

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

Chamber Ref: FTS/HPC/CV/21/1600

Property at Cobrigdale, Oyne, Inch, Aberdeenshire, AB52 6QN (“the Property”)

Parties:

Mr Gerard Dunn, 6 Beechcroft Terrace, Inch, AB52 6WJ (“the Applicant”)

**Mr Peter Lumley, Mrs Sara Hughes, 2802 Crescent Valley Court, Crescent
Valley Court, Katy, Texas USA 77494; 2802 Crescent Valley Court, Katy, Texas
USA 77494 (“the Respondents”)**

Tribunal Members:

**Josephine Bonnar (Legal Member)
Elaine Munroe (Ordinary Member)**

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that an order for payment in the sum of £253 should be
granted against the Respondents in favour of the Applicant.**

Background

- 1. The Applicant seeks a payment order in relation to unpaid rent. A copy private residential tenancy agreement and rent statement were lodged in support of the application.**
- 2. A copy of the application was served on the Respondents. All parties were advised that a case management discussion (“CMD”) would take place by telephone conference call on 17 December 2021 and that they were required to participate. They were provided with the telephone number and passcode. At the request of the Respondents, the CMD was postponed to 4 March 2022 at 10am. The time was then changed to 2pm to accommodate the time difference between Texas and the UK.**

3. The CMD took place on 4 March at 2pm. All parties participated. Mr Lumley advised the Legal Member that the application was opposed. The Respondents stated that the outstanding rent is not due because the Applicant failed to ensure that the property met the repairing standard during the tenancy. As a result, he had failed to meet his contractual obligations to the Respondents who are therefore entitled to an abatement of rent. Mr Lumley further advised that there had been a serious leak at the property. The damage was extensive and affected the bedrooms so that they could not be used. The damage was not repaired for several months. Initially the Respondents continued to pay rent. They were then served with a notice to leave. As the property had still not been brought up to the repairing standard by the end of the tenancy, they do not believe the rent for the last two months is due.
4. Mr Dunn advised the Legal Member that the Respondent's claim is disputed. He confirmed that there had been a leak caused by a burst pipe which occurred during a cold snap in February 2021. It had been difficult to get the work done due to pandemic restrictions, but it was completed within 8 weeks of the leak being reported. Thereafter the Respondents continued to make complaints, but the property had been brought back to a good condition. By this point the relationship between the parties had deteriorated. He has now sold the property and the home report can verify the condition of the property at the end of the tenancy.
5. Mr Lumley advised the Legal Member that the work had not been completed within 8 weeks, that it had taken 8 days for the Applicant to take any action following the leak being reported and that the work did not start for at least 6 weeks. Both parties confirmed that the tenancy deposit repayment was arranged through the approved scheme. Most of the deposit was repaid to the Respondents. The part paid to the Applicant did not relate to arrears of rent.
6. The Legal Member advised the parties that the application would proceed to a hearing to determine whether the unpaid rent is due. The hearing took place by video conference on 17 June 2022 at 2pm. All parties participated.

The Hearing

The Respondent's evidence

7. Mr Lumley confirmed that the timeline lodged by Mr Dunn which provides details of the work carried out is accurate in terms of dates and work specification. He told the Tribunal that they had been woken at 4.45am on 12 February 2021 by a loud banging from the water tank. Water was leaking from the chandelier and down the window frame. They switched the water off and contacted Mrs Dunn by telephone and text. There was a quarter of an inch of water in the bedroom. Mrs Dunn said that someone would be out to investigate. Meantime they contacted the plumber. Mr Lumley referred the Tribunal to page 20 of his submissions, a copy of an email sent to Mr Dunn on 21 February. In the email he noted that they had been surprised that it had taken 8 days for the

Landlord's son to attend and investigate the damage. The email provided details of the damage and the effect on their use of the property. It also states that the leak had been caused by a coupling detaching from the pipe. Mr Dunn was unable to attend himself as he was living in Bahrain at the time. His son did not attend until the 19th. It had started to thaw by then. As the loft had been full of mouse droppings, the water leaking into the house was very dirty and there was a terrible smell. Their dogs became unwell as a result. They decided to chase up the landlord which led to his son attending. The son noted the extent of the damage and reported back to Mr Dunn. He claimed it was worse than they had said, but that was not the case. Mr Lumley said that he had been angry when he sent the email, because of the delay in action being taken, and he made reference to the repairing standard and contractual obligations. He had also become concerned about the safety of the electrics in the property because of the leak. When he checked the electric box, located in the bedroom which was affected by the leak, he noted a sticker which said that the electrics had not been inspected since the 1990's. They were not given an EICR at the start of, or during the tenancy, until he requested that it be arranged.

