Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing Act 2014

Chamber Ref: FTS/HPC/CV/20/1313

Re: Property at 1/7 Dumbryden Grove, Edinburgh, EH14 2QP ("the Property")

Parties:

Mr Mahmudul Parag, 74 Sighthill Loan, Edinburgh, EH11 4NS ("the Applicant")

Ahmed Al-Kinani, (whose current address is unkown) ("the Respondent")

Tribunal Members:

Andrew Cowan (Legal Member) and Elaine Munroe (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determines to grant an order for payment by the Respondent to the Applicant in the sum of £450.00.

Background:

1. The Tribunal convened to consider an Application which the Applicant sought payment, by way of damages for breach of the terms of a tenancy agreement between the Applicant and the Respondent. The Tribunal considered the Application under Section 16 of the Housing (Scotland) Act 2014 and Rule 70 of the First Tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure (the rules) 2017.

2. The current address for the Respondent is unknown. The Tribunal held a Case Management Discussion in relation to the Application on 14 October 2020. As the Respondent's address is unknown, the Tribunal advertised details of the Application and the planned the Case Management Discussion on the Tribunal's website from 9 September 2020. The Tribunal was satisfied that the terms of Rule 6A of the Rules of Procedure had been complied with and that according with the Application was deemed to have been served upon the Respondent.

3. A Case Management Discussion ("CMD") took place on 14 October 2020. Due to the ongoing disruption caused by the Covid-19 pandemic, the hearing took place during tele-conferencing facilities. The Applicant took part in the conference call. The Respondent did not join the conference call and did not take part in the CMD. At the CMD the Tribunal issued directions to the Applicant in which the Applicant was required to provide a copy of a video which showed the condition of the property at the time of the Applicant's complaint regarding insect infestation at the property. The Tribunal also required the Applicant to provide legal authority to support the quantum of each heading of his claim for damages. The Tribunal also directed that a full hearing should be fixed in relation to the Application.

4. A hearing in relation to the Application was thereafter fixed for December 2020. As the address for the Respondent is still unknown the Tribunal again advertised details of the Application and the planned hearing on the Tribunal's website from 29 October 2020. The Tribunal is again satisfied that, in terms of Rule 6A of the Tribunal rules, the Application and the date of the hearing in relation to the Application have been served upon the Respondent.

5. At the hearing on 14 December 2020 the Applicant took part in the hearing by conference call. The Respondent did not join the conference call and accordingly did not take part in the hearing.

6. By written note dated 3 December 2020, the Applicant provided detail of the legal authority upon which sought to rely in support of each heading of his claim for damages. He had also previously provided a copy of the video which he had referred to at the CMD in relation to his complaint about insect infestation. The Applicant had accordingly complied with the terms of the directions of the Tribunal which had been issued at the CMD on 14 October 2020.

7. At the hearing, the Tribunal had the following papers before it:

    a. The Application dated 12 May 2020 including written submissions from the Applicant.
    b. Copy Short Assured Tenancy Agreement between the Applicant and the Respondent in relation to the property, dated 28 June 2017 ("the tenancy agreement")
    c. Copy productions from the Applicant along with a note prepared by the Applicant in relation to each heading of his complaint in which he referenced various parts of the productions which had been lodged.
    d. The written submission (including list of authorities) dated 3 December 2020 which the Applicant had lodged in response to the Tribunals directions of 14 October 2020.

The Claim:

8. The Applicant claims damages for loss and inconvenience for material breach of contract, for the failure of the Respondent to (1) carry out repairs to identify defects in central heating within a reasonable time, or indeed at all; (2) to carry out within a reasonable time a repair to a hole in a wall in the bedroom of the property, and (3) to provide alternative storage

following reduction of storage in the property after the installation of a new central heating boiler by the Respondent.

