



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71(1) of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/20/1401

Re: Property at 470 George Street, Aberdeen, AB25 3XH (“the Property”)

Parties:

Miss Florina Birkert, 5 Elmbank Road, Aberdeen, AB24 3PH (“the Applicant”)

TJ Property Consultants Ltd, 35 King Roberts Way, Bridge of Don, AB23 8FB (“the Respondent”)

Tribunal Members:

Anne Mathie (Legal Member), Janine Green (Ordinary Member) and Jacqueline Taylor (Legal Member [Reviewer])

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application be refused.

Background

1. An application was submitted to the Tribunal dated 19 June 2020 in terms of Rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 by the Applicant’s representative. In terms of the details of the order being sought from the Tribunal the application form stated “*The Applicant is seeking that the Respondent restores the value of the first month of rent at the sum of £325 for breaching ‘the Repairing Standard’, as set out in section 18 of the lease document.*”
2. In addition to the application form the following documents were lodged:
 - An addendum to 7(b) which provided further information as to the background of the application.
 - An addendum to 8 which comprises a list of documents lodged as follows:

1. Addendum to 7(b)
2. Tenancy Agreement
3. Facebook message from the Respondent confirming the flat has been cleaned.
4. Email from applicant stating she signed the lease document after the flat was confirmed to be cleaned several times and an email from the Respondent stating that any monies due to the Applicant will be returned.
5. Photographs of damage within the flat to the settee and washing machine.
6. Photographs showing general uncleanliness of flat including insects on windowsill and floors, grease and dirt on glasses, cabinets, toaster and oven and damage to flooring.
7. Bank transfer of the rent payment from the Applicant to the Respondent on 11 December 2019 showing the value of the rent.

3. The Tribunal wrote to the Applicant's representative on 7 July 2020 requesting further information. The Tribunal wanted clarification of the designation of the Respondent as there was a disparity between the information on the application form and the lease agreement. They also wanted further information as to the legal basis upon which it was stated that the Applicant was entitled to re-payment of one month's rent.

4. The Applicant's representative replied by email dated 21 July 2020 to request that the Respondent's details were amended to TJ Property Consultants Ltd and provided written submissions in relation to the legal basis for stating that the Applicant was entitled to repayment of one month's rent.

5. The application was accepted and a Notice of Directions was issued by the Tribunal addressed to the Applicant/Applicant's representative directing that the following documents be lodged by 8 September 2020:

1. A written submission specifying the legal basis upon which the Applicant maintains that she is entitled to "restoration of the first month of rent which is wrongly withheld by the Respondent"; with citation of all authorities to be relied on; and
2. Copies of authorities which clearly identify any particular sections or passages relied upon.

6. Papers were served on the Respondent advising that any written representations should be lodged by 17 September 2020.

7. The Applicant's representative responded to the Notice of Directions by email dated 8 September 2020 with written submissions and attachments. The Applicant's representative stated that the Applicant was proceeding with their application in terms of "Regulation 13 of the Housing (Scotland) Act 2006".

Many of the submissions refer to the provisions of the Housing (Scotland) Act 2006 (“the 2006 Act”) and to case law concerning the 2006 Act. Some of the submissions refer to there having been a material breach of contract. A copy of the 2006 Act was lodged along with other productions most of which had previously been lodged with the original application.

8. Written representations were received from the Respondent by email dated 16 September 2020. The Respondent also lodged copies of emails which were unfortunately not fully legible due to some of the email content being cut off in attachments.

9. Following the Case management Discussion the Tribunal issued a further Notice of Directions directing the Applicant’s representative to submit further detail of the legal basis of the application and dealing with the subject of the Repairing Standard. The Notice of Directions also directed the Respondent to lodge documents showing when the professional clean of the Property had been carried out after the previous tenant’s departure, the date of the previous tenant’s departure and full copies of correspondence the Respondent had referred to in his written representations.

10. Both parties complied with the Notice of Directions in submitting further submissions and documents as directed. The Applicant’s representative also advised of the identity of two witnesses she intended to call.

11. Unfortunately the day before the Hearing, the Tribunal were advised that one of the witnesses could no longer attend and a witness statement was sent to the Tribunal from this witness. The Tribunal members had sight of this immediately prior to commencing the Hearing.

The Hearing

12. The Hearing took place by teleconference today due to the Covid-19 pandemic. The Applicant attended with her representative, Rebecca Quinn of the Aberdeen Law Project. The Respondent attended on his own behalf.

