

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

**Chamber Ref: FTS/HPC/CV/22/1035**

**Re: Property at 11 Iona Street, Edinburgh, EH6 8SG (“the Property”)**

**Parties:**

**Ms Helen Clift, Moulin Du Paradis, 56160 Langoelan, Langoelan, France (“the Applicant”)**

**Ms Dani Oluwashegun, 11 Iona Street, Edinburgh, EH6 8SG (“the Respondent”)**

**Tribunal Members:**

**Ms H Forbes (Legal Member) and Mrs S Brydon (Ordinary Member)**

**Decision (in absence of the Respondent)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment should be granted in favour of the Applicant in the sum of £3660.**

**Background**

1. By application dated 7<sup>th</sup> April 2022 and made under Rule 111 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended (“the Rules”), the Applicant applied for an order for payment in the sum of £1830 in respect of alleged unpaid rent. The Applicant lodged a rent statement, email correspondence between the parties, unsigned private residential tenancy agreement, Rent Service Scotland letter dated 10<sup>th</sup> March 2022 and rental agreement commencing on 17<sup>th</sup> July 2021.
2. By email dated 7<sup>th</sup> June 2022, the Respondent lodged written representations.
3. A Case Management Discussion (“CMD”) took place by telephone conference on 6<sup>th</sup> July 2022. The Applicant was in attendance. The Respondent was not in attendance. The case was continued to a hearing and a Direction was issued directing the Respondent to lodge a note of defence.

4. By letter and email dated 20<sup>th</sup> July 2022, the Respondent made written representations in response to the Direction. A further copy of the representations was lodged by the Respondent by email dated 26<sup>th</sup> July 2022.
5. By email dated 4<sup>th</sup> August 2022, the Applicant made an application to increase the sum sought to £4420.
6. Parties were notified on 12<sup>th</sup> August 2022 of a hearing to take place by telephone conference on 27<sup>th</sup> September 2022.
7. By email dated 19<sup>th</sup> September 2022, the Applicant made an application to increase the sum sought to £5535. The Applicant lodged an inventory of productions.
8. By email dated 21<sup>st</sup> September 2022, the Applicant made an application to increase the sum sought to £5895. The Applicant lodged a copy of a Tribunal decision in an appeal lodged by the Respondent to a Rent Officer's determination in terms of Section 28 of the 2016 Act.
9. By email dated 23<sup>rd</sup> September 2022, the Respondent lodged further written submissions and a rent statement.

### **The Hearing**

10. A hearing took place by telephone conference on 27 September 2022. The Applicant was in attendance. The Respondent was not in attendance. The start of the hearing was delayed in case there was an issue with the Respondent gaining access to the telephone conference.
11. There were some preliminary discussions regarding whether the hearing could proceed. The Tribunal heard from the Applicant in this regard. It was her position that the hearing should proceed. She was concerned that arrears are mounting and the matter has been going on for some time. There was some discussion about the fact that the last two applications to amend the sum sought were not lodged timeously, and the Tribunal would not be accepting them. The Tribunal indicated that it would accept the application to increase the sum sought as lodged on 4<sup>th</sup> August 2022. The Applicant indicated that she was content with that position and would make a further application to the Tribunal in due course, but it was her preference to continue with the hearing today based on the sum sought as at 4<sup>th</sup> August 2022.
12. The Tribunal adjourned to consider its decision. The Tribunal considered the terms of Rule 29. The Tribunal determined that the Respondent had been given reasonable notice of the time and date of the hearing and that the requirements of Rule 24(1) had been satisfied.
13. The Tribunal noted that no application had been made by the Respondent to adjourn the hearing, despite having made late representations, and no reason

had been given for her non-attendance. The Tribunal noted that the Respondent had set out her position in detail in her written representations. The Tribunal was concerned that the Respondent had referred to documents in her representations, but the documents had not been lodged by the Respondent. The Tribunal Clerk made enquiries in this regard to ascertain whether the documents had been lodged together with the representations, but there was no indication that the documents had ever been lodged, despite the Respondent having lodged her written representations twice. The Tribunal took the view it was the responsibility of the Respondent to ensure that productions were lodged.