8. Mr and Mrs Lumley said that they moved into the guest bedroom on the 12 February because the master bedroom was unusable. On the 23 February they moved into the summer room, which is a sitting room located at the other side of the house. This was because the smell had got so bad that the part of the house where the bedrooms are located could no longer be used and they were also worried about the electrics. When the EICR was carried out in May 2021, the electrician was told to disconnect anything that would not pass. The Respondents were not told this and only discovered when they tried to use an outside light and it did not come on. An outside flood light and another garden light had been disconnected. Mr Lumley said that the Landlord had dragged his feet getting the work carried out. He added that there was inadequate insulation in the loft where the leak had occurred. They were unhappy about the delay in getting the work carried out. They had paid their rent as usual in February but withheld the March instalment until progress was made. They were told that contractors were unable to attend due to COVID, but made their own enquiries and were told that an exception would be made for emergencies like this. The March instalment which was due on 21 March was paid on 15 April. The Lumley's said that they continued to sleep in the summer room which was not ideal as there were no curtains on some of the windows. They decided to withhold the April rent payment because of continuing delays and concerns about the electrics and the lack of an EICR. When the work was finished in the master bedroom, the blind was not replaced. They discovered that it was covered in black mould. This was discovered when they moved back into the master bedroom when the EICR had been carried out. Mr Lumley said that he woke up with a pain in his chest. He had pneumonia as a child and has to be careful. They discovered the condition of the blind and were very angry. They contacted Environmental Services. They also spoke to the electrician who told them about disconnecting the lights that did not pass the inspection. They were then served with a Notice to Leave. By this point most of their contact was with Mrs Dunn as Mr Dunn had been ill. Mr Lumley again referred to the email of 21 February. In the last section he listed the work which was outstanding for the property to meet the repairing standard. This comprised – the replacement of

underlay, deep cleaning or replacement of carpet, inspection of the electrics, the replacement of the mattress, removal of skirting in hall to check for damp, insulation installed where missing in the loft, damp in small bedroom fixed, EICR obtained, smoke alarms upgraded to comply with current regulations, the doorway between the kitchen and sunroom made watertight. By the time they vacated the property, most of these had been addressed although the doorway between the kitchen and sunroom had not been resolved. Mr Lumley then referred the Tribunal to an email sent to Mrs Dunn on 11 May 2021. In this he takes issue with a number of repairs issues – the disconnection of lights which did not pass the inspection, the downgrading of the light switch in the summer room, the mouldy blind in the master bedroom, the landlord's refusal to replace the lawn mower, the leak above the kitchen door, a leak above the window in the guest bedroom, the wardrobe doors in the master bedroom not opening properly because of the new carpet, some damage to the bath siding and master bedroom furniture (raised because they did not want to be blamed for this damage when they vacated). Mrs Dunn replied saying that the blind would be replaced, the dimmer switch fixed, the outside light would be fixed, no action was required regarding the lawn mower, and the leaks would be investigated. The dimmer switch and wardrobe doors were addressed. The blind and outside lights were not. A roofer did attend and replaced some tiles, but the leak did not resolve. Mr Lumley then referred to an email dated 30 May 2021 which provided an update on the repair issues. The blind was still to be arranged and the dimmer switch was due to be fixed. They were asked to provide access on 6 June 2021 but were away on holiday. They moved out of the property on the 13 June 2021.

