Housing and Property Chamber
First-tier Tribunal for Scotland

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

Chamber Ref: FTS/HPC/CV/21/1447

Re: Property at Balide, By Crosshill, Maybole, South Ayrshire, KA19 7QE ("the Property")

Parties:

Mr Carlos Gayubas Urresti, 7 Smith Road, Reigate, Surrey, RH2 8HJ ("the Applicant")

Miss Ashleigh Stein, Balide, By Crosshill, Maybole, South Ayrshire, KA19 7QE ("the Respondent")

Tribunal Members:

Andrew Upton (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent is liable to make payment to the Applicant in the sum of SEVEN THOUSAND SEVEN HUNDRED POUNDS (£7,700.00) STERLING

FINDINGS IN FACT

1. The Applicant was the landlord, and the Respondent the tenant, of the Property under and in terms of a Private Residential Tenancy Agreement that commenced on 6 July 2020.

2. The Respondent failed to pay the sum of £9,000 in respect of rent as it fell due under the Tenancy Agreement.

3. The Property had satisfactory methods of detecting fires and for giving warning in the event of a fire or suspected fire throughout the tenancy.

4. The Property had satisfactory methods of giving warning if there was a hazardous concentration of carbon monoxide gas throughout the tenancy.

5. There was no Electrical Installation Condition Report or Energy Performance Certificate given to the Respondent during the tenancy.

6. The downstairs bathroom at the Property was, at the commencement of the tenancy, in need of refurbishment.

7. The parties entered into an agreement whereby the Applicant consented to the Respondent undertaking refurbishment works to the downstairs bathroom and also reduced the first month's rent by £500.

8. The Respondent did not refurbish the downstairs bathroom.

9. The Respondent made payment to the Applicant of £1,000 as a "holding fee" for the Property, which sum formed part of the Respondent's Tenancy Deposit under the Tenancy Agreement.

10. On 31 December 2020 the foul water drainage at the Property backed up into the Property. The Respondent notified the Applicant on the same day.

11. On 1 January 2021, contractors acting on the instructions of the Applicant attended at the Property and jetted the pipes, thereby clearing the blockage.

12. In or around March 2021, the foul water drainage at the Property backed up into the Property again. The Respondent notified the Applicant on the same day. The Applicant contacted the same contractor as before, but he refused to attend. The Applicant then contacted the Respondent's partner, Mike Hammill, and was advised that he had cleared the blockage himself.

13. The Respondent did not notify the Applicant of any further blockages to the foul water drainage.

14. The equestrian arena comprised a gravel base overlaid with a membrane and silica sand topping.

15. The Respondent has spread shredded carpet fibre over the arena.

16. The Applicant intends to remove the shredded carpet fibre from the arena.

17. The Respondent undertook works to the field adjacent to the stables whereby she removed hedging, installed field drains to direct water flow, and installed an area of hard standing at the bottom of the field.

FINDINGS IN FACT AND LAW

1. The Applicant failed to provide the Respondent with an Electrical Installation Condition Report ("EICR") or Energy Performance Certificate ("EPC") in breach of his contractual and statutory obligations.

2. The Respondent is entitled to an abatement of rent at the rate of £50 per month for 13 months in respect of the Applicant's failure to provide an Electrical Installation Condition Report ("EICR").

3. The Respondent is entitled to an abatement of rent at the rate of £50 per month for 13 months in respect of the Applicant's failure to provide an Energy Performance Certificate.

4. The Applicant did not warrant the condition or suitability for any purpose of the equestrian arena or field adjacent to the stables.

5. The equestrian arena and field adjacent to the stables did not require repair during the tenancy.

6. The Respondent is not entitled to set-off her illiquid claim for betterment of the Property against the Applicant's liquid claim for payment of rent arrears.

7. The Respondent is liable to make payment to the Applicant in the sum of £7,700.

STATEMENT OF REASONS

1. This Application called for its Hearing by teleconference call on 21 September 2021. The Applicant participated on the call. The Respondent was represented by Mr Mike Hammill.