14. The Tribunal took into account that the Respondent had not attended at the previous CMD. The Tribunal was concerned that, if the hearing was adjourned, and another hearing fixed, which was not likely to be scheduled for approximately two months, the Respondent may not attend, and this would only delay matters further. The Tribunal took into account the fact that the application was made in April 2022, and that the arrears had risen since that time. Having considered all the circumstances, the Tribunal considered it was appropriate to proceed with the application and the hearing in the absence of the Respondent.
15. The Tribunal considered it was appropriate to accept the late productions lodged by both parties. The following PDF documents were referred to:
  - (i) Written Representations Applicant 4<sup>th</sup> August 2022 – 4 pages
  - (ii) Applicant Submissions 19<sup>th</sup> September 2022 – 191 pages
  - (iii) Applicant E-mail with Rent Statement 21<sup>st</sup> September 2022 – 11 pages
  - (iv) Response to FTT July 22 (Respondent) – 7 pages
  - (v) Respondent's Updated Rent Statement – 6 pages
16. Upon reconvening, the Tribunal indicated that it would not be considering the following claim made by the Respondent in her most recent submissions:

*The claimant owes me £2500 in excess rent payment from excess payments made for gas and electricity. Bills from the provider, initially SSE and now OVO from November 2021 have been repeatedly requested but claimant refused to provide the required bills (see emails from 18th August). As the tenant residing in the property, there is a statutory requirement to be provided with bills which I pay for, which the claimant has withheld; a civil claim for payment is hereby made.*

The Tribunal considered that it was not appropriate to accept a counterclaim of this nature and the Respondent would have to make a separate application to the Tribunal with the necessary evidence, if she was so minded.

## Rent Arrears

### The Applicant's position

17. The Applicant explained the background to the case. She had intended the let of the Property, which commenced on 17<sup>th</sup> July 2020 at a rent of £1050, to be a short term let. She was advised by a letting agent that this was acceptable, and a six-month lease was put in place. The Applicant later became aware that this was not correct in law, and she accepted that the tenancy was a private residential tenancy ("PRT") from the start.
18. The Applicant took the Tribunal through the rent statement submitted with the application to increase dated 4<sup>th</sup> August 2022. The initial rent was £1050 and this included an element for council tax and utilities. The Respondent paid no rent on 17<sup>th</sup> February 2021, and that took her into rent arrears. There were email discussions between the letting agent and the Respondent in that regard (p26/191). The Respondent said her payments had been delayed due to administrative changes as a result of the Covid-19 pandemic. The arrears were cleared in July 2021. No rent was paid on 17<sup>th</sup> August 2021. Thereafter, negotiations were taking place as to whether the rent would be paid in advance or in arrears.
19. In January 2022, the Respondent took on responsibility for council tax, and the rent was reduced to £915. In March 2022, the Respondent paid no rent. By letter dated 10<sup>th</sup> March 2022, the rent was increased by the Rent Officer to £1105, which included utility bills, to take effect from 17<sup>th</sup> April 2022. The Respondent appealed the decision of the Rent Officer.
20. The Respondent paid £915 in late April 2022, and the same sum in early June 2022. No further rent was paid up to 4<sup>th</sup> August 2022. The Applicant explained that she had found it difficult to know how to attribute rent paid in the rent statement, as it was difficult to know if the Respondent was paying her rent in advance or in arrears. The Applicant said she had drafted the statement as if the rent was being paid in advance, for instance, attributing the rent paid on 7<sup>th</sup> June 2022 as the rent due on 17<sup>th</sup> June 2022, rather than attributing it as a late payment for May.
21. The Applicant had expected the Respondent to move out on 17<sup>th</sup> July 2021 as originally discussed. When that did not happen, the Applicant changed her letting agent and attempts were made by the new letting agent to put a written PRT agreement in place. The Respondent would not agree to the content of the PRT. The letting agent was unable to change their model agreement and recommended that the Applicant negotiate using the Scottish Government model agreement. Negotiations then took place between the parties directly.
22. The Applicant took the Tribunal through the chronology in relation to the draft PRT agreements provided by her to the Respondent (p25/191). There were five draft PRT agreements provided, the first one being provided on 15<sup>th</sup> October