9. Mr and Mrs Lumley said that they had been unable to use the master bedroom and another bedroom also affected by the leak from 12 February until 9 May. The other 2 bedrooms were also unusable from 23 February until 9 May, due to the smell. They could not use the ensuite bathroom throughout this period as well. They continued to use the shower room and there was a toilet at the other end of the house. The small bedroom was used for storage – both for their belongings and some of the Dunn's stuff which they moved to protect them from water damage. In response to questions from the Tribunal, Mr Lumley said that they did not formally notify Mr Dunn that they were withholding the rent but told him when he asked about it that it would be paid when the property was brought up to standard. When it was clear that an impasse had been reached, Mr Dunn offered to let them move out of the property early. As part of the discussions regarding this, Mr Lumley said that they agreed that they would not pay the outstanding rent but that they would also not make a claim on the deposit. However, when they returned from holiday, they received a letter from Mr Dunn's daughter demanding that they pay the rent. Before they moved out, they had the house deep cleaned. They received most of the deposit back except for a small amount which they conceded could be paid to Mr Dunn.

The Applicant's evidence

10. Mr Dunn confirmed that he had been living abroad for several years when the leak at the property occurred. Although aware of a telephone conversation taking place between his wife and Mr Lumley, he was not present during the call and cannot say what was discussed. He relied on the WhatsApp messages sent which indicated that the leak had been a minor issue. The plumber attended to fix it and he thought that the matter had been resolved. There was no need for anyone to investigate, based on what was said in the messages. Although he did not hear the conversation, he indicated that his wife must have been referring to the plumber when she said someone would attend. The Respondents had already been provided with his number. He was under the impression that no further action was required until they made contact again on 19 February. His son went to investigate and reported back that the damage was extensive with collapsed walls and ceilings. Mr Dunn said that he believes the Respondents played down the initial leak because they were responsible for the pipe bursting. That's why they waited until the thaw a few days later to notify him about the extent of the damage. He said that the lease requires them to take reasonable care and to heat the property. He disputes the allegation about the insulation as he installed additional insulation throughout the roof space. However, if a property was not heated the pipes will freeze. With regard to the time taken to get the work carried out, Mr Dunn said that he thinks he did well to get everything finished in 8 weeks when the country was in lockdown, and he was out of the country. Travel was very difficult, and it was hard to get contractors and materials. He confirmed that he did not see the house during the relevant period, but his son confirmed the extent of the damage and he stated that there will be a damp smell if a house is flooded. However, he disputed the claim about the impact of the mouse droppings. Although mouse droppings are usual in a country house, these would have been above the pipe which led to the leak. He confirmed that 2 bedrooms were damaged, but they could have used the other guest bedroom.
11. Mr Dunn said that he had obtained legal advice which indicated that he was not required to obtain an EICR for this type of property. The Respondents had been residing at the property for 2 years and had not previously asked about it. Because they wanted it as quickly as possible, a couple of outside lights which he had fitted himself had to be disconnected. However, there were other outside lights. Mr Dunn said that, once the leak damage had been fixed the Respondents started to complain about numerous minor issues. No matter what action he took to get repairs carried out, they were never satisfied. He said that he accepted that the leak over the kitchen door was not fixed. This is an occasional leak which occurs during heavy rain. He has had roofers at the property on many occasions, but they have not managed to fix it. It's something to do with the pitch of the roof. Mr Dunn said that he had spent £10000 on the property to re-instate it after the leak, which should never have been required. He was unable to claim on his insurance because it was caused by a burst pipe. He advised the Tribunal that the blind had not been replaced because the joiner (who was the main contractor) said that it was not damaged. Mr Dunn said that he did not agree to waive the last 2 months rent. In fact, Mr Lumley had been very careful when he gave evidence about that, he did not say that Mr Dunn had agreed. Mr Dunn added that he told the Respondents that they would not protect their deposit by withholding their rent. He made a mistake by not having

a check in report. As a result, the Respondents got most of their deposit back although he had to spend money getting dog hair and smell out of the house. Following their departure, Mr Dunn said that he instructed a home report. He referred to the report which does not identify any required repairs. Mr Dunn concluded by saying that the timescale for completion of the work was not excessive given the time of year, with burst pipes everywhere and the impact of the pandemic. He was fortunate that he has a good team of people that he can trust to do a good job.

