



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

Chamber Ref: FTS/HPC/CV/20/2217

Re: Property at Forel Fauld, Linden Park Road, Milnathort, Kinross, KY13 9XX (“the Property”)

Parties:

Mr Harvey Sheriff, Mrs Chai Sheriff, Sara Compound, Villa A16a, PO Box 98, Dhahran 31932, Saudi Arabia (“the Applicants”)

Mr Iain Proctor Grant, Mrs Gemma Grant, 1 The Mart, Main Street, Blairingone, Dollar, FK14 7NU; 1 The Mart, Main Street, Blairingone, Dollar, FK14 7NU (“the Respondents”)

Tribunal Members:

Neil Kinnear (Legal Member) and Mary Lyden (Ordinary Member)

Decision

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

Background

[1] This was an application for a payment order dated 5th November 2020 and brought in terms of Rule 111 (Application for civil proceedings in relation to a private residential tenancy) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[2] The Applicants sought in their application payment of the sum of £3,540.00 in respect of rent arrears from the Respondents incurred until the end of the tenancy on 7th September 2020.

[3] The Applicants provided with their application copies of a private residential tenancy agreement and rent arrears statement.

[4] The private residential tenancy agreement had been correctly and validly prepared in terms of the provisions of the *Private Housing (Tenancies) (Scotland) Act 2016*, and the procedures set out in that Act appeared to have been correctly followed and applied.

[5] The Respondents had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 25th November 2020, and the Tribunal was provided with the executions of service.

[6] The Respondents submitted a detailed letter by e-mail to the Tribunal on 15th December 2020 disputing that any arrears of rent were due to by them to the Applicants. They narrated that they were entitled to withhold rent payments as a result of the Applicants failing to attend to a variety of serious defects in the Property which the Respondents reported to the Applicants' letting agents.

[7] A Case Management Discussion was held at 11.30 on 16th February 2021 by Tele-Conference. The Applicants did not participate, and were represented by Mr Akinosho and Ms Vacca, letting agents. The Second Respondent, Mrs Gemma Grant, participated, and was not represented. The First Respondent did not participate, but was represented by his wife, the Second Respondent.

[8] Mr Akinosho advised the Tribunal that the Applicants had incurred further costs which they wished to recover from the Respondents, and that they would shortly seek to amend the application to add these additional elements to their claim. The Tribunal drew Mr Akinosho's attention to the provisions in terms of Rule 14 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended with regard to amendment.

[9] Both parties accepted that there were clear and substantial factual disputes between them as to the circumstances surrounding this matter, which could only be determined by the Tribunal after hearing evidence, and for that reason the Tribunal set a Hearing.

[10] On 17th March 2021, the Applicants submitted substantial further documentary evidence together with an amendment increasing the sum sought to £4,192.45, which sum included additional claims for tracing costs and repair to a lawnmower.

The Hearing

[11] A Hearing was held on 30th March 2021 by Tele-Conference, which was continued to further dates on 4th May, 5th August and 2nd September 2021. The Applicants did not participate, and were again represented by Mr Akinosho and Ms Vacca, letting agents. The Respondents participated, and were not represented.

[12] The Tribunal heard evidence from Mr Akinosho and from both Respondents. It was the Respondents position that they were entitled to withhold payment of the rent which would otherwise be due upon the basis that the landlord was in breach of the tenancy agreement with respect to the property not being in repair and fit for habitation.

Findings in fact

[13] After hearing all the evidence led by both parties on the issues in dispute between them and upon which the Tribunal required to reach a decision, the Tribunal found in fact:

