



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 33 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/21/0090

Re: Property at 1 Church Place, Findhorn, Forres, IV36 3YR (“the Property”)

Parties:

Mr Jonathan Lobban, 2 Howden Hall Court, Edinburgh, EH16 6UT (“the Applicant”)

Mr David Hassall, 1 Church Place, Findhorn, Forres, IV36 3YR (“the Respondent”)

Tribunal Members:

Andrew Upton (Legal Member) and Janine Green (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for possession of the Property should be granted in favour of the Applicant

FINDINGS IN FACT

1. The Applicant is the landlord, and the Respondent the tenant, of the Property under and in terms of a Short Assured Tenancy Agreement which commenced on 13 January 2012.
2. The Property is served by an electric immersion boiler and also a “back boiler” where a water tank is heated from the open fire in the lounge.
3. In or around early January 2020, the Respondent intimated to the Applicant through the Applicant’s letting agent, Cluny Estate Agents, that the electric immersion boiler was not working.

4. In or around late January 2020, Malcolm McIntosh completed a temporary repair to the immersion boiler at the Property and recommended a permanent repair.
5. The UK entered a national lockdown on 23 March 2020 to combat the spread of coronavirus, at which time Cluny's office was closed.
6. Cluny's contact details, including office telephone number and general email address, were re-directed to Rebecca Garner during the first lockdown.
7. Cluny considered that the permanent repair recommended by Mr McIntosh was a non-essential repair so long as the temporary repair was effective.
8. Cluny followed the guidance prepared by the Scottish Association of Landlords regarding the completion of repairs during lockdown.
9. The permanent repair could have been carried out when lockdown restrictions were eased, but was not carried out until December 2020.
10. The Respondent intimated, for the first time, that there was a gutter leaking at the Property and causing dampness within the Property during an inspection of the Property by Cluny in August 2020.
11. The Respondent did not keep any unpaid rent aside during the period February 2020 to February 2021, and has spent it. He has kept rent for March and April 2021 aside, in the total sum of £900.
12. The Respondent has resided at the property since January 2012.
13. There was nothing to suggest that the Respondent had a poor rent payment history at the Property.
14. The Respondent had been in arrears since May 2019.
15. The total arrears, having regard to the abatement of rent that the Tribunal considered he was entitled to, was £5,676.99.
16. His arrears amount to over 12 months' rent.
17. The Respondent had not taken steps to set aside the rent pending determination of appropriate abatement, and had spent it on living expenses instead.
18. The Respondent did not seek to agree abatement with the Applicant.
19. The Respondent has not paid rent since the necessary remedial works were completed.

20. The Respondent has made no attempt to pay rent for the period since necessary remedial works were completed.
21. The Respondent has made no attempt to make arrangements to pay future rent.
22. The Property was tenantable and habitable.
23. The Respondent has anxiety and depression, for which he takes medication.
24. The Respondent was on furlough for a significant period of time between March 2020 and April 2021.
25. The immersion boiler was temporarily repaired in January 2020, and there is nothing to suggest that the temporary repair failed at any time prior to November 2020.
26. Even if the immersion boiler was not operational, the property was tenantable and habitable in that it had facilities for the heating of water via the back boiler, and showering by way of an electric shower.
27. The Property is the Applicant's only source of income.
28. The Applicant has required to make payments towards the repair of the Property but has not received income from the Property since January 2020.

FINDINGS IN FACT AND LAW

1. The tenancy has reached its ish.
2. Tacit relocation is not applying to the tenancy.
3. Notice in terms of section 33 of the Housing (Scotland) Act 1988 was served on the Respondent by the Applicant on a period of notice of six months.
4. It is reasonable to grant an order for possession.