13. As a preliminary issue, the Tribunal raised the issue of the Repairing Standard submissions. While mention had been made at the Case Management Discussion and in the subsequent Note of Directions about this Tribunal not being in a position to deal with Repairing Standard Cases this was only where the remedy sought was a specific Repairing Standard remedy in terms of the Housing (Scotland) Act 2006, for example, an application for a Repairing Standard Enforcement Order or a Rent Relief Order. In a case where a remedy was being sought for breach of contract, arguments regarding breach of the Repairing Standard would be relevant to this Tribunal especially where the tenancy agreement contained a Repairing Standard clause as in this case

at Clause 17. The Tribunal offered the Applicant's representative an adjournment to consider this further as the previous Case Management Discussion Note may have been misleading in this regard. The Applicant's representative was content to continue without an adjournment.

14. As a further preliminary issue, the Tribunal sought the parties' submissions on the date the tenancy agreement had been signed. The copies of the tenancy agreement in the papers had the Applicant signing the tenancy agreement on 22 November 2019 and the Respondent signing it in 27 November 2019 but there were only names not signatures in the signature boxes. Both parties agreed that these dates were in fact the dates that the tenancy agreement had been signed.

15. A last preliminary issue arose in respect of the witness statement of Martina Cafiso who was no longer able to attend the hearing as a witness. The Tribunal confirmed they had received a copy of the statement that morning and had had the chance to read it. The Respondent confirmed too that he had received and read the witness statement.

16. The Tribunal confirmed with the Applicant's representative that her primary position was that this had been a contract induced by fraudulent or negligent misrepresentation and that the Applicant was therefore entitled to void the contract and seek the return of the first month's rent of £325. If the Tribunal did not accept this then the Applicant's secondary position was that there had been a material breach of contract such as to allow the Applicant to rescind the contract and seek repayment of the first month's rent of £325. The Applicant's representative confirmed that she had not thought what her position would be in the event that the Tribunal found that there was a more minor breach of contract and what potential remedy that may follow in that situation.

17. The Applicant herself gave evidence that she had first viewed the Property on 13 November 2019. At the time she said she had liked the flat but that it had been very dirty. Her evidence was that she had asked the Respondent about cleaning as the first time she had seen the flat all the surfaces had been greasy and "smearly" with insects all over the floor. There had been a small leak in one of the heaters. Her evidence was that she had tried to get an assurance from the Respondent that the flat would be cleaned before she moved in. She said she had sent several messages and made phone calls in this regard. She said that she only signed the tenancy agreement on the 22 November 2019 on the understanding the flat would be cleaned before she moved in. She had spoken with a potential flatmate who had viewed the Property on 10 December 2019. The potential flat mate had said the Property was dusty. The Applicant had sent a message to the Respondent on 11 December 2019 wanting to know how to get the flat keys and this message also said "Also, has the flat been cleaned yet?" The response from the Respondent was "Flat is clean yes".

18. The Applicant gave evidence that she received the keys to the Property about lunchtime on 13 December 2019. She was with her boyfriend, Marco Antonio. They took photographs of a number of defects with the Property which had been lodged with the application: one of the radiators had been leaking and there was a stain on the floor, the sofa had some cosmetic damage to the fabric on the arms, the surfaces, appliances, dishes and glasses in the kitchen were greasy, there was some mould on the rubber seal of the washing machine, there were dead flies on the living room windowsill and floor. The Applicant's position was that the Property was "uninhabitable". She had contacted the Respondent demanding that a full clean be undertaken within 24 hours. The Respondent advised that his cleaner was unable to clean the Property until Sunday 15 December 2019 and that he would not charge the Applicant for one day's rent. The Applicant herself found a cleaner who would be able to do the work but the Respondent wanted to employ his own cleaner. The Applicant wanted the cleaning done sooner as she required to get a flight to India first thing on the morning of 16 December 2019. As a result of this, the Applicant returned the keys to the Property to the Respondent on 14 December 2019.

19. On questioning, the Applicant confirmed that there was nothing unsafe about the sofa and she did not know whether the washing machine was in working order as she had not used it. She confirmed that the Property had two bedrooms, one bathroom, a hallway and a combined kitchen/living room. Her evidence was that the Property was dirty throughout and that there had been dead flies in the main bedroom. She gave evidence that she was given an assurance by the Respondent by telephone on 14 November 2019 that the flat would be cleaned before she moved in and that without this assurance she would not have signed the tenancy agreement. The Applicant confirmed that the Property had been in a similar condition when she viewed it as it was when she got the keys although maybe slightly worse when she got entry on 13 December 2019.

20. The Applicant advised that had she not required to go to India so early on Monday morning then a deep clean of the Property on Sunday 15 December 2019 might have worked but her personal circumstances did not suit for this to happen.