2021. The Respondent wished to change her rent payment arrangement, so that she would pay her rent in arrears on the 17<sup>th</sup> of the month. There were extensive email discussions between the parties in this regard (pp30-38/191). The Applicant's position was that she was agreeable to the rent being paid in arrears, provided that the Respondent paid a further £500 deposit to allay the Applicant's concerns about unpaid rent. The Respondent indicated she was agreeable to this; however, she edited the draft PRT agreements to remove the reference to an additional deposit and to reflect that the rent was to be paid in arrears. The Applicant's position was that she was only agreeable to the rent being paid in arrears if the additional deposit was paid, so she amended the draft PRT agreements to reflect her position.

23. There was also discussion taking place between the parties about the Respondent's responsibility for the stairwell. The Applicant said she became concerned that the Respondent was repeatedly editing the draft model PRTs, so she sent a digitally signed copy of a PRT dated 27<sup>th</sup> December 2021 (pp77-102/191), in the hope that the Respondent would make no further amendments. This copy stated at clause 7 that rent would be paid in advance from 17.1.22 and no additional deposit would be paid. However, the Respondent then edited clause 7 of the PRT to read that payment would be made in arrears from 17.1.22 (pp103-128/191).

24. The only signed copy of a PRT was signed by the Respondent on 18<sup>th</sup> October 2021 and the Applicant on 27<sup>th</sup> December 2021. It was the Applicant's position that no agreement on a PRT had been reached between the parties, due to the disagreement over the additional deposit, and the signed PRT had been doctored by the Respondent. The Applicant believes there is no PRT in place, therefore, no agreement that payment of rent can be made in arrears. Rent is, therefore, due in advance on the 17<sup>th</sup> of each month and covers the month ahead, as agreed between the parties at the start of the tenancy.

### **The Respondent's position**

25. The representations from the Respondent were referred to by the Tribunal throughout the hearing. It was the Respondent's position that there had been agreement on the terms of the PRT, to the effect that rent could be paid in arrears. That meant she was not in arrears when the application was initially made. Any further arrears had arisen because she was withholding rent due to repairs required to the Property. The Respondent had stated in her representations that the claim for rent was false as it was based on an unlawful and procedurally defective rent estimation by the Rent Officer, who had failed to undertake a physical inspection. She had appealed the Rent Officer's decision by application dated 24<sup>th</sup> March 2022. The case had been due to be heard by a Tribunal on 6<sup>th</sup> July 2022, but it had been adjourned, and was heard on 6<sup>th</sup> September 2022.

26. It was the Respondent's position that rent had been paid for the period from 17<sup>th</sup> August 2021 on 23<sup>rd</sup> July 2021. Thereafter, she withheld rent until 'the matter was resolved'. The Applicant did not acknowledge receipt of the July

payment until 8<sup>th</sup> September 2021. It was the Respondent's position that, due to the Applicant's delay in confirming she had received payment, subsequent rent payments became arrears payments. The parties had negotiated thereafter, and it was the Respondent's position that they agreed payment in arrears and a PRT to that effect was signed on 18<sup>th</sup> October and 27<sup>th</sup> December 2021.

27. The Respondent claimed that the Applicant was seeking retaliatory eviction and had made up false and misrepresenting allegations of rent arrears since July 2021.