STATEMENT OF REASONS

1. This Application called for its Hearing by teleconference on 26 April 2021, together with the related application CV/21/0091. The Applicant was represented by Ms Rebecca Gardiner of Cluny Estate Agents. The Respondent participated in the Hearing personally.
2. In this Application, the Applicant seeks an order for possession of the Property, which is let on a Short Assured Tenancy, under and in terms of section 33 of the Housing (Scotland) Act 1988. In terms of section 33 of the 1988 Act, as temporarily amended by the Coronavirus (Scotland) Act 2020:-

“33.— Recovery of possession on termination of a short assured tenancy.

- (1) Without prejudice to any right of the landlord under a short assured tenancy to recover possession of the house let on the tenancy in accordance with sections 12 to 31 of this Act, the First-tier Tribunal may make an order for possession of the house if the Tribunal is satisfied—
 - (a) that the short assured tenancy has reached its ish;
 - (b) that tacit relocation is not operating;
 - (c) ...
 - (d) that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house; and
 - (e) that it is reasonable to make an order for possession.
 - (2) The period of notice to be given under subsection (1)(d) above shall be—
 - (i) if the terms of the tenancy provide, in relation to such notice, for a period of more than six months, that period;
 - (ii) in any other case, six months.
 - (3) A notice under paragraph (d) of subsection (1) above may be served before, at or after the termination of the tenancy to which it relates.
 - (4) Where the First-tier Tribunal makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that ish shall end (without further notice) on the day on which the order takes effect.
 - (5) For the avoidance of doubt, sections 18 and 19 do not apply for the purpose of a landlord seeking to recover possession of the house under this section.”
3. In this case, it is a matter of agreement that the tenancy is a Short Assured Tenancy, that it has reached its ish, that tacit relocation is not operating and that the notice required by section 33 was properly served. The only question for determination by the Tribunal is whether it is reasonable to grant the order for possession.

Evidence

Caroline Smith

4. The Applicant's first witness was Caroline Smith. She is the sister of the Applicant. Mrs Smith explained that the Property had formerly belonged to her uncle. She had held a power of attorney for her uncle, and had decided to let the Property out to generate an income for him. Her uncle died in 2011. In his will, her uncle bequeathed the Property to the Applicant. The Property provided the Applicant's only income. Mrs Smith explained that, after her uncle's death, she continued to principally manage the Property on behalf of her brother. In 2018, Mrs Smith and the Applicant discussed the property management and decided to appoint a professional agent. That was because the Applicant lived in Edinburgh and did not drive, and Mrs Smith lived in South Wales. It was thought that having a local agent would be better. Cluny Estate Agents ("Cluny") were appointed at that time. Mrs Smith continued to provide instructions to Cluny on her brother's behalf thereafter.
5. Mrs Smith said that the electric immersion boiler first had an issue in or around June 2016. The boiler was repaired at that time. Thereafter, she was unaware of any issues with the boiler until on or around 1 May 2019 when the Respondent notified Cluny that he had no hot water and Cluny contacted Mrs Smith. She said that Malcolm McIntosh, an electrician familiar with the Property, was instructed to inspect the boiler. Mrs Smith spoke to a series of text messages between her and the Respondent from around that time which had been produced in advance of the Hearing. On or around 17 June 2019, Mrs Smith was advised that the boiler could be fixed, but it required a part. She could not recall why it took six to seven weeks for that determination to be made. In any event, the boiler was repaired by 5 July 2019. Her recollection was that the immersion heating element was replaced.
6. Mrs Smith said that the Respondent again complained of a lack of hot water in January 2020. Mr McIntosh was again instructed to attend at the Property and the issue was identified as being the thermostat. Mr McIntosh advised that the thermostat required to be replaced, but that he had effected a temporary repair that had remedied the issue for the time being. Mr McIntosh produced a quote for the required works that was sent to Cluny, and Cluny sent that on to Mrs Smith on 24 February 2020. On 25 February 2020, Mrs Smith instructed Cluny to proceed to instruct the work.
7. Thereafter, Mrs Smith confirmed that the works were not carried out. The UK entered a national lockdown due to the coronavirus pandemic in March 2020. Mrs Smith's belief is that this want of repair slipped through the cracks and was forgotten about in the weeks and months that followed. She recalled that letters were sent to the Respondent setting out the letting agent's procedures for dealing with properties during lockdown.
8. Mrs Smith said that attempts to contact the Respondent by telephone had failed. She said that his telephone number was uncontactable. For that reason, two letters were sent to the Respondent in November 2020. One of those included the contact details of Mr McIntosh and a request that the Respondent contact him as soon as possible to arrange for the outstanding thermostat repair. She said that the repair must have been carried out because Mr McIntosh invoiced for it on 23 December 2020.