2. In this Application, the Applicant seeks payment of rent arrears in the sum of £9,000. The Respondent accepts that the sum of £9,000 which was, on the face of it, due to the Applicant for rent had not been paid. The Respondent's defence fell under four chapters:-

    a. The Respondent was entitled to withhold rent due to wants of repair at the Property, in order to force the Applicant to comply with his repairing obligations;
    b. The Respondent is entitled to an abatement of rent due to the wants of repair at the Property during the tenancy and the Applicant's failure to meet his contractual repairing obligations;
    c. The Respondent, having undertaken works that improve the Property, is entitled to set-off the rent arrears against the sums paid for those works; and
    d. The sum sued for is excessive in that it failed to take account of a £1,000 holding fee paid by the Respondent and £500 rent abatement agreement.

3. At the beginning of the Hearing, Mr Hammill confirmed that the Respondent had moved out of the Property, and that the tenancy was at an end. On that basis, it was clear that the Respondent could no longer withhold rent to force compliance with a contractual obligation. Accordingly, the Respondent's defence proceeded on the other three chapters only.

4. Given that there was no dispute as to the value of rent unpaid, and the onus was on the Respondent to prove that her defences were well founded, the Tribunal determined that the Respondent ought to lead at the Hearing. The Respondent's only witness was Mr Hammill. The witnesses for the Applicant were the Applicant himself and Stephen MacMillan, a tradesman that he instructed in respect of the Property.

Evidence

Mike Hammill

5. Mr Hammill is the partner of the Respondent. He resided with her at the Property during the tenancy, and now resides with her at their new address. He is a plumber to trade.

6. Mr Hammill described the Property as being located in just over four acres of land. It comprises a dwellinghouse, stables, sheds, riding area and two fields. The Property had been advertised as an equestrian property, which suited the Respondent. Mr Hammill explained that the Respondent is a competitive showjumper. She owns horses, and requires facilities to train. She did not take the Property to operate a riding school or similar business from the Property. The benefit of the equestrian facilities was for her own training.

7. Mr Hammill spoke of various repairing issues that presented in the dwellinghouse. In particular, he described the following:-

    a. There was no EICR or EPC certificates in the property;
    b. There were smoke alarms in the kitchen and hall, but none upstairs or in the main living area;
    c. There was no carbon monoxide detector; and
    d. There were issues with domestic drainage. He spoke of raw sewage backing up into the downstairs shower. He spoke of other toilets backing up. He advised that he contacted the Applicant directly, who arranged for a drainage company to attend in or around November 2020. He said that the drainage company jetted the pipes which seemed to clear the issue, but he was warned that they might have just pushed the blockage further along the pipe and that it might recur. The issue recurred in or around January 2021. On that occasion, Mr Hammill borrowed jetting equipment from a friend and cleared the blockage himself. The issue recurred in March 2021, at which time he jetted it again. He said that this was a repeating pattern throughout the rest of the tenancy. Under cross-examination, Mr Hammill conceded that his dates could have been off, and that the issue could have happened in late December 2020.

8. Mr Hammill also said that the downstairs bathroom was generally in a state of disrepair. However, the parties had agreed at the commencement of the tenancy that the Respondent would renovate the downstairs bathroom, and a rent reduction of £500 was agreed to reflect those works being undertaken. Mr Hammill confirmed that no works were undertaken to the downstairs bathroom.