- a) That the Respondents viewed the Property with the Applicants' letting agent on 7th February 2020, and paid a £200 deposit to secure the tenancy.
- b) That the Respondents noted the poor cleanliness of the Property at the time of viewing, and various elements of disrepair including exposed electrical wiring in the sauna and carpeting in poor condition in the lounge, and were advised by the Applicants' letting agent that the Property would be deep-cleaned and defects repaired prior to their taking entry on 26th February 2020.
- c) That neither the Applicants nor their letting agents conducted a pre-tenancy inspection before the Property was let to the Respondents.
- d) That neither the Applicants nor their letting agents carried out any inspection of the Property after an initial inspection in or about September or October 2019.
- e) That the Applicants paid the first monthly rental on 26th February 2020, and thereafter withheld payment of any further rental.
- f) That when the Respondents took entry to the Property on 26th February 2020, the Property suffered from a number of serious defects and deficits. There was no key for the front door. There were no mains-wired smoke detectors installed. The existing battery-operated smoke alarms were inoperative. There was no heat detector in the kitchen. Neither electrical safety nor gas safety certificates had been provided, and no examination to obtain these had taken place. The sauna was inoperative, and mains electrical wiring was sticking out of the wall. Neither the washing machine nor the fridge/freezer were in working order. The toilets did not flush properly and the drains were partially blocked due to a known pre-existing drainage problem. There was a leak in the boiler system causing loss of pressure and loss of hot water supply. The kitchen and interior of the Property was dirty and had not been cleaned to a satisfactory standard. The shower enclosure had a number of tiles re-attached with silicone after coming away from the wall behind, which were neither secure, nor sufficient to prevent water penetration to the wall behind. No certificate to confirm that the water supply had been checked for the presence of legionella were provided, and no such check had been carried out.
- g) That the Respondents reported all the defects and deficits to the Applicants' letting agent in a series of e-mails from 27th February 2020 to 12th March 2020.
- h) That the Respondents in their e-mail of 12th March 2020 to the Applicants' letting agent listed all the defects and deficits and advised that they would not pay further rent until the problems were all rectified.
- i) That the shower enclosure was in a condition that was unsafe for use due to severe black mould problems which had been painted over as opposed to being

rectified, shower-enclosure tiling falling off the walls due to inadequate fixing, and soft flooring under the shower tray.

- j) That the Respondents reported the problems with the shower enclosure to the Applicants' letting agent by e-mail of 11th April 2020, and that the Second Respondent, Mrs Grant, had been slightly injured when a tile fell off the wall on to her foot.
- k) That the Applicants' letting agent subsequently arranged for electrical, gas and water inspections to take place and appropriate certificates to be provided, and arranged for mains-wired smoke alarms and a heat detector to be installed, but failed to rectify the other defects and deficits prior to the end of the tenancy on 7th September 2020.

Findings in fact and law

[14] The Tribunal found in fact and law:

- a) That the Applicants were in breach of their common law obligation to provide the Respondents with a property that was in a tenable and habitable condition.
- b) That the Applicants were in breach of the repairing standard imposed on them by the *Housing (Scotland) Act 2006*, and in particular were in breach of section 13(a), (b), (c), (d) and (f) thereof.
- c) That the Applicants were in breach of their private residential tenancy agreement with the Respondents, and in particular clauses 19 and 20 thereof.

Finding in law

[15] The Tribunal found in law:

- a) That in consequence of the Applicants' material breach of their common law obligation to provide the Respondents with a property that was in a tenable and habitable condition, breach of the repairing standard imposed on them by the *Housing (Scotland) Act 2006*, and breach of their private residential tenancy agreement with the Respondents, the Respondent were entitled to withhold payment of rent until those breaches were rectified.
- b) That as many of the material breaches were not rectified prior to the end of the tenancy, the Respondents are entitled to withhold payment of the rent sought by the Applicants.

The Evidence

[16] The Tribunal heard evidence from Mr Akinosho. His evidence may be summarised as follows.

[17] Mr Akinosho is a director of the Applicant's letting agent. He explained that his co-director was a friend of the Applicants, and that the Applicants had asked her to act as their letting agent for the Property in about August 2019. A preliminary property

check had been carried out by his colleagues in either September or October 2019, and they had prepared a schedule.

[18] The Respondents viewed the Property with one of his staff on 7th February 2020 and paid a £200 deposit to secure it. The Respondents took entry on 26th February 2020.

[19] On about 3rd or 4th March 2020, the Second Respondent contacted his office to report that the drains were blocked. She was very rude, and his colleagues arranged for dynorod to inspect the problem. They reported that nothing was wrong.

[20] In his evidence on 30th March 2021, Mr Akinosho stated that the electrical, gas and legionella checks had not been carried out by the date when the tenancy commenced (26th February 2020), that no pre-tenancy inspection had been carried out after the Respondents had viewed the Property, that there was no heat detector installed in the kitchen, that the existing smoke alarms were battery operated and were not working. He confirmed that no such checks had previously been done, and that there were gas or electrical safety certificates for the Property. He stated that an electrician came on 16th March 2020 who installed mains-wired smoke detectors and a heat detector, and also completed electrical safety checks and issued an electrical safety certificate. He stated that a legionella test had also been carried out on 16th March 2020, and a certificate issued.