9. Mrs Smith advised that the Respondent had made no attempt to contact her directly since February 2020.
10. Mrs Smith said that she had been unaware of the water leak from the gutter until 14 August 2020. She had been contacted by Cluny following a visit by them to the Property for an inspection and advised that there was a leak in the gutter. She said that she gave instructions to Cluny that same day to remedy the gutter issue. She was not advised that the leak was causing damp in the Property.
11. Mrs Smith said that the Respondent did not suggest at any time to her that he was unhappy with the Property. The Respondent has not suggested to her directly that he was withholding rent to force the Applicant to effect repairs to the Property. There was simply no contact from the Respondent during the majority of 2020. Mrs Smith said that she felt she and Cluny had done the best they could in the circumstances to attend to repair issues. They had tried to contact the Respondent but had found that challenging. He had not engaged, and the onus had been on him to report repairing issues in any event.
12. Finally, Mrs Smith advised that the Property was the Applicant's sole source of income. Insofar as liabilities for the Property fall due, he is currently without the rental income for the Property to attend to those liabilities.

Rebecca Garner

13. Ms Garner is an employee of Cluny. She has worked for Cluny for approximately ten years. She is the Rental and Sales Manager, and has held that position for approximately two years. She advised that her role principally deals with what she described as "out of office work". That includes property visits for lettings, sale activities and repair management.
14. Ms Garner confirmed that she had previously attended the Property for its inspections. She also confirmed that she had corresponded with the Respondent regarding repairing issues in the past.
15. Ms Garner spoke to the history of Cluny's involvement with the Property. She said that Cluny was first instructed in November 2018. Cluny first became aware of an issue with one of the boilers at the Property in May 2019. The Property is served by two boilers. The first operates by way of an electric immersion heating element that can be turned on and off. The second is a water tank that is heated from the open fire in the lounge. The reported issue was that the electric boiler was not heating water. Ms Garner spoke to obtaining instructions from Mrs Smith to instruct Mr McIntosh to effect the necessary repair. Thereafter the matter was dealt with through direct communication between Mrs Smith, the Respondent and Mr McIntosh. Cluny had minimal involvement in that repair.