## **Repairing Issues**

### **The Applicant's position**

28. The Applicant referred to the decision of the Tribunal in the rent increase case, dated 6<sup>th</sup> September 2022, which she had lodged. She pointed out that the Tribunal referred only to issues with uneven flooring in the hall and kitchen and exposed pipes within a cupboard area that had no doors. It was her position that, had the situation been so bad that the Respondent was justified in withholding rent, the Tribunal would have noted that. The Tribunal increased the monthly rent to £1165.
29. The Applicant said she arranged for a gas safety check to be carried out in mid-October 2021. The engineer noticed a leak in the pipes. He fixed the leak, which had affected the flooring. He carried out repairs to fix the flooring at that time. The Applicant was concerned that the leak may have been happening for some time and there could be further damage to the joists. She was keen to have the floorboards lifted to investigate matters and determine whether there was structural damage. She intended to claim the repairs on insurance, after obtaining a quote from a joiner. The Respondent would not allow the flooring to be lifted to enable the investigations to go ahead. The Applicant said it had only become clear at the hearing on the rent increase on 6<sup>th</sup> September 2022 that the Respondent's reason for refusing was because she felt the work would be too disruptive and she only wanted the flooring fixed.
30. The Applicant referred to an email from her to the Respondent dated 4<sup>th</sup> May 2022 (p40/191) stating that it was not appropriate to withhold rent for works to the floors whilst refusing access to the tradesmen. The Applicant provided the joiner's email address to the Respondent to allow her to contact the joiner to arrange access. The Applicant stated that, when the investigations had been completed for insurance purposes, she would have a handyman ready to repair any damage *'as per my previous emails'*, and *'if there are holes/exposed pipes that need to be dealt with, you need to send me photos so that I can organise repairs in advance of the handyman coming'*. It was the Applicant's position that the email showed she had previously been in touch with the Respondent in this regard.

31. By email dated 10<sup>th</sup> May 2022 (p41/191), the Respondent stated '*As you have failed to make the necessary repairs to the property, it is appropriate to make arrangements for repairs myself as the occupant.*' On the same date, the Applicant reiterated that the Respondent should make an appointment with the joiner and allow access, otherwise it was impossible to make an insurance claim and effect repairs.
32. By email dated 18<sup>th</sup> May 2022 (p42/191) the Respondent wrote that she was holding two months' rent on account for full repairs to the floor as it was likely she would have to pay for it herself. She wrote that previous quotes would have cost the Applicant four months' rent, but she was seeking a more suitable quotation. The Applicant responded on the same day to say that it was her responsibility to undertake repairs and the Respondent must allow access to the joiners to get the process underway.
33. The Applicant said the amount of £2745 mentioned in the Respondent's most recent representations (p3/6) described as being '*payments set aside to remedy failure to repair and keep the property safe*' did not appear to be based on any quote. The Applicant said she had never received a written quote from the Respondent and presumed the Respondent had got verbal quotes from contractors.
34. The Applicant said she had arranged prompt attendance by plumbers on both occasions of issues with the heating system. The Respondent had never been without hot water or heating. There had also been issues in relation to getting the gas safety certificate carried out, as the Respondent limited the time allowed for a contractor to attend to one hour.
35. The Applicant said there were other emails between the parties in March 2022 where the Applicant was asking the Respondent for her availability in terms of arranging access for the joiner. These emails were not lodged with the Tribunal. There had been no response from the Respondent.
36. In April 2022, a heating engineer had visited the Property and reported on issues with the flooring. Responding to questions from the Tribunal, the Applicant said she was not aware of any mobility issues with the Respondent but she accepted that the flooring was causing a trip hazard and allowing access for rodents.
37. Responding to questions from the Tribunal, the Applicant said she would have had a joiner attend, had the Respondent agreed, and the work would have been carried out at that time, or soon afterwards, depending on what was required. Now, the situation was that access was to be given in October 2022 to patch up the floor at a cost of £600. The investigative work will not be carried out at this time and will have to wait until the Property is empty, as the Respondent will not agree to it.

