016.
3) That the rent payable was £725 per calendar month.
4) That the Respondents vacated the Property on or around 22 February 2020.
5) That the contractual tenancy ended on 26 February 2020.
6) That as at the end of the contractual tenancy, the Respondents were in arrears of rent to the extent of £725 and remain so in arrears.
7) That in terms of the lease agreement between the Applicant and the Respondents, the Respondents owed certain duties to the Applicant in terms of the care to be taken of the Property and the condition it should be returned to the Applicant at the end of the tenancy.

8) That, as at the date of the termination of the contractual tenancy, the Respondents were in breach of certain of those obligations only in the following respects:
    a) Various items were left at the Property by the Respondents after they vacated the Property. These items included a child's swing set; a waterlogged dog's bed;
    b) That the Respondents failed to properly sort the waste they paced in the rubbish bins provided so much so that the local authority would not remove the waste from the rubbish bins;
    c) The garden for the Property was, in places, overgrown; and
    d) Paint marks being left on the woodburning stove in the living room of the Property.
9) That as a result of these breaches the Applicant required to instruct contractors to arrange removal of same.
10) That this, in part, involved the hire of a skip for such removal.
11) That as at 26 February 2020 there was oil in the oil tank at the Property.
12) That the obligations owed by the Respondents in terms of care owed to the Applicant in relation to the Property did not extend to ensuring that there was a minimum amount of heating oil left at the Property after they vacated to heat the Property for a period of 3 or more weeks.

- Reasons for Decision

As a general point, the Tribunal felt that both Mr Good and Mrs Sinclair were doing their best to assist the Tribunal in relation to this claim and both of them conducted matters sensibly and with appropriate levels of courtesy. The Tribunal felt that Mr Good and Mrs Sinclair were trying to tell the truth as they saw it and only sought to present their respective positions to the best of their abilities. They both made appropriate concessions when faced with the documentation and there was no sense that there was any intention by either party to mislead the Tribunal. In truth, there was very little factual dispute between the parties and generally the dispute boiled down to what inferences each sought to draw from the documents and photographs before the Tribunal. That said, Mr Good freely admitted he had not been at the Property in many years and crucially had not seen the Property after the Respondents had vacated. He was therefore heavily reliant on the input of third parties who were not present to give evidence and the documentation that had been lodged on behalf of the Applicant and the Respondents – in particular the Check-in and Check-out inventories.

<u>Rent Arrears</u>

The claim as it related to the claimed rent arrears was admitted by the Respondents. It was therefore appropriate to make an award in the amount admitted being £725.

<u>Emergency Repairs regarding Escaping Water</u>

The Applicant had restricted this claim to £225.89. This sum related to a claim for 500 litres of heating oil that was delivered to the Property on 28 February 2020. The Applicant sought this on the basis that he claimed there was a duty on the

Respondents to ensure sufficient heating oil was left in the tank at the Property to last 3 to 4 weeks after their tenancy had ended. This was based on the terms of clause 2.50. The Tribunal took the view that there was nothing in clause 2.50 that subsisted beyond the end of their tenancy. It was noted by the Tribunal that, in terms of clause 2.6, the Respondents did have a responsibility for utilities (including oil) during the course of the tenancy. There was unchallenged evidence that the Respondents had arranged for a delivery of 20litres of heating oil shortly before they vacated the Property. However, based on the evidence led on behalf of the Applicant the Tribunal, on the balance of probabilities, was unable to determine to what extent the Respondents may have used any oil provided by the Applicant at the start of their tenancy which was in excess of the oil they left when they vacated. That being the case, the Tribunal felt they were unable to make an award in favour of the Applicant in this regard.

Repairs carried out by Longden Homes & Gardens Ltd

a) The claim for damaged radiators

The Tribunal took the view that any damage to the heated towel rail was minor – so much so it was not recorded in the inventory – and that replacement of the heated towel rail was unnecessary. Such matters fall within “fair wear and tear” and as such the Tribunal was unable to award any sum in that regard. In relation to the damage to radiator grill, again it was noted that this had not been recorded in the Check-out inventory and it was noted that the radiator was not replaced until on or around May 2020 (see figure 6 on page 7 of the “Briefing” document). Based on the evidence led, on the balance of probabilities, the Tribunal was unable to determine when the damage to the said radiator grill occurred. That being the case, the Tribunal was unable to make an award in this regard.