16. Ms Garner said that the Respondent notified Cluny that he had no hot water from the electric boiler in January 2020. Cluny instructed Mr McIntosh to attend at the Property. At some point prior to 4 February 2020, Mr McIntosh attended at the Property and reported back that he had effected a temporary repair that would provide hot water, but that the thermostat required to be replaced. On 4 February 2020, Mr McIntosh's opinion was provided to Mrs Smith and instructions were received from her to obtain a quote for the necessary works. Mr McIntosh provided a quote on or around 22 February 2020. A copy of that quote was produced to the Tribunal ahead of the Hearing. This was provided to Mrs Smith, confirmed that the repair should be carried out on or around 25 February 2020.
17. In March 2020 the UK entered the national lockdown to combat coronavirus. Ms Garner confirmed that Cluny's office was closed as a consequence. All emails to Cluny were redirected to Ms Garner. The office telephone number was redirected to Ms Garner's mobile telephone number. Cluny followed guidance produced by the Scottish Association of Landlords, which suggested that only emergency repairs should be undertaken during the period of lockdown. In this case, Mr McIntosh had effected a temporary repair, so there was no urgent and cogent need for the completion of the permanent repair. Further, the Respondent did not contact Cluny to suggest that the temporary repair had failed. Ms Garner conceded that the need for permanent repair had slipped through the cracks, and suggested that the focus on emergency works during the lockdown and the Respondent not having raised the issue again until much later in 2020 had contributed to that failure.
18. Ms Garner confirmed that Cluny's offices re-opened in mid-June 2020. She said that the Respondent did not attend at their offices to complain about any repairing issues.
19. On 14 August 2020, Ms Garner attended the Property for a routine property inspection. Whilst there, the Respondent highlighted that the gutter was cracked and causing water ingress. He did not suggest that the electric boiler was not working. That day Ms Garner contacted Mrs Smith to advise of the need for repair, and received instructions to instruct the repair. Unfortunately, Ms Garner found it difficult to find a contractor with capacity to undertake the necessary repair. A quote was ultimately received on 5 November 2020, and the works specified therein were completed in December 2020.
20. Ms Garner confirmed that she wrote to the Respondent on 22 October, 29 November and 11 December, all dates 2020, to highlight his rent arrears and highlight advice agencies that he may contact.
21. On 26 November 2020, Cluny received a letter from the Respondent regarding the wants of repair outstanding at that date. That included the leaking gutter and the thermostat replacement. On 27 November 2020, Cluny wrote to the Respondent seeking to arrange access to complete the necessary repairs. Those repairs were completed during December 2020. A

copy of the invoice from Mr McIntosh dated 23 December 2020 was produced showing that the works had been completed.

22. Ms Garner said that Cluny received no further contact from the Respondent until the Case Management Discussion on 17 March 2021. At the CMD, the Respondent had said that he still had issues with hot water at the Property. This was the first time that he had said that the problem was persisting. Until then, the belief was that the repair had resolved the issue. In late March 2021, Mr McIntosh attended at the Property and determined that the repair had resolved the issue, but that the thermostat was set too low. He adjusted the thermostat, which increased the water temperature.
23. Ms Garner advised that the Property is served by two water boilers. The first is an electric boiler which operates by way of an immersion heating element. The second, the back boiler, is a water tank which is heated by the open fire in the lounge. Ms Garner also advised that the Property has electric storage heaters.
24. Ms Garner concluded by advising that Cluny had followed the advice issued by the Scottish Association of Landlords during the first UK national lockdown. In line with that advice, only essential repairs were being undertaken. Given that a temporary repair had been undertaken to the boiler prior to lockdown which appeared to resolve the issue, albeit temporarily, and the Respondent had not suggested that the repair had failed, Cluny had taken the view that the permanent repair was non-essential. On reflection, this had unfortunately resulted in the permanent repair being overlooked when the country exited lockdown.

David Hassall (the Respondent)

25. Mr Hassall advised that he is a customer service manager for a betting shop. He had been on furlough during the pandemic and the resultant store closures that his employer had experienced, but was due to return to full time working on the Wednesday following the Hearing.
26. Mr Hassall said that he had been experiencing issues with the immersion boiler for about four years. He said that it had been temporarily fixed on and off during that time. He said that the problem was persistent, and was always the same. He said that the contractor had prepared a quote to replace the boiler but that the landlord had refused to do so.
27. Mr Hassall spoke to the capacity of the “back boiler”, which was the boiler operated by lighting an open fire. He said that it would take approximately one hour to heat the water in the tank, and that was sufficient for a dishwasher, a wash and not much else. He also advised that the Property was served by an electric shower.
28. Mr Hassall confirmed that the immersion boiler had been temporarily repaired at the beginning of 2020. However, he said that the temporary repair had

stopped working almost immediately. He said that the problem was that when the open fire was lit the heat tripped the thermostat. He said that Cluny's office was opposite his place of work and that he went into it at the end of February or beginning of March 2020 to complain about a lack of hot water, and spoke to a bald man at the back of the office. The Respondent did not recall the gentleman's name. Thereafter, he recalled speaking to Mr McIntosh on the telephone to arrange access for the permanent repair to be carried out. However, the UK entered the national lockdown the following week, and so the repair was not carried out.