Findings in Fact

12. The Applicant is the former owner and landlord of the property.
13. The Respondents were the tenants of the property in terms of a private residential tenancy agreement.
14. The Respondents were due to pay rent at the rate of £1650 per month.
15. The tenancy ended on 13 June 2021. The Respondents vacated the property on that date.
16. The sum of £2915 in unpaid rent was outstanding at that date.
17. The property suffered extensive damage caused by a leak from a pipe in the loft on 12 February 2021.
18. The Respondents were unable to use the master bedroom of the property from 12 February 2021 until 9 May 2021. They were unable to use the second and third bedrooms at the property and the ensuite bathroom from 23 February 2021 until 9 May 2021.
19. The Landlord did not provide the Respondents with an EICR for the property until 8 May 2022. Two outside lights were disconnected by the electrician during the inspection.

Reasons for Decision

20. The parties are agreed that the tenancy contract stipulates that rent was due by the Respondents at the rate of £1650 per month. The sum sought by the Applicant is for the period 21 April 2021 until 13 June 2021, the sum of £2915. The Respondents deny that they are obliged to pay this sum, because the Applicant failed to fulfil his contractual and statutory obligations to ensure that the property meets the repairing standard. The Tribunal notes that the provisions relating to the repairing standard in the Housing (Scotland) Act 2006 do not include a right to withhold or seek an abatement of rent. The remedy available to tenants is the right to apply to the Tribunal for a repairing standard enforcement order. However, the parties signed the standard Scottish

Government model tenancy agreement which incorporates the repairing standard obligations. The Applicant is therefore contractually obliged to ensure the property meets the standard required. The Respondents main complaint is about the length of time taken by the Applicant to re-instate the property after the leak. Secondly, they are concerned that the property did not have an EICR and that this was not obtained until 8 May 2021, although the leak had affected electrics at the property. In addition, there are several other repair issues raised which were notified to the Applicant in various emails between February and May 2021 which the Respondents also rely upon in their claim for abatement of rent.

21. As Mrs Dunn did not give evidence, and Mr Dunn was unable to say what was discussed by Mr Lumley and Mrs Dunn when he called to report the leak, the Tribunal only have the Respondent's account of that conversation. The Tribunal is satisfied that they were led to believe that someone would be out to assess the damage. As Mr Dunn pointed out in his evidence, the subsequent messages sent by the Respondents were very positive. They suggested that the pipe had been fixed and the property was drying out. However, it would be usual for a landlord to visit following a leak, or to arrange for someone else to do so, even if he believed that the damage might not be significant. Mr Dunn seemed to think that the Respondents deliberately misled him and chose to wait for a week before advising him that the situation was more serious. It is hard to see what the Respondents would have gained if this was the case. The Tribunal is satisfied that the Applicant ought to have arranged for the damage to be assessed more quickly, although the delay of a few days would have had little impact on the overall timescales involved.
22. Mr Dunn made it clear during his evidence that he holds the Respondents responsible for the leak. However, he did not see the property following the leak or arrange the repair. The Respondents claim that the pipe did not burst because of the cold snap but did argue that there was inadequate insulation. Neither party provided clear evidence which established the cause of the leak, and the Tribunal was therefore unable to determine if either (or neither) were at fault.
23. Given the extent of the damage to the property, a period of 8 weeks does not seem unreasonable for the re-instatement work to be completed. The pandemic affected the availability of contractors and materials, and the leak happened during a cold spell when demand would have been high. In any event, the Respondents did not provide any evidence that Mr Dunn was "dragging his feet" although they may well have felt that the work was taking too long, given their living conditions while the work was ongoing. A solution would have been to move out during the work. However, Mr Dunn's offer of an alternative property was not a realistic option, since they were unable to take their dogs with them.
24. The Tribunal is satisfied that the water damage at the property resulted in some rooms being uninhabitable. The Applicant did not lead any evidence which challenged the Respondent's account on this issue. He did not see the property during the relevant period but knew from his son that the damage was

extensive. He also conceded that there would be a smell of damp. The Respondents explained that two bedrooms had been damaged, and a third could not be occupied as it was used for storage. A bathroom and 4th bedroom were also out of commission, due to the smell and concern about the electrics. This situation persisted for three months, during which time the Respondents slept in a living room at the other end of the house.