9. Mr Hammill also spoke to various works which he claimed were undertaken to the external areas of the Property. He spoke of undertaking a temporary repair to a water supply tap, which he said he confirmed to the Applicant would require replacement. He said that the Respondent had undertaken drainage works to one of the fields by installing field drains and an area of hardstanding, at a cost of £4,600. He said that the arena had to be resurfaced because the existing topping had worn down to the membrane layer. He confirmed that shredded carpet fibre had been laid by the Respondent at a cost of £1,200. He said that these were matters that the Applicant was under contractual obligation to repair, had been called upon to repair and had refused to repair. When asked to highlight which obligation of the tenancy agreement that he was founding on, Mr Hammill directed the Tribunal to the general repairing obligations at Clause 17 of the Tenancy Agreement. Mr Hammill said that the Applicant had refused to repair and had told the Respondent to just keep the horses inside during the winter. Mr Hammill said that was not feasible.

10. Mr Hammill said that the Respondent had paid a £1,000 holding fee to the Applicant prior to the commencement of the tenancy. It was agreed that the holding fee would form part of the tenancy deposit for the Property.

<u>Carlos Gayubas Urresti</u>

11. Mr Urresti stated that he had not been present at the time that the Respondent and Mr Hammill were checked into the Property. He had instructed Stephen MacMillan to hand over the keys to the Property, take the initial payments from the Respondent, and generally show the Respondent around the Property. However, to the best of his knowledge, all paperwork that was required for the Property had been left in a drawer in the kitchen. He believed that this included the Gas Safety Certificate, EPC and EIRC. Mr Urresti also confirmed that he instructed Mr MacMillan to deduct £500 from the rent to be paid initially to reflect the agreement that the Respondent refurbish the downstairs bathroom.

12. Mr Urresti spoke of discussions between him and the Respondent prior to the commencement of the tenancy. He said that the Property was more like a smallholding than a standard domestic property. He said that the Parties discussed, and agreed, that for any “smallholding repairs”, such as fencing around the fields, the Respondent would be responsible for those. For all other repairs, the Applicant would be responsible, and the Respondent required to notify him of all such repairs.

13. Mr Urresti said that, prior to the commencement of the tenancy, he instructed Mr MacMillan to arrange to fit three new heat and carbon monoxide alarms at the Property, in addition to the two existing smoke alarms located in the hall and kitchen. He said that, at the commencement of the tenancy, all required smoke, heat and carbon monoxide alarms were present.

14. With regards to the domestic drainage at the Property, Mr Urresti said that he had first been contacted by Mr Hammill on 31 December 2020. He arranged for a drainage company to attend at the Property on 1 January 2021 and fix the issue. Two or three months later, Mr Hammill contacted Mr Urresti to say that the issue had recurred. Mr Urresti said that he then contacted the drainage company again, but they refused to attend. The drainage company alleged that someone at the Property had behaved inappropriately during the previous visit, and they therefore would not go back. Mr Urresti contacted Mr Hammill to advise him of this, and was told that he had sorted the issue. The issue was never reported to him again. Mr Urresti also advised that he was now living part-time in the Property, and had not experienced the same issue with drainage whilst at the Property.

15. Turning to the fields, Mr Urresti advised that of the two fields the issues raised by Mr Hammill were all related to the same field, which was the one next to the stables. Mr Urresti described that field as lying on a slope. At the bottom, there is a stream and a flat area. Mr Urresti's position was that he was not responsible for the condition of the field. That was a "smallholding" repair matter that the Respondent was responsible for. Mr Urresti said that he had not given any warranty that the field was suitable for horses. In any event, his position was that there was nothing wrong with the field. The Respondent has now altered the way that the field drains, and installed an area of hardstanding. This now causes the water to back up into the field, which is not really a field anymore due to the hardstanding. These works required landlord consent, in Mr Urresti's opinion, and that was not given. Further, the works did not better the Property. Hedging was removed, meaning that the arena area is less private than it previously was.

16. In respect of the arena, Mr Urresti described its composition as having a gravel base, then a membrane overlay, and a silica sand topping. He described that topping as being top quality. He complained that the Respondent had laid shredded carpet fibres over the top of the sand. He described that as an inferior product that he would require to remove. He explained that the carpet fibre retains water, whereas the silica sand allows water to drain. For an arena in the west of Scotland, Mr Urresti said that carpet fibre was not appropriate. He said that the material had been banned by regulatory bodies as dangerous.

