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/21/1801

Re: Property at 16 Lower Granton Road, Edinburgh, EH5 3QH ("the Property")

Parties:

Miss Helen Corrigan and Mr Andrew McNiven, 93/A 2 Parkgrove Terrace, Edinburgh, EH4 7RD ("the Applicants")

Mrs Alison Watson, 26 Penicuik Road, Rosslyn, Midlothian, GH25 9LH ("the Respondent")

Tribunal Members:

George Clark (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent had been in breach of contract and made an Order for Payment by the Respondent to the Applicant of the sum of £2.700

Background

1. By application, received by the Tribunal on 23 July 2021, the Applicants sought an Order for Payment of the sum of £18,900 as reparation for breach of contract by the Respondent. The Parties had entered into a tenancy of the Property which commenced on 16 February 2011 and ended in November 2018. Throughout the tenancy, the Applicants had been put to the inconvenience of complaining about and reporting dampness and disrepair issues and of allowing the Respondent or those acting under their instructions to visit the Property in an attempt to address those issues. The problems had

never been fully addressed. The Respondent did not carry out the necessary works within a reasonable time. A report obtained from Dr Stirling Howieson had confirmed that there were several specific areas where the Property did not meet the repairing standard. The report confirmed the presence of significant dampness and mould and that the Property was not wind and watertight. The gutters were not in a reasonable state of repair and the timber windowsills and architraves were rotting. The electrics were not safe and damage to the front door had left the Property insecure. The Respondent was in breach of Section 13 of the Housing (Scotland) Act 2006 and, having failed to carry out repairs timeously, Section 14 of that Act.

2. The Application stated that the Respondent had failed in their duties under the Tenancy Agreement, as the Property was not wind and watertight (Clause 21) and defective fixtures and fittings were not repaired or replaced within a reasonable period of time (Clause 24).

3. As a result of the Respondent's said breaches of contractual and statutory duty, the Applicants had suffered loss, damage, stress and inconvenience. They could not heat the Property to a reasonable comfort level and their heating costs were excessive. The had worried constantly about the dampness and disrepair issues including electrical problems, gas leaks, mice infestations, leaking windows, holes and splits in the flooring, leaking pipes and broken external locks.

4. During the seven years and eight months that they had lived in the Property, £37,800 was paid in rent. The amount sought was one-half of that sum, which in the circumstances described, was a reasonable estimate of the loss sustained by the Applicants due to the condition of the Property, and the extent to which they were unable to enjoy the subjects that they had let. The Applicants had called upon the Respondent to make reparation, but the Respondent had refused to do so.

5. The application was accompanied by a copy Tenancy Agreement between the First-named Applicant and the Respondent's late husband, commencing on 16 February 2011 at a rent of £460 per month, a report by Dr Stirling G Howieson dated 18 September 2018 and copies of various email exchanges between, principally, the Applicant Miss Corrigan and the Respondent's letting agents, Glenham Property.

6. On 12 August 2021, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the Respondent was invited to make written representations by 2 September 2021. The Case Management Discussion scheduled for 15 September 2021 was postponed at the request of the Respondent's solicitor and was rearranged for 12 October 2021.

7. On 27 September 2021, the Respondent's solicitors submitted written representations on her behalf. The Respondent admitted that during the tenancy, the Applicants had complained and reported disrepair issues. With the exception of one letter dated 17 May 2018, they had been addressed to the Respondent's letting agent. A few days after receipt of the letter of 17 May

2018, the Respondent's son had visited the Property and had offered to lay underlay and carpets to prevent draughts through gaps in the floorboards. The offer had been accepted but, despite attending three times during the days following, he had been refused entry to carry out these works. The Respondent's solicitor listed nine instances of repairs carried out at the Property between October 2016 and April/May 2018 and provided the Tribunal with the relevant invoices/receipts. In September and October 2017, the Respondent's letting agent had tried to arrange repairs to the roof and guttering of the tenement incorporating the Property, but only one proprietor apart from the Respondent had agreed to authorise the works, so the remedial works did not proceed.