[21] Mr Akinosho stated that a front door key to the Property had been provided, but that he accepted that no back door key was provided. He denied that any of the Applicants' personal possessions were left in the Property.

[22] On 30th March and 2nd September 2021, the Tribunal heard evidence from the Respondents. They stated that at the original viewing on 7th February 2020, they noted that the kitchen needed deep-cleaned, and that the carpets in the lounge and one bedroom were old and had holes in them. They were told that painting and cleaning would be carried out before the commencement of the lease, and replacement carpets would be fitted in the lounge and bedroom.

[23] The Respondents stated that items of clothing and property of the Applicants were present in the Property, and that they were told these would be removed before the tenancy commenced. They observed that the sauna did not work, and that exposed mains electrical wiring was sticking out of the wall of the sauna. They were told that the sauna would be fixed, and that the overgrown grass outside in the garden would be cut.

[24] As a result of Mr Akinosho's evidence, the Respondents, who had already lodged a selection of interior photographs of the Property, indicated that they had also taken various videos of the interior of the Property which would confirm the truth of what they said and disprove Mr Akinosho's assertions.

[25] In the period from 30th March 2020 to 2nd September 2020, the Respondents lodged five videos which showed in particular the non-operational battery-powered smoke alarms, which did not work when the test buttons were depressed, and the

shower enclosure. The shower enclosure was in appalling condition. Tiles within it had fallen off the walls, and the plaster on the wall behind was clearly visible. The shower-head was encrusted with dirt, and substantial black mould was present on the ceiling above it. This was taken in July 2020, after tiles had fallen off and black mould had progressively appeared on the ceiling. The Respondents explained that the tiles appeared to have been previously repaired by simply sticking them back on the wall with silicone instead of applying grout, and that pre-existing mould appeared to have been painted over at some point and re-appeared once the shower was in use by them.

[26] The Respondents explained that the toilets flushed slowly or wouldn't flush at all. There was no pressure in the hot water system due to a problem with the boiler. The First Respondent found he could make the hot water system partially operable by topping up the water level using a valve located beside the boiler in the attic space where the boiler was located.

[27] The Respondents put drain cleaner in the drains to try and resolve the problem, but this did not work for long, and dynorod carried out an inspection which confirmed that there was a problem with the drain at some point located outside the property in the garden area.

[28] The Respondents referred to their e-mail of 12th March 2020 to the Applicant's letting agent, which had been lodged. This set out all the many defects with the Property and indicated clearly that they would not pay any rent until the issues were resolved. Other than the issue of the smoke alarms and heat detector, none of those issues were resolved by the Applicants or their letting agent.

[29] The Respondents explained that the lawnmower provided had simply broken down when they attempted to use it through no fault on their part.

[30] The Respondents referred the Tribunal to an e-mail from one of Mr Akinosho's colleagues dated 3rd March 2020 which stated that there was a problem with the drains which had been confirmed by the Applicants, which e-mail demonstrated that Mr Akinosho's assertion that there was nothing wrong with the drains was untrue.

[31] The Respondents also referred to correspondence between mydepositscotland and Mr Akinosho, which were lodged by both themselves and by the Applicants in relation to the tenancy deposit. These clearly showed that the deposit had been lodged on 12th March 2020, and that Mr Akinosho had completed a Deposit Release Request which he had submitted to mydepositscotland on 27th March 2020. That request sought payment of the deposit to him in consequence of deductions in respect of "rent arrears/outstanding bills, damage to property, missing replacement items, other deductions". The Respondent pointed out that having paid the first month's rent, they were not in arrears on 27th March 2020, and that as no-one had visited the Property from the Applicant's letting agents since they had moved in, Mr Akinosho could not have had any proper basis to allege any property damage or missing items. Mydepositscotland replied to Mr Akinosho explaining that as the Respondents were still living in the property the deposit could not be released to him.

[32] In response to the Respondents' evidence, Mr Akinosho on 2nd September 2021 denied that he had given evidence on 30th March 2021 to the Tribunal as set out in paragraph 20 above. When the Tribunal pointed out that apart from a clear recollection on the part of both members of his evidence, both had separately made contemporaneous notes of that evidence, Mr Akinosho asserted that both members had made erroneous notes.

[33] Mr Akinosho then asserted that contrary to the clear and unambiguous terms of the correspondence between mydepositscotland and himself which he had himself lodged, it was the Respondents who had sought to have the deposit released to them in March 2020, and that he had merely put in what he described as a counter-claim.