38. The Respondent had previously queried the contractors that the Applicant had arranged to do the investigative work, stating that they were not joiners, but plumbers. The Applicant referred to an email dated 4<sup>th</sup> July 2022 (p44/191) where she pointed out to the Respondent that the firm had different trades, and provided the joiner's direct phone number. In the email, the Applicant stated *'It is important that I get quotes for the floor as soon as possible so that I can make an insurance claim, there has been damage done by the leaking central heating system as you know. As soon as the joiners have been to do their quote then we can get the holes in the floorboards temporarily patched up.'*
39. The Applicant referred to the decision of the Tribunal following the inspection on 6<sup>th</sup> September 2022 (p5/11), stating that it indicated that there were no other issues in respect of the Property other than the flooring and exposed pipes. The Tribunal found that the rent should be increased to £1165 per month. The Tribunal stated that it had regard to the state of repair in making its decision, which suggested the state of repair was not as serious as the Respondent suggested. The Applicant said not only is the Respondent failing to pay her rent, but the Applicant is also having to pay the utility bills.
40. Responding to questions from the Tribunal as to whether or not the Applicant could claim the increased rental sum from April 2022, when the effective date in terms of the decision on which the rent determined by the Tribunal becomes payable was 17<sup>th</sup> September 2022, the Applicant said she had taken advice from the Landlords' Association and she was entitled to claim the increased sum from the original effective date, which was 17<sup>th</sup> April 2022. The Applicant referred to section 31 of the 2016 Act as authority for her position. The Applicant pointed out that, in terms of section 30 of the 2016 Act, there was no provision for appeal, although an appeal clause had been included in the Tribunal decision.

### **The Respondent's position**

41. The Respondent claimed in her written representations that she had never denied access to contractors to undertake repairs, and that the Applicant had scheduled plumbers to carry out inspection of the property to make a false insurance claim about non-existent structural damage (p3/9).
42. It was her position that the Property failed to meet the repairing standard from the beginning of the tenancy. She claimed there were multiple holes in the walls, floor, floorboards and ceiling from badly laid wooden flooring and uncovered entry and exit points for central heating and water pipes, which the Applicant had not disclosed. These posed health and safety hazards from vermin and there was a risk of skin burns from exposed heating pipes.
43. In November 2021 and March 2022, further damage and disrepair was caused to the wooden flooring by plumbing and engineering contractors hired by the applicant to fix a faulty boiler. Additional holes were created in the hallway floor on both occasions. The floor was left very uneven and health and safety risks



were further increased from a risk of trips and falls, further infestation of vermin, and burns from exposed central heating and water pipes.

44. The Respondent had referred in her written representations to withholding rent because of the disrepair of the Property. She wrote that she had appealed the Rent Officer's decision on the grounds of failure to meet the repairing standard. In her most recent written representations, the Respondent stated '*A most conservative estimate for the repairs is £3150 and £2745 has been set aside for the repairs which the claimant has failed to make. I do not owe the claimant money.*'

### **Findings in Fact and Law**

- 45.
- (i) The parties entered into a tenancy agreement in respect of the Property that commenced on 17<sup>th</sup> July 2020. A written document entitled 'Rental Agreement' purporting to let the Property for a period of six months was signed by the parties. The tenancy agreement, notwithstanding the written document, was a private residential tenancy without an end date.
  - (ii) The monthly rent for the Property was £1050. This included council tax and utility bills. The rent was payable in advance on the 17<sup>th</sup> of each month.
  - (iii) Throughout 2020, the Respondent was always late in paying her rent.
  - (iv) In February 2021, the Respondent failed to pay her rent and fell into rent arrears.
  - (v) The Respondent paid her rent late in March 2021.
  - (vi) The Respondent cleared the rent arrears in July 2021.
  - (vii) Thereafter, the rent was paid prior to the 17<sup>th</sup> of the month until September 2021, when the rent was again paid late for that month and the next month. The rent for November and December 2021 was paid on the due date.
  - (viii) No rent was paid for March, June, or July 2022
  - (ix) Negotiations took place between the parties in an attempt to agree the terms of a private residential tenancy agreement. No agreement was reached and no signed tenancy document exists.
  - (x) The failure to reach negotiation means the rent was due throughout the tenancy in advance on the 17<sup>th</sup> of each month, as initially agreed between the parties.