8. The Respondent's solicitors also provided the Tribunal with copies of Landlord/Home Owner Gas Safety Records dated 11 October 2016 and 5 October 2017 which, they said, recorded that no Warning Notices were issued and no Warning tags or stickers were affixed to any gas appliances at the Property. Copies of the letting agent's Routine Inspection Reports dated 13 October 2016 and 7 August 2017 were also provided to the Tribunal

9. The Respondent denied that the sum sought was a reasonable estimate of the loss sustained by the Applicants if it was the case (which was denied) that the Respondent was in breach of the Tenancy Agreement between the Parties. The Respondent had refused to make reparation, under explanation that none was due.

Case Management Discussion

10. A Case Management Discussion was held on the morning of 12 October 2021. The Applicants attended and were represented by Ms Hazel Bon of the Civil Assistance Office, Edinburgh. The Respondent was represented by Mr Andrew Taylor of Murray, Beith, Murray, solicitors, Edinburgh.

11. Ms Bon told the Tribunal that she understood that there had been issues of dampness in the Property from early on in the tenancy and that these had been reported verbally to the late Mr Watson. Letting agents had taken over management of the letting in 2016. The Applicants accepted that the repairs and other works detailed in the Respondent's written representations had been carried out between 2016 and 2018, but the bath sealing work had not been properly done. The Applicants had complained about the gas pipe behind the cooker prior to a gas leak having been discovered. A second emergency notice had been applied to the boiler in May 2018. In September 2016, Mr Watson, junior, had visited the Property and told the Applicants that the letting agents were taking over. He had assured them that the agents would ensure all necessary work was carried out. The Applicants denied the suggestion of the Respondent that Mr Watson, junior, had been denied access to the Property after he agreed to fit underlay and carpets.

12. Ms Bon told the Tribunal that this was a claim for reparation for breach of contract by the Respondent.

13. Mr Taylor, for the Respondent, said that no evidence had been provided in respect of any issues prior to 2016, when the letting agents took over and it would be grossly unfair for evidence to be allowed which referred to the period prior to 2016. The Respondent, Mrs Watson, had had minimal involvement in the management of the tenancy before it was handed over to the letting agents. The central issue, as he saw it, was the amount that the Applicants were seeking to recover. There was no basis stated as to why it should be one-half of the rent rather than one-quarter or any other fraction.

14. Ms Bon responded that the issues had been long-standing and did not suddenly emerge in 2016. They were the result of long-term neglect.

15. The Tribunal Chair asked the Parties if they were of the view that a full evidential Hearing would be required and granted a short adjournment to allow the Applicants' representative to obtain instructions. When the Case Management Discussion reconvened, Ms Bon stated that her clients were content for the Tribunal to deal with the matter without a full evidential Hearing. Mr Taylor was in agreement with that. The Parties' representatives then addressed the Tribunal on quantum.

16. Ms Bon referred the Tribunal to previous cases where the Tribunal had made Rent Relief Orders as high as 50% in respect of failure by landlords to comply with a Repairing Standard Enforcement Notice. 50% of the rent paid was reasonable in this case. Every room was significantly affected by dampness, there were various items of disrepair and also rodent infestation. The Applicant had paid the rent but had been unable to enjoy the subjects let. Ms Bon also referred the Tribunal to the English case of *Wallace and Others v Manchester City Council*, heard by the Court of Appeal (Civil Division) on 7 July 1998, where the Court had looked at stress, inconvenience and loss of enjoyment being valued on the basis of a proportion of the rent. The situation had had a huge impact on the Applicants, who had been paying rent for a property that was not fit for habitation.

17. Mr Taylor contended that there should be a set figure to cover a set period of the tenancy to reflect the Respondent's breach of contract, which he conceded seemed to be evident. He asked the Tribunal not to punish the Respondent for the non-action of other owners in the tenement in relation to necessary common repairs. The Respondent had also, in 2018, applied to the Tribunal at the time for an Order for Possession on the ground that the Property required substantial repair work which could not be carried out while the Applicants remained in occupation as tenants.

Reasons for Decision

18. Regulation 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to enable it to decide the application without a Hearing. In addition, the Parties had indicated that they would be content to have the application determined following the Case Management Discussion.