[34] Mr Akinosho asserted that the Respondents had not made any complaint about the shower enclosure until at earliest June 2020. When the Tribunal pointed out that he had lodged a copy of an e-mail to his office from the Second Respondent dated 11th April 2020, in which she made complaint about the shower enclosure and advised that a tile had fallen off the wall in the shower onto her foot, he was unable to explain how that accorded with his evidence.

Submission on behalf of the Applicants

[35] Mr Akinosho submitted that the Respondents were obliged to pay the rent until the tenancy ended. The Respondents did not pay any rent other than the first month. He also asserted that the Applicants were entitled to claim for the costs of tracing the Respondents and for a broken lawnmower.

Submission on behalf of the Respondents

[36] The Respondents submitted that in consequence of the Applicants' material breach of their common law obligation to provide the Respondents with a property that was in a tenable and habitable condition, breach of the repairing standard imposed on them by the *Housing (Scotland) Act 2006*, and breach of their private residential tenancy agreement with the Respondents, the Respondent were entitled to withhold payment of rent until those breaches were rectified. As many of the material breaches were not rectified prior to the end of the tenancy, the Respondents were entitled to withhold payment of the rent sought by the Applicants.

Statement of Reasons

[37] The jurisdiction of the Tribunal in relation to Private Residential Tenancies, such as that which applied to the Property, is set by statute. Section 71(1) of the *Private Housing (Tenancies) (Scotland) Act 2016* provides:

"First-tier Tribunal's jurisdiction

- (1) In relation to civil proceedings arising from a private residential tenancy—
(a) the First-tier Tribunal has whatever competence and jurisdiction a sheriff would have but for paragraph (b),

- (b) a sheriff does not have competence or jurisdiction.
- (2) For the purposes of subsection (1), civil proceedings are any proceedings other than—
- (a) the prosecution of a criminal offence,
- (b) any proceedings related to such a prosecution.”

[38] The Tribunal accordingly has jurisdiction to hear civil proceedings arising from a private residential tenancy such as between the parties in this application.

[39] The Respondents asserted that they were entitled to withhold the rent otherwise due in terms of the tenancy agreement in consequence of the Applicants’ material breach of their common law obligation to provide the Respondents with a property that was in a tenable and habitable condition, breach of the repairing standard imposed on them by the *Housing (Scotland) Act 2006*, and breach of their private residential tenancy agreement with the Respondents. They asserted that they were entitled to withhold the rent otherwise due until those breaches were rectified. As the majority of the breaches were not rectified by the end of the tenancy, they are not liable for the rent arrears sought.

[40] A tenant is entitled to retain rental otherwise due where the landlord will not fulfil their obligations. Once the landlord complies with their obligations, the rent becomes due in full (see, for example, *Stair Memorial Encyclopedia – Landlord and Tenant (2nd Reissue)* at para 196, *Rennie – Leases (SULI)* at paras 17-52 and 17-53, *Robson & Combe – Residential Tenancies (4th Ed.)* at para 4-23, and *Stalker – Evictions in Scotland (2nd Ed.)* at page 128).

[41] The question for the Tribunal was whether the Applicants were in breach of their legal obligations as the Respondents asserted.

[42] Clause 19 of the tenancy agreement obliges the Applicants as landlords to meet the repairing standard. It provides that the landlord must carry out a pre-tenancy check of the let property to identify work required to meet the repairing standard and notify the tenant of any such work. It states that on becoming aware of a defect, the landlord must complete repair work within a reasonable period. It provides that the Property must meet the repairing standard as follows:

- The Let Property must be wind and water tight and in all other respects reasonably fit for human habitation.
- The structure and exterior (including drains, gutters and external pipes) must be in a reasonable state of repair and in proper working order.
- Installations for supplying water, gas and electricity and for sanitation, space heating and heating water must be in a reasonable state of repair and in proper working order.
- Any fixtures, fittings and appliances that the Landlord provides under the tenancy must be in a reasonable state of repair and in proper working order.
- Any furnishings that the Landlord provides under the tenancy must be capable of being used safely for the purpose for which they are designed.
- The Let Property must have a satisfactory way of detecting fires and for giving warning in the event of a fire or suspected fire.

- The Let Property must have a satisfactory way of giving warning if there is a hazardous concentration of carbon monoxide gas.

These contractual provisions repeat the provisions of section 13 of the *Housing (Scotland) Act 2006*.