29. Mr Hassall said that he was on furlough during the first lockdown. During that period he was home during the day, which meant he could have a fire going in the lounge. He said that the back boiler was not an effective solution when he was working, because he could not leave it on while he was out. That meant that when he got home, it would take at least an hour to have hot water. Reliance on the back boiler was also an issue during the summer months. When it was warmer, it was unnecessary to have an open fire burning in the lounge. He said that the issue was primarily financial. It was, he said, more expensive to have an open fire burning than to run the immersion boiler. He estimated that the open fire was costing him about £12 per day.
30. Mr Hassall said that, during the initial lockdown, he had tried to contact Cluny's regarding his lack of hot water. He tried to contact them by telephone, but there was no answer and no voicemail facility. The telephone rang out. He did not have internet access, and so could not email.
31. In August 2020, Mr Hassall said that Ms Garner undertook a routine inspection of the Property. At this time, Mr Hassall advised that he had no hot water, dampness in the Property and a crack in the exterior wall. Regarding the dampness, he said that this was caused by a leaking gutter which he had first reported to Cluny in October 2019. He said that those issues went unresolved for a period of months after the August 2020 inspection.
32. On or around 23 November 2020, Mr Hassall said that he received a letter from Cluny's threatening Tribunal proceedings due to rent arrears. He responded with his letter outlining the outstanding repairs required, specifically the thermostat for the immersion boiler and a leaking gutter causing dampness in the Property. Both of those issues were fixed in December 2020, a couple of weeks after his letter threatening to raise proceedings of his own. There was a further issue with the thermostat, but that was resolved by Mr McIntosh adjusting the settings.
33. Mr Hassall confirmed that the rent schedule produced by the Applicant was accurate, and that he had made no rent payments since February 2020. He said that this was because he was upset with the boiler situation. He said that he was withholding rent. He confirmed that he had not paid rent recently, since the issues had been fixed, because he was unable to get to the bank to instruct payment. However, he had kept his rent payments aside in the total sum of £900. He said that he used to pay his rent in cash, but could not do so

when Cluny's office was shut. He did not have a cheque book and could not do internet banking. He was not set up for telephone banking. He had a debit card, but had not contacted Cluny's to see whether rent payments could be taken over the telephone.

34. Mr Hassall confirmed that he had not retained any of the rent for the period February 2020 until February 2021. He said that he had used the sums not paid to the Applicant for "living costs". He suggested that he had spent at least some of it on additional fuels costs.
35. Mr Hassall said that he suffers from anxiety and depression. He was first diagnosed with these conditions approximately five years ago. He was placed on medication, and stopped taking medication in or around 2018. However, he has recently resumed taking his medication which was left over from his last filled prescription.
36. Mr Hassall said that the lack of hot water had caused him personal embarrassment. He had to take his laundry to the homes of others to wash. He required to shower elsewhere.
37. In cross examination, Mr Hassall confirmed that he had telephoned 01309673836 when trying to contact Cluny.

Rebecca Garner (recalled)

38. In light of Mr Hassall's assertions, Ms Garner was recalled to speak to the issues raised by Mr Hassall that had not been foreshadowed by him previously in written representations or at the CMD.
39. Ms Garner said that she had personally undertaken the Property inspections in April, August and December 2019. She said that there was no report of a leaking gutter during those visits. She recalled that it was raining at the visits in August and December 2019, but there was not evidence of a leaking gutter at that time.
40. Ms Garner explained that Cluny's internal process when they receive communication from a tenant is to take notes and add them to the file. This occurs when tenants attend at their office. Where the contact from the tenant is to notify of a need to repair, that is followed by an email to the landlord seeking instructions. Ms Garner said that there was no record of the tenant having attended at their premises in February or March 2020, and no email to the landlord seeking instructions on the back of such a visit. Her position was that the Respondent had not attended at Cluny's office. If he had done so, there would have been a record of it.
41. Ms Garner said that the telephone number 01309673836 is Cluny's office number. That is the number that was redirected to her mobile telephone during the first lockdown. She said that, if the Respondent had called that number and she had not answered the call then he would have reached her

voicemail. She said that she has not had any known issues with anyone leaving a voicemail at the time of the Respondent's alleged calls.