21. The second witness for the Applicant was Marco Antonio Perdomo Briano. He had been forwarded the photographs by email from the Tribunal that morning and was able to refer to them in his evidence. He confirmed that he had attended the Property viewing on 13 November 2019 with the Applicant. He confirmed that he had been with the Applicant when she had spoken with the Respondent on the phone on 14 November 2019 and that this call had been on speaker phone. He confirmed that an assurance had been given that the flat would be cleaned before the Applicant took entry of the Property. He described the Property as "uninhabitable". On questioning, he did not think the sofa was unsafe but it was damaged. He did not know whether the washing machine was in working order. He confirmed that he had taken the photos which had been lodged with the Tribunal. He said there were dead flies all over the living room but, on further questioning, said they were confined to the

windowsill and the areas of the living room floor in the photographs. He also said there were spiders in the bathroom and flies in one of the bedrooms. He confirmed that the surfaces and dishes in the kitchen were greasy and said the toaster was rusty. He confirmed one of the radiators had been leaking and caused a stain on the floor.

22. The Respondent was represented by Tarun Dureja. He gave evidence that he had done the viewing with the Applicant on 13 November 2019. He confirmed that the photos were a true reflection of the state of the Property. His position was that the previous tenant had moved out on 7 September 2019 and a deep clean had been carried out on 26 September 2019 and an invoice in respect of the cleaning had been lodged with the Tribunal. The flat had been empty for some weeks. He advised he had no particular system for inspecting empty Properties. He confirmed that all the furniture in his flats came from Ikea and all met the necessary fire safety standards. He said the flat was clean. He advised he had never had any complaints of this nature previously. The Property was now rented out without any deep clean having been done after the Applicant departed although he had cleaned up the dead flies.

23. The Respondent's position was that he had been reasonable offering to have the Property cleaned within 48 hours of the complaints being made to him and had also offered to waive one day's rent. He said that the Applicant's description of the Property defects was exaggerated. He denied that the Property was "uninhabitable" and denied that there were dead flies all over the living room floor. The Respondent could not recall giving an assurance in a phonecall on 14 November 2019 to the Applicant that the Property would be cleaned again before she moved in.

Findings in Fact

24. The parties entered into a Private Residential Tenancy agreement signed by the Applicant on 22 November 2019 and by the Respondent on 27 November 2019 in respect of the Property.

25. At the date of entry of 13 December 2019 there were various issues with the Property including the sofa being damaged, a leaking radiator, greasy surfaces and appliances in the kitchen, some mould on the rim of the washing machine and some dead flies on the living room windowsill and floor.

26. The Applicant refused the Respondent's offer to have a clean of the Property carried out on 16 December 2019 and instead handed the keys to the Property back on 14 December 2019.

Reasons for Decision

Taking into account all the documents lodged, the written submissions from both parties, the witness statement of Martina Cafiso, the oral submissions from parties and the evidence heard today, the Tribunal are not satisfied that this was a contract entered

into as a result of fraudulent or negligent misrepresentation. The Applicant's evidence was that she had been given a verbal assurance by phone on 14 November 2019 from the Respondent that the Property would be cleaned before she took entry. The Respondent cannot recall giving this assurance. The terms of any assurance given in relation to the formation of the contract are difficult to define where there is nothing in writing and there is a dispute over whether any such assurance was given. The Tribunal accepts that two witnesses gave evidence of this assurance being given. However, Marco Antonio Perdomo Briano was not an impartial witness, given that he is the boyfriend of the Applicant and his evidence requires to be weighted accordingly. The Tribunal is not satisfied that the Applicant would not have entered into the contract without such an assurance being given.

If the Property was as "uninhabitable" as described by the Applicant and Marco Antonio Perdomo Briano and was so at the time of the viewing on 13 November 2019, it is difficult to imagine why the Applicant would have proceeded to sign the tenancy agreement, even if an assurance that the flat would be cleaned had been given.

Further the Tribunal did not consider that there had been a material breach of contract. The defects complained of appear to be superficial in nature and would have been easily remedied. The Applicant herself said that, had she not been travelling to India early on the morning of 16 December 2019 then a clean on Sunday 15 December 2019 might have worked.

There was no position advanced as to what the Tribunal should do if there was found to be a minor breach of contract but, given the particular facts in this case, and the fact that the Respondent had offered to have a deep clean carried out within 48 hours and had offered to waive one days rent, it makes it difficult to see that any damages for breach of contract would have been appropriate here. There appeared to be no mitigation of loss on the part of the Applicant.

Decision

The Tribunal refuses the application

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.

27 November 2020

Legal Member/Chair

Date

Anne Mathie