17. In respect of the holding fee, Mr Urresti accepted that this had been paid. He said that this formed the tenancy deposit, which was now held by an approved Tenancy Deposit Scheme.

18. Mr Urresti accepted that he had been asked to provide further copies of the EPC and EICR, but had been unable to obtain copies from his electrician.

Stephen MacMillan

19. Mr MacMillan confirmed that he is a joiner to trade. He was familiar with the Property, having been instructed by the Applicant to undertake works there. He explained that he first knew the Applicant as a veterinary surgeon, and then as a landlord for whom he undertook work. He acts as a central point of contact for the Applicant. If the work required is joinery, then Mr MacMillan undertakes that himself. If it is another trade, he procures the work.

20. Mr MacMillan said that he had met both the Respondent and Mr Hammill on about four occasions. The first of those was when he met them to hand over the keys to the Property at the commencement of their tenancy. Mr MacMillan said that he walked the Respondent and Mr Hammill through the Property. He said that he formed the impression that they were already familiar with the house. They seemed to know about it. They were also distracted by the Labrador puppy that they had with them and were trying to control. Mr MacMillan said that he took the Respondent's money for the Property, handed over the keys and then left.

21. Mr MacMillan said that any paperwork for the Property was in the kitchen, and would likely have been sitting on the island in the kitchen. However, he had no recollection of actually seeing any paperwork.

22. Mr MacMillan said that he had advised the Applicant to get fire and smoke detectors for the Property that were connected to the ring main electrical circuit. The Applicant agreed to do so, and Mr MacMillan instructed an electrician to attend to that in 2019. Mr MacMillan said at least three new smoke detectors were installed together with a heat detector in the kitchen. In addition, Mr MacMillan said that three new battery operated carbon monoxide detectors were installed in the Property the week before the Respondent moved in.

23. Mr MacMillan spoke of having attended at the Property to undertake repairs and investigate issues, but being turned away by the tenants. He also said that he was instructed to attend at the Property in July 2021 to check if it had been abandoned, due to reports of the garden being overgrown.

24. Finally, with regards to the field, Mr MacMillan said that the drainage area is about 30 metres by 100 metres. He said that the area needs ploughed and re-seeded. He spoke to his experience tending to agricultural land.

Analysis

25. In respect of the smoke, heat and carbon monoxide alarms, the Tribunal prefers the evidence of the Applicant and Mr MacMillan. The Tribunal is satisfied that adequate measures for the detection of fire, heat and carbon monoxide were present in the Property throughout the tenancy.

26. Regarding the domestic drainage issues, where the evidence of the Parties conflicts the Tribunal prefers the evidence of the Applicant. He was clear with his dates regarding the first intimation of the drainage issue, and that it was addressed swiftly. That evidence was not challenged by Mr Hammill. His evidence that Mr Hammill notified him of a recurrence, but then confirmed that he had sorted it out himself was consistent with Mr Hammill's. Mr Hammill suggested that the issue was not reported to the Applicant.

27. In respect of the EICR and EPC, the Tribunal finds that those documents were not within the Property at the commencement of the tenancy, and that they were not provided to the Respondent during the course of the tenancy. The Applicant's evidence was that he believed the documents were in the Property, but he had no first-hand knowledge of their being there. He deferred to Mr MacMillan, who had no recollection of seeing any specific documents. The Applicant even admitted that he had attempted to obtain further copies but had been unsuccessful. In the circumstances, the Tribunal prefers the evidence of Mr Hammill.