42. Finally, Ms Garner advised that the works required to the Property were instructed on 5 November 2020, some three weeks prior to receipt of the Respondent's letter. She took issue with his inference that the works were only carried out because of his threat to bring his own proceedings.

Submissions

43. The submissions of the parties were to the point. The Applicant's position was that, in all of the circumstances, it was reasonable to grant the order for possession. The Respondent's position was that it was unreasonable to grant the order for possession, having regard to the repairing issues he had experienced.

Decision

44. Firstly, the Tribunal requires to assess the witnesses. The Tribunal considered that Ms Garner and Mrs Smith gave their evidence in a clear, straight-forward manner. They were specific about the events that had happened, and did not shy away from events which were potentially damaging to them, such as the overlooking of the permanent repair. The Tribunal considered them to be both credible and reliable.
45. The Tribunal was not impressed with Mr Hassall's evidence. He was vague in his recollection, and gave the impression that he was making up his evidence as he went along. His evidence that he required to shower elsewhere was at odds with his evidence that he had an electric shower in the Property. The boiler was not necessary to heat the water feeding the shower. We did not consider him to be credible or reliable. Insofar as his evidence was in conflict with that given by Ms Garner or Mrs Smith, the Tribunal preferred their evidence.
46. When assessing reasonableness, the Tribunal requires to take into consideration all of the circumstances. In reaching our decision, we have had regard to the following matters:-
 - a. The Respondent has resided at the property since January 2012;
 - b. There was nothing to suggest that the Respondent had a poor rent payment history at the Property;
 - c. The Respondent had been in arrears since May 2019;
 - d. The total arrears, having regard to the abatement of rent that the Tribunal considered he was entitled to, was £5,676.99;
 - e. His arrears amount to over 12 months' rent;
 - f. The Respondent had not taken steps to set aside the rent pending determination of appropriate abatement, and had spent it on living expenses instead;
 - g. The Respondent did not seek to agree abatement with the Applicant;

- h. The Respondent has not paid rent since the necessary remedial works were completed;
- i. The Respondent has made no attempt to pay rent for the period since necessary remedial works were completed;
- j. The Respondent has made no attempt to make arrangements to pay future rent;
- k. The Property was tenable and habitable;
- l. The Respondent has anxiety and depression, for which he takes medication;
- m. The Respondent was on furlough for a significant period of time between March 2020 and April 2021;
- n. The immersion boiler was temporarily repaired in January 2020, and there is nothing to suggest that the temporary repair failed at any time prior to November 2020;
- o. Even if the immersion boiler was not operational, the property was tenable and habitable in that it had facilities for the heating of water via the back boiler, and showering by way of an electric shower.
- p. The Property is the Applicant's only source of income; and
- q. The Applicant has required to make payments towards the repair of the Property but has not received income from the Property since January 2020.

47. Having regard to these factors, the Tribunal considers that it is reasonable to grant the order for Possession. The Tribunal did not believe the Respondent when he said that he was retaining rent to force the landlord to carry out a repair. If that were true, the Respondent would have kept the rent, or at least a portion of it, aside to bring his rent account up to date following completion of the repairs. That the Respondent has made no effort at all to pay rent now that the repairs have been completed tend to suggest that his failure to pay is unrelated to the repairing issues at the Property, which were relatively minor in the context of this tenancy. The Tribunal accordingly granted an order for possession.

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.

11th May 2021

Andrew Upton

Legal Member/Chair

Date