9. The Applicant claims compensation in the total sum of £1644.00 as damages for the Respondent's alleged breaches of contract

10. The Applicant claims the sum of £1644 as damages for the inconvenience he suffered as a result of the Respondent's failure to resolve issues with the heating system at the property.

11. The Applicant claims the sum of £1233.00 as damages for the inconvenience he suffered as a result of the Respondent's failure to repair the wall at the property.

12. The Applicant claims the sum of £150.00 as damages for the inconvenience he suffered as a result of the Respondent's failure to provide alternative storage capacity in the kitchen at the property.

The Hearing:

13. At the hearing, the Applicant gave evidence and made reference to the written submissions which he had submitted with Application and the further written submissions he had submitted, dated 3 December 2020.

Central Heating:

14. The Applicant explained that the Respondent had installed a new central heating boiler and radiators within the property in July 2018. In November 2018 the Applicant explained that he had reported problems with the central heating to the Respondent's agents. The Applicant explained that the central heating system at the property was not fully functional between late November 2018 and the date upon which he vacated the property on 27th July 2019. The Applicant explained in his evidence that throughout this period the radiators in the living room, hallway, and bedroom of the property did not heat properly. The Applicant accepted that the radiators in the kitchen and bathroom of the property did operate during this period. The Applicant made reference to the emails which he had sent to the Respondent's agents throughout this period in which he had raised his complaints in relation to this issue.

Defect In Wall

15. The Applicant explained that a wasp's nest formed in the wall of the bedroom of the property and that he notified the Respondent's agent of this issue by email on 17 July 2018. On 18 July 2018 wasps entered the property and stung both the Applicant's wife and his

young child. By email of 19 July 2018, the Respondent's agents indicated they did not consider the issue of the wasps nest to be the responsibility of the Respondents. The Respondent did, however, instruct a pest control contractor to eradicate the wasps from the wall within the property on 30th July 2020. In course of carrying out this work the contractors required to break a hole in wall in order to remove the wasp nest. Despite requests from the Applicant the Respondent's failed to repair the hole in the wall until 19 April 2019.

Storage

16. The Applicant explained in his evidence that the Respondent had failed to provide alternative storage following reduction of storage in the property, after the installation of a new central heating boiler by the Respondent in a storage cupboard in the kitchen of the property. The Applicant had made a complaint to the Respondent in this regard, but the Respondent had failed to provide any suitable alternate storage.

The Tribunal found the Applicant to be entirely credible and accepted his uncontested evidence.

Findings and Fact:

17. The Applicant entered in to a Short Assured Tenancy Agreement with the respondent dated 28th June 2017.

18. The tenancy commenced on 28 June 2017 and ended on 27 July 2019.

19. The rent payable throughout the term of the tenancy was £685.00 per month.

20. Between 8 November 2018 and the termination date of the tenancy the Applicant was in frequent correspondence with the Respondent's agents in connection with the central heating system at the property which was not in proper working condition.

21. During the period from 8 November 2018 to the end of the tenancy the central heating system at the property was only partially in operation. The central heating radiators in the living room, hallway and bedroom of the property did not heat during that period.

22. The Respondent failed to keep in repair and in proper working order the central heating system in the property between 8th November 2018 and 27 July 2019.

23. A new central heating boiler was installed in the property in July 2018. The Applicant was no longer able to use the kitchen cupboard in which the new boiler was installed for the purposes of storage.

24. The Applicant had been denied the use of storage space in the property. This storage space was available at the start of the tenancy.

25. On 17 July 2018 the Applicant notified the Respondent's agents of a wasps nest in the wall of the bedroom of the property.

26. On 31 July 2018, the Respondent's instructed contractors to remove the wasps nest.

27. The work carried out on 31 July 2018 to remove the wasps nest created a hole in the wall in the bedroom of the property.