28. Regarding the arena, there was conflicting evidence from the parties regarding the suitability of both the arena surface as at the date the tenancy commenced and with the material that the Respondent laid on top of the pre-existing material. We were not persuaded that the condition of the arena was unsuitable for equestrian pursuits. That is a matter which the Tribunal would have required to hear expert evidence in order to properly determine it. No such evidence was produced by the Respondent. Similarly, we were not persuaded that the material laid by the Respondent was an inferior product that had been banned by authorities. No credible evidence was presented in that respect. Insofar as the arena is concerned, the Tribunal determined that its composition was gravel, a membrane and then silica sand, and that the Respondent laid shredded carpet fibre material on top during the tenancy.

29. Regarding the field, the Tribunal was similarly unable to determine whether its condition was unsuitable for equestrian pursuits. That is not a matter that the Tribunal is knowledgeable in, and it would have required expert evidence in relation to.

30. In respect of all other matters, the Tribunal found the witnesses to be generally credible and reliable. They gave their evidence in a straight-forward and clear manner, and the Tribunal did not doubt that they believed in what they were saying. The real question was how that fit together in the context of this Application, and which of the parties is correct regarding repairing responsibilities for different areas according to the Tenancy Agreement.

Discussion

Abatement

31. A tenant's remedies when faced with a landlord in breach of his repairing obligations was set out by Sheriff Principal Caplan in *Renfrew District Council v Gray*, 1987 S.L.T. (Sh. Ct.) 70, at page 72, where he said:-

"On my reading of the authorities there are three remedies open to a tenant who does not get full or effective possession of the subjects leased. In the first place he can retain the rent. However this measure is to secure performance or secure against the rent such rights as may ultimately be established and does not by itself govern the eventual obligation to pay rent. Secondly, the tenant may be able to claim damages if loss is incurred due to the landlord's breach of contract. Thirdly, the tenant may claim an abatement of the rent on the basis that he has not enjoyed what he contracted to pay rent for. Rights to abatement of rent and damages for loss due to breach of the lease may in many cases be equivalent in practical terms but they are different concepts. It is a prerequisite of damages that there has been a breach of contract and the quantification is based on established loss flowing from the breach. Abatement of rent as illustrated by the authorities is an equitable right and is essentially based on partial failure of consideration. That is to say, if the tenant does not get what he bargained to pay for it is inequitable that he should be contractually bound to pay such rent."

32. The Respondent's first line of defence therefore necessarily brings us back to the Tenancy Agreement. That is the only agreement between the Parties, and sets out the extent of their obligations. Clause 16 requires the Respondent, as tenant, to generally take care of the Property so as to avoid damage occurring. The bulk of the repairing obligations are set out at Clause 17, and place the obligation on the Respondent to undertake repairs.

33. However, the phrasing of Clause 17 is not particularly helpful in respect of properties of the nature of the Property. It plainly envisages an ordinary domestic dwelling, and whilst the Property includes such a dwelling, the equestrian parts of the Property do not comfortably sit within that clause. Clause 17 focuses primarily on the statutory Landlord's Repairing Standard, the purpose of which is to ensure that residential properties are safe for tenants to reside in. The statutory repairing standard does not apply, for example, to fields or equestrian arenas.

34. Having regard to the terms of the Tenancy Agreement, we have concluded that the Applicant's repairing obligations therein relate to the dwellinghouse only. It focuses entirely on the dwellinghouse and not on any non-accommodation external areas. For that reason, the Tribunal does not consider that the Respondent is entitled to abatement in respect of any alleged want of repair of the riding arena, field or external water sources not serving the dwellinghouse.

35. Even if we are wrong in our analysis of the Applicant's repairing obligations, the Tribunal was not satisfied with the Respondent's evidence that there was

any want of repair with the arena or field. No warranty was given by the Applicant as to the suitability of either the arena or the field for any purpose against which to benchmark the standard of repair. The Respondent's allegations that the arena and field were unsuitable for equestrian pursuits would have required evidence from an appropriate independent expert to establish its suitability in any event, and no such evidence was produced. For all of those reasons, if we had been required to reach a determination on whether there were wants of repair with the arena and/or field, we would have found that no wants of repair existed.