25. Two complaints are made about the electrics at the property. The first is that the Respondents had contracted with the Applicant for the use of the whole property and to a particular standard. Following the issue of the EICR they were deprived of 2 external lights and the dimmer switch in the summer room, although this was later addressed. The Tribunal is not satisfied that these minor issues could justify an abatement of rent, particularly when the lights were only out of action from 8 May 2021 until the tenancy ended a month later. The Respondents were also away on holiday for part of that last month. The second and more significant issue is the lack of an EICR. This was raised with the Applicant on 21 February 2021, although he ought to have been aware that it was required before the tenancy started and ensured that it was provided. This ought to have been arranged immediately, particularly, since the leak affected lights in the master bedroom and the electric box is located there. The Tribunal is therefore persuaded that this was an additional valid reason for the Applicants to stay out of the part of the house affected by the water damage.
26. The other matters raised by the Respondents are all relatively minor. If the blind was affected by mould, the Respondents did not notice until they had moved back into the master bedroom. They did not identify any problem until the following day. It therefore seems likely that the contractor may also have been unaware that there was a problem, and Mr Dunn was relying on him as he was out of the country. However, the Tribunal notes that Mrs Dunn referred to new blinds in some of the messages/emails which were sent to the Respondents, so they may have expected that new blinds were being fitted. Mr Dunn referred the Tribunal to an email he received from Environmental Services. However, this email only indicates that the tenants were advised to remove the blind if it was a health hazard. It does not support either party's position regarding the condition of the blind. In any event, the Tribunal is not persuaded that this was a serious issue and again it only affected the last month of the tenancy. Although several other issues were raised by the Respondents in their emails in February and May 2021, there was no evidence that these had a significant impact on their use and enjoyment of the property which would justify an abatement of rent.
27. The Respondents assert that they are entitled to an abatement of rent because of the condition of the property from 12 February 2021 until the end of the tenancy. In the case of *Renfrew District Council v Gray* 1987 SLT (Sh Ct) 70, the Council sought an order for payment for rent arrears. It was agreed by the parties that the property had been uninhabitable for a period. Despite this, the tenant had continued to reside there but had not paid rent. The Sheriff found in favour of the Council, stating that the tenants had been entitled to withhold rent,

but that they ought then to have paid it to the Council once the repairs had been completed. The decision was reversed on appeal. Sheriff Principal Caplan concluded that there were three remedies available to a tenant – retention of rent, damages, and abatement of rent. He stated, “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... 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 rent for it is inequitable that he should be contractually bound to pay such rent”. (72).

28. Applying the reasoning in the Gray case, it is clear that it does not matter whether the re-instatement work was carried out speedily or otherwise. The Respondents contracted with the Applicant to let a four-bedroom property with ensuite bathroom. From 12 February onwards they were unable to use several rooms, including the main bedroom and bathroom. It was not established that the whole property was uninhabitable, but the Tribunal is satisfied that several rooms could not be used. The Respondents are therefore entitled to an abatement of rent for the relevant period, namely 12 February to 9 May 2021, approximately 3 months. The disruption was significant, but they still had washing and toilet facilities and somewhere to sleep, although the room they used was a sitting room. In the circumstances, the Tribunal is persuaded that the rent payable for the three-month period affected by the leak and the lack of an EICR should be abated by 45%. The Tribunal is not satisfied that they are entitled to an abatement for the period from 10 May 2021 until the vacated the property on 13 June 2021, approximately one month
29. The Respondents paid the rent due on 21 January, 21 February and 21 March 2021. The payments made during this period which are subject to the abatement are one third of the January payment (for 12 to 20 February) and all the February and March payments. The Respondents did not pay the instalment due on 21 April, for the period to 20 May 2021 or the payment due on 21 May for the period to 13 June 2021, when the tenancy ended. The sum paid for the relevant period was £3795. The sum due (once the abatement is applied) is £4048. The Tribunal therefore determines that the sum due to the Applicant is £253.

Decision

30. The Tribunal determines that a payment order should be granted against the Respondent for the sum of £253.

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.

Josephine Bonnar, Legal Member

20 June 2022