28. The Respondent did not repair the hole in the property until 19 April 2019.

Reasons:

30. The Respondent's contractual obligations in relation to the repair and maintenance of the property are set out in the tenancy agreement. In particular, the following clauses are relevant to the Applicant's claim:-

"REPAIRS AND MAINTENANCE

22. HABITABILITY

The landlord agrees throughout the period of the tenancy to maintain the accommodation in a wind and watertight condition and in all other respects reasonably fit for human habitation.

23. STRUCTURE & EXTERIOR

The landlord undertakes (together with any other owners of common parts of the building in which the accommodation is situated, if appropriate) to keep in repair that structure and exterior of the accommodation including the following:

I. Drains, gutters and external pipes;
II. Root;
III. Outside walls, doors, windowsills, window catches, sash cords, and window frames;
IV. Internal walls, floors, ceilings, doors, door frames, internal staircases and landings;
V. Chimneys, chimney stacks, and flues (including sweeping);
VI. Pathways, steps or other means of access
VII. Plaster work;
VIII. Boundary walls and fences.

24. INSTALLATIONS

The landlord will keep in repair and in proper working order the installations in the accommodation for the supply of water, gas, electricity, sanitation, space heating and water heating (with the exception of those installed by the tenant or which the tenant is entitled to remove) including the following:

I. *Basins, sinks, baths, toilets, and showers;*
II. *Gas & electric fires and central heating systems;*
III. *Electrical wiring;*
IV. *Door entry system;*
V. *Cookers;*
VI. *Extractor fans.*

The landlord takes full responsibility that all soft furnishing supplied comply with the 1998 Fire and Furnishing Act."

31. The Tribunal are satisfied, on the evidence of the Applicant, that he had notified the Respondent on a number of occasions that the heating system in the property did not operate correctly. Despite these notifications, insufficient action was taken by the Respondent to repair the central heating systems so that it was in a full working order. As a consequence of the Respondent's failure to carry out necessary repairs, the central heating system in three of the rooms did not operate. The Tribunal noted that the failure to provide a proper working heating system extended over the winter months. The Tribunal concluded that the Respondent has breached the terms of Clause 24 of the Tenancy Agreement in this respect.

32. The Tribunal is satisfied, on the evidence of the Applicant, that following the installation of a new boiler, the amount of storage space in the kitchen of the property have been reduced. The Tribunal are not satisfied that there is any material breach by the Respondent in relation to the terms of the tenancy in relation to this matter. The loss of storage space is not something which the Respondent could or ought to have replaced following the installation of the new boiler in the property.

33. The Tribunal is satisfied, on the evidence of the Applicant, that he notified the Respondents agents of the existence of a wasp's nest within the property. In terms of clause 19 of the Tenancy Agreement between the parties the Respondents were not liable for pest extermination if there is no evidence of such within the first 3 months of the tenancy. Any delay by the Respondent in instructing works to eradicate the wasp's nest was not a breach of the terms of the tenancy agreement

34. The Tribunal is satisfied, on the evidence of the Applicant, that, during work to eradicate the wasps nest in the bedroom, the Respondents contractors created a hole in the bedroom wall of the property. Despite requests from the Applicant, the Respondent failed to carry out such works as were necessary to repair the hole in the bedroom wall of the property until April 2019. In terms of the Tenancy Agreement the Respondents have a duty to keep and repair the structure of the accommodation. The Respondent failed to repair the bedroom wall within a reasonable time period, having being notified of the issue by the Applicant. However, the Tribunal further noted that the hole created in the bedroom wall was relatively small and, whilst the Applicant complained of cold air coming through the hole in the bedroom wall, the Tribunal did not consider the effect of any delay in repairing the hole

in the wall to be material. The Tribunal accordingly concluded that the Respondent had not breached the terms of Clause 23 of the Tenancy Agreement in this respect

Damages:

35. The Respondent has contractual obligations with regards to the repairs of the property which are set out in Clauses 23 and 24 of the Tenancy Agreement. The Tribunal has found that the Respondent has breached those obligations by his failure to carry out such repairs as were necessary to the heating system at the property so that it was in a reasonable state of repair and in proper working order.