[43] Clause 19 also provides that the landlord must ensure that there is an annual gas safety check on all pipework and appliances carried out by a Gas Safe engineer, and that the tenant must be given a copy of the landlord's gas safety certificate. It provides that the landlord must ensure that an electrical safety inspection is carried out at least every five years, and that the tenant must be given a copy of the EICR and PAT.

[44] Clause 19 provides that the landlord must ensure that mains-powered smoke alarms are installed, which should be interlinked, and that the landlord will keep in repair and in proper working order the installations for the supply of water, gas, water heating and sanitation. It finally provides that all fixtures and fittings provided by the Landlord should be in a reasonable state of repair and in proper working order.

[45] Clause 20 provides that at the start of the tenancy and throughout, the landlord must take reasonable steps to assess any risk from exposure to legionella to ensure the safety of the tenant.

[46] Further, there is a common law obligation on a landlord of a residential tenancy to provide subjects reasonably fit for the purpose for which they are let and which are in a habitable and tenantable condition (see *Rennie – Leases (SULI)* at paras 14-07 and 21-22).

[47] The Tribunal found the Respondents to be credible and reliable. They gave a clear and consistent account of the many serious defects in the Property. Their evidence was supported by the photographs they provided, and the correspondence lodged by both parties. In particular, the videos they provided showed the non-operational battery-operated smoke alarms, and the truly appalling state of the shower enclosure, which was clearly in the Tribunal's view unfit for use and a health hazard.

[48] By contrast, the Tribunal found Mr Akinosho to be both incredible and unreliable. His demeanour throughout his evidence was defensive and argumentative. When faced with apparently incontrovertible video evidence about the condition of the shower enclosure and non-operational smoke detectors, he continued to refuse to accept that there was anything seriously wrong. His evidence that he was responding to a request from the Respondents for the return of the deposit in March 2020 was clearly and unequivocally disproved by the documentation which he himself had lodged on behalf of the Applicants. Further, as he did not seek to suggest that anyone from the Applicants' letting agent had attended at the Property from 26th February 2020 to 27th March 2020, he had no basis to suggest that any items had been damaged or that replacement items were missing. His continued assertion that there was no problem with the drains was disproved by e-mails to the Respondents he produced from his own office accepting that there was a known problem with the drains as confirmed by the Applicants.

[49] Throughout his evidence, Mr Akinosho made assertions which were not established by the documentary evidence, and which in many instances were clearly contradicted and disproved by the documentary evidence.

[50] For those reasons, the Tribunal had little difficulty in rejecting the evidence Mr Akinosho gave. When the Tribunal pointed out that his evidence on 30th March 2021 noted in paragraph 20 above had changed in his subsequent evidence on 2nd September 2021, he refused to accept that was the case and stated that the members had wrongly noted what he had said on 30th March 2021. His position on that point was symptomatic of his general approach in giving evidence.

[51] The Tribunal concluded from the evidence that the Property was let to the Respondents in a very poor condition. Of particular seriousness were the facts that no pre-tenancy check was carried out, that no gas, electrical and legionella certification or checks were obtained or carried out, that the drains were not in good working order, that no mains-wired smoke detectors and heat detector were present, that the existing battery-operated smoke detectors were non-operative, and that the shower enclosure was a health hazard.

[52] Most of these defects were not fixed, despite them being reported by the Respondents to the Applicants' letting agent. The Tribunal has little difficulty in concluding that the Applicants were in material breach of their common law obligation to provide the Respondents with a property that was in a tenantable and habitable condition, in breach of the repairing standard imposed on them by the *Housing (Scotland) Act 2006*, and in breach of their private residential tenancy agreement with the Respondents.

[53] In consequence, the Respondent were entitled to withhold payment of rent until those breaches were rectified. As many of the material breaches were not rectified prior to the end of the tenancy, the Respondents are entitled to withhold payment of the rent sought by the Applicants.

[54] The Tribunal accepted the Respondents' account that the lawnmower broke down through no fault of theirs, and also rejected the Applicants' claim for damages.

[55] The Tribunal would note its concern about the letting agent's conduct in relation to this tenancy, which may well breach a number of provisions of the letting agent's code of conduct, and will draw the attention of the appropriate authorities to its decision.

Decision

[56] For the above reasons, the Tribunal dismissed this 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.

Neil Kinnear

24th September 2021

Legal Member/Chair

Date