b) The Stove

It was noted by the Tribunal that there appeared to be some form of white paint spilled on the top and to a lesser extent on the front of the stove. The Tribunal do not accept the suggestion by Mrs Sinclair that this looked like “chalk”. This is despite the fact that there is no reference to paint marks in the Check-out inventory provided (although it could be noted in the photographs contained within same). Mr Good explained that the claim in relation to the stove related to various items including the replacement of the glass to the front of the stove and to reseal same as well as to sweep the chimney. There was unchallenged evidence that the Respondents had hardly used the stove during their tenancy (between 1 and 3 times). There was no evidence led to explain why the front glass or the seal being replaced would have been required as a result of neglect or improper use of the stove by the Respondents. Whilst it was noted there was some paint marks on the stove, the invoice dated 15 July 2020 contained no breakdown of how the costs had been allocated. Mr Good was unable to provided any such detail (except for the cost of sweeping the chimney). There was no evidence led to explain why the paint could not have been cleaned from the stove without the need to repaint/refurbish same. That being the case, the Tribunal found itself in the position of not being able to determine what cost, if any, was incurred by the Applicant as a result of the paint on

the stove. Further, it seemed to the Tribunal that the Applicant may have sought to refurbish the stove with a view to enhancing his prospects for the sale of the Property in any event. If that is the case, that is not a cost that can be passed on to the Respondents. In terms of the cost claimed for the sweeping of the chimney, it was noted that Mr Good was unable to lead any evidence that the chimney had been swept prior to the tenancy commencing. He relied on a presumption that the previous tenant would have swept the chimney. The Tribunal take the view that the Respondents were under no duty to return the Property in a better condition than the condition they received it in. Without evidence of the chimney being swept prior to them taking occupation, the Tribunal felt it would be inappropriate to allow such a claim. Further, the unchallenged evidence was that the stove was used very infrequently by the Respondents. Mr Good did make reference to clause 2.36 which states:

"At least once every nine months of the tenancy to have any working chimneys, made use of by the tenant, swept by a person (holding appropriate insurance) and retain a suitable record, receipt or invoice to demonstrate compliance with this clause."

In any event, the Tribunal took the view that, the obligation to clean the chimney once every nine months if a tenant made <u>any</u> use of chimney is not a reasonable one and not enforceable. It goes beyond what is necessary to protect a landlord's legitimate interests in terms of having a tenant take reasonable care of a property let to them. Further, requiring production of receipts is also an unreasonable obligation and therefore not enforceable. There was no evidence that the chimney required sweeping (for example in the Check-out inventory) or that the chimney was returned in any different a condition to which it was at the outset of the tenancy.

c) The Garden

It was accepted by the Respondents that they had left items in the garden of the Property. These included large, heavy and bulky items such as a child's swing set. The Tribunal took the view that this did breach their obligations to the Applicant in terms of the lease between the parties. That being the case the Tribunal was content to award the sum of £96 claimed for the removal of such rubbish. In addition, the Tribunal accepted the Applicant's position that the hiring of a skip to remove rubbish from the Property would be necessary for that. However, the evidence was that the said skip was not at the Property until 26 May 2020. This was more than 3 months after the tenancy had ended. It was also noted that, as part of preparing the Property for sale, various garden works such as removal of overgrown trees and pruning of other bushes and fruit trees had also been undertaken on behalf of the Applicant at the same time. The Tribunal noted that the Applicant had hired an 8 cu skip (see figure 5 on page 8 of the "Briefing" document). This was more than was required to remove the items left at the Property by the Respondents and a smaller skip would have sufficed had it not been for this additional work. That being the case, the Tribunal took the view that it would be appropriate to award half of the sum claimed for the skip hire being £142.50. The Tribunal was not convinced based on the evidence led that the Applicant was entitled to recover the costs of the "Garden Restoration" and dressing of the patches on the rear lawn. It was noted that the

Applicant's intention was to return the garden to its original condition, presumably for the purpose of sale. It was also noted that no account seems to have been taken of the seasonal variation between May (when the tenancy started) and February (when the tenancy ended). However, whilst the tenancy ended in February 2020, it was noted that the work claimed for did not appear to have been carried out until May 2020. No evidence was led as to what happened between February 2020 and May 2020 and it would hardly be surprising that, after a wet winter, various garden works, and cleaning of patios and paths would be required. All in all, whilst it was noted that the Check-out inventory recorded that some gardening would be required, the Tribunal, based on the evidence led and provided, was unable to determine on the balance of probabilities, how much that work would have cost the Applicant had it been done in February rather than 3 months later in May 2020. It also appeared to the Tribunal that the works eventually carried out to the garden at the Property likely went beyond what would have been required by the Respondents to return the garden to a reasonable condition and were therefore more likely aimed at presenting the Property for subsequent sale. All this being the case, the Tribunal was not in a position to make an award against the Respondents in this regard.

- Decision

A Payment Order in the sum of £963.50 would be awarded against the Respondents and in favour of the Applicant.

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.

Rory Cowan

_____ _____30 November 2020_____

Legal Member/Chair **Date**