19. The Tribunal's conclusion from the evidence was that this was essentially a debate about quantum. Both Parties accepted that repairs that were required had not been carried out within a reasonable period. The explanation offered on behalf of the Respondent was that the major work required was a common repair. The letting agents had obtained quotes and had attempted to obtain the agreement of the other owners in the tenement to having the work carried out, but only one owner had agreed, so the work could not proceed. Whist this might have been the reason for repairs not being caried out, it did not alter the fact that the Applicants had to live in a property which was in need of repair.

20. It was common ground that the Respondent had breached the terms of the tenancy agreement by failing to carry out, within a reasonable period, repairs to the Property that had been intimated by the Applicants to the Respondent's letting agents. The Tribunal had not, however, been provided with any evidence which related to the period prior to the appointment of the letting agents in 2016, so was not prepared to consider the situation that pertained prior to that date. The Tribunal accepted the Applicants' contention that the repairing issues had not just emerged in 2016, but, in the absence of any evidence, any award relating to that period would be based on speculation. It appeared that the letting agents had been appointed in or around September 2016 and the Applicants vacated the Property in November 2018.

21. The report by Dr Stirling Howieson dated 18 September 2018 identified dampness and mould on the inside of the external walls of the Property. The windows were not wind and watertight and the exposed tongue and groove joints in the sanded and exposed floorboards were split in many places and admitted draughts. The roof gutter was blocked with vegetation and the timber windowsills and architraves were in poor condition. There was also an issue with the waste pipe adjacent to the kitchen sink. The electric wiring appeared to be beyond its lifespan and the front entrance door was damaged. The Tribunal was satisfied that the Applicants' enjoyment of the Property had been significantly impacted by the problems they had experienced and by repairs issues that had not been remedied by the Respondent within a reasonable time after they were reported to the letting agents.

22. The Applicants wrote directly to the Respondent on 17 May 2018, acknowledging a ten-day abatement of rent as a result of the boiler being broken. They also stated that, until the necessary repairs were carried out they were unwilling to pay an increase in the rent from £460 to £525 per month, which, according to an email of 15 August 2017 from the Applicant Miss Corrigan to the letting agents was to take effect from August 2017. The

Tribunal determined, therefore, that the rent on which the calculation of damages should be based, was £460 per month.

23. The Respondent had not questioned the accuracy of the Report from Dr Howieson and the Tribunal, therefore, accepted it as an accurate assessment of the condition of the Property in September 2018. The Tribunal also took into account the fact that the Applicants had suffered anxiety and stress resulting from a gas leak in June 2017.

24. The Tribunal considered the analogy that the Applicant's representative had drawn with Rent Relief Orders made by the Tribunal but was not persuaded that the analogy was useful. A Rent Relief Order is made after the Tribunal has inspected a property, decided it does not meet the Repairing Standard, and issued a Repairing Standard Enforcement Oder with which the landlord has then failed to comply. Crucially, Rent Relief Orders are not retrospective. They are, in essence, a sanction imposed by the Tribunal for the failure by a landlord to comply with an Order of the Tribunal

25. The Tribunal agreed with the decision in *Wallace and Others v Manchester City Council,* where the Court of Appeal in England held that damages payable to a tenant for a landlord's failure to repair where the tenant remains in the property are not separate damages for discomfort and diminution in rental value since these amount to the same thing. The Tribunal had, therefore, to quantify the difference in rental value between the disrepaired Property in the condition identified in Dr Howieson's report and what that value might be if the landlord had fulfilled the repairing obligation.

26. The Tribunal accepted that this process was not an exact science, particularly as it was likely that the repairs issues would have become worse during the period from September 2016 and November 2018, the period under consideration by the Tribunal. The Tribunal could not speculate on the condition of the Property in September 2016, so could not apply a graduated differential.

27. Having considered carefully all the evidence, written and oral that had been presented to it, Tribunal decided that a reasonable estimate of the diminution in rental value was £100 per month and that this figure should be applied to the 27 months from September 2016 to November 2018 inclusive, the aggregate amount being £2,700.

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.

G. C

____________________________ **12 October 2021**
Legal Member/Chair **Date**