36. Turning then to the alleged wants of repair within the accommodation itself, we consider that the Respondent is not entitled to any abatement in respect of the drainage issue. The Applicant attended to the drainage issue promptly when it was first reported. On the second occasion, the Respondent reported it and then dealt with the matter herself before the Applicant had an opportunity to attend to the matter. The Respondent did not notify the Applicant when the issue recurred, and it therefore cannot be said that the Applicant had failed to attend to the matter promptly in breach of his obligations. The Tribunal has also rejected the Respondent's evidence in respect of the smoke, heat and carbon monoxide detectors. The only matter that the Tribunal requires to consider is whether the failure to provide the EPC and EICR entitles the Respondent to an abatement of rent. We consider that it does. The failure to provide that documentation is contrary to the Applicant's contractual and statutory obligations. The Tenancy Agreement expressly states, at Clause 17, that the Landlord is under obligation to provide such documentation. We consider that such failures are to be treated with the utmost seriousness. We therefore determine that the Respondent is entitled to an abatement of £50 per certificate per month of the Tenancy that the certificates were not produced. The Tenancy endured from July 2020 until July 2021, which was thirteen months. Accordingly, we are satisfied that the Respondent is entitled to an abatement of £1,300.

Set-Off of Improvement Costs

37. The Respondent's submission is that she has improved the Property by undertaking works to the arena and the field, and that she is entitled to set-off the sums that she has expended against the rent that she owes.

38. Put shortly, the Respondent is not so entitled. The obligation to make payment of rent is what is regarded in law as a liquid claim. The Respondent's claim is effectively a counterclaim for unjustified enrichment. Its value is not crystallised by reference to a defined obligation, but results from a set of circumstances which themselves require proof. It is, as a consequence, illiquid. A party may not set-off a liquid debt against an illiquid debt (*Logan v Stephen*, (1850) 13 D. 262; *Munro v Macdonald's Executors*, (1866) 4 M. 687). That maxim is subject to the following exceptions: (i) Where the illiquid claim admits of instant verification; (ii) Where both the liquid and the illiquid claim arise out of a mutual contract; (iii) Where on or other of the parties is bankrupt; or (iv) where, in exceptional circumstances, retention has been allowed to meet the justice or convenience of the particular case (*Inveresk plc*

v Tullis Russell Papermakers Limited, [2010] UKSC 19). In this case, none of those exceptions apply. If the Respondent wishes to pursue a claim for betterment, then that is a matter for another process.

39. Even if the Respondent had been able to set-off her claim against her rent liability, the Tribunal was not satisfied that the sums claimed represented betterment of the Property. The Respondent did not lead sufficient evidence that the works undertaken had improved the Property. The Applicant's evidence, which we accept, is that he will now have to incur additional cost to effectively undo all of the works that the Respondent contends were improvements. In that respect, the Property was not improved for the Applicant. We would have found that the Respondent was not entitled to set-off any sums against the rent liability.

The Holding Fee and Abatement Agreement

40. We accepted the Applicant's evidence that the sum which he agreed to abate from the initial rent payment had not been taken into account when calculating the rent arrears. Against that background, the Respondent's submission that a further £500 falls to be deducted fails.

41. In respect of the Holding Fee, we also accepted the Applicant's evidence that the Holding Fee of £1,000 formed part of the Respondent's Tenancy Deposit, and that the said sum is currently held by an approved Tenancy Deposit Scheme. For that reason, we consider that the Respondent's submission that a further £1,000 falls to be deducted also fails. That sum will be returned to the Respondent in due course if her claim to the Tenancy Deposit Scheme for repayment is successful.

Order

42. Accordingly, the Tribunal considers that the Respondent is entitled to a total abatement of £1,300. She is not entitled to set-off any sums against her remaining rent liability, which has been correctly calculated. It follows that the Respondent is under contractual liability to make payment to the Applicant in the sum of £7,700. We will make that order.

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.

20/10/2021

Legal Member/Chair **Date**