36. In his application the Applicant has set out a claim for damages for loss and inconvenience for material breach of contract. The Applicant has quantified his loss by reference to a percentage of the rent which he paid during the term of the tenancy. In his further written submissions of 3 December 2020 the Applicant appears to argue that he is entitled to rent abatement for inconvenience and loss suffered as a result of the Respondent's breach of his duties under the Tenancy Agreement.

37. The Applicant has made reference to a number of cases of the Tribunal where the Tribunal has considered the common law remedy of rent abatement.

38. In particular the Tribunal has referred to the published decision of the Tribunal in the case of Parker – v – Treherne (reference FTS/HPC/CV/19/0649) dated 14 October 2019. The Tribunal found this case to be helpful in setting out the law in relation to this matter. In that case it was noted that

"It has been agreed by both parties that the Applicant did not retain rent in an attempt to try and encourage the Respondent to carry out certain repairs. Nor can they claim abatement as they paid the rent in full. The Applicant are however trying to claim that the damages they believe they are entitled to, should be based on the "equivalent of a claim for abatement", and instead of averring actual loss are claiming that, as they allege the property was uninhabitable for most of the time, they are entitled to a general 80% reduction in rent without proving any specific head of loss. The Tribunal does not accept that this is a competent way of calculating loss. This is not supported by any of the cases or authorities they have quoted. As stated above, abatement can be used as a defence to a claim for payment of rent. It is an equitable remedy where the tenant loses the beneficial enjoyment of the property (for whatever reason). The cases however including Renfrew District Council v Gray all refer to it being used as a defence to a claim for payment of rent, not as a head of loss in a claim for damages after the tenant has fully paid the rent which is the position in this case. If the Applicant had wanted to claim abatement they required to do so while in the property by not paying the rent and then claiming abatement. Having not done so their remedy for any breach of contract lies in claiming damages for the loss they have incurred as a result of the breach. (Even if damages based on the equivalence of

an abatement of rent was permissible, the Tribunal does not find as a matter of fact that the repairing issues amounted to the Property being in an uninhabitable condition for 80% of the duration of the tenancy)."

39. This Tribunal respectfully agrees with the reasoning provided in the decision of Parker – v – Treherne. The Tribunal agrees that rent abatement is not a competent method for calculating loss in a claim for damages. Abatement of rent can be used as a defence to a claim for payment of rent, but not as a head of loss in a claim for damages after rent has been fully paid.

40. In the Application the Applicant also sets out a claim for his loss as a consequence of the stress and inconvenience caused by the constant need to complain and the Respondent's breach of contract.

41. In assessing an award of damages for suffering inconvenience the Tribunal had regard to the cases of the courts to which the Applicant had referred in his submission. He makes reference to:

    "Gunn V NCB 1982 SLT 526 - £300 for 10 months in conditions stemming from inadequately treated rising dump.

    McEachran V City of Glasgow DC (1991) 1 SHLR 149 - £1950 for three years of dampness from water penetration through roof and gutters.

    Christian V Aberdeen City Council - £2750 for about 3.5 years of dump conditions.

    Frankenburg V Dundee City Council 2004 - £500 for one-year infrequent water ingress."

42. The Tribunal accepted the Applicant's argument that each case is unique in its circumstances.

43. Having regard to the cases to which the Applicant has referred and taking account of the age of some of these cases and the rent which the Applicant was paying at the property, the Tribunal have concluded that the sum of £450 would be an appropriate award of damages for inconvenience suffered by the Applicant as a consequence of the Respondent's breach of the terms of the Tenancy Agreement following his failure to keep in repair and proper working order the central heating at the property.

44. The Tribunal accordingly granted an order for payment by the Respondent to the Applicant in the sum of £450.00.

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.

Andrew Cowan

14th December 2020

Legal Member/Chair **Date**