- (xi) Following water damage from plumbing leaks, the flooring in the hall and entrance to the kitchen was damaged and constitutes a trip hazard.
- (xii) The Applicant responded to requests from the Respondent for repairs to be carried out to the flooring by requesting that the Respondent allow contractors to access the Property and carry out investigative works to allow her to make an insurance claim, after which the flooring would be patched up.
- (xiii) The Respondent refused to allow access to contractors to carry out investigative and repairing works to the flooring.
- (xiv) The Respondent claimed to have withheld rent to cover the cost of carrying out the repair works to the flooring. The Respondent did not provide any quotes for this work and did not have the works carried out.
- (xv) In January 2022, the rent was reduced to £915 per month as the Respondent took on the responsibility for paying council tax.
- (xvi) After a referral to a Rent Officer, the rent was increased by letter dated 10<sup>th</sup> March 2022 to £1105, to take place from 17<sup>th</sup> April 2022. This was appealed by the Respondent by application dated 24<sup>th</sup> March 2022.
- (xvii) By decision of a Tribunal under section 29(1) of the 2016 Act, dated 6<sup>th</sup> September 2022, the rent was set at £1165 per month, the effective date being 17<sup>th</sup> September 2022.
- (xviii) The Applicant is not entitled to claim the backdated increased rental sum until 17<sup>th</sup> September 2022.
- (xix) The Respondent has failed to pay rent lawfully due.
- (xx) The Applicant is entitled to recover rent lawfully due.

### **Reasons for Decision**

46. The Tribunal found that no agreement had been reached by the parties on the terms of the PRT. The Respondent appeared to have signed a PRT in October 2021, and the Applicant signed a PRT in December 2021. The Respondent claimed there was a signed and legal document between the parties signed on the aforementioned dates, however, negotiations had continued to take place between October and December, with the Applicant providing several draft PRTs. The Tribunal did not consider that parties signed the same document, and the terms of the signed PRT document did not reflect agreement reached between the parties. It appeared to have been put

together from two different drafts, with the terms to the Respondent's advantage, namely with rent due in arrears and no increased deposit. It was abundantly clear from the correspondence between the parties that the Applicant had not agreed to that position at any time, and would not have signed a document to that effect. There was, therefore, no PRT, and no agreement that rent was to be paid in arrears. Rent was, therefore, due in advance as initially agreed between the parties.

47. In relation to the recent decision on the rent increase, the Tribunal considered the terms of section 31(2) of the 2016 Act. While the Applicant is entitled to recover underpaid rent between the original proposed effective date and the actual effective date, the Respondent only became liable for underpaid rent on 17<sup>th</sup> September 2022. The order for payment only concerns arrears to 4<sup>th</sup> August 2022, therefore, there was no liability for underpaid rent at that time. Consequently, the Tribunal deducted the sum of £760 from the sum claimed. To 4<sup>th</sup> August 2022, the Respondent owed the Applicant the sum of £3660.
48. The Tribunal found that the Applicant had not refused to carry out repairs. The nature of the emails between the parties made it clear that the Applicant wished to carry out legitimate investigative works as a result of water leaks, which would involve lifting floorboards, after which the flooring would be attended to in the most appropriate way, taking the advice of contractors. The Tribunal considered that the Applicant was entitled to take this course of action, and the Respondent's resistance was not appropriate or justified. The Applicant, as landlord, must ensure the property is repaired and maintained, and she was attempting to do both by taking the proposed course of action. The Tribunal noted that the emails between the parties from March 2022 had been lodged with the initial application and that they upheld the position put forward earlier by the Applicant.
49. Despite the Respondent stating that she was withholding rent to have the works carried out herself, as early as March 2022, the works were not carried out, and no vouching was given to support the Respondent's position, in the form of quotes from contractors. No justification was given for the sum withheld, and the Respondent's position in withholding two months' rent was somewhat undermined by the Applicant's recent quote of £600 to patch up the flooring.
50. Withholding rent is an equitable remedy and the Tribunal must be satisfied that the remedy is being exercised in good faith. It was clear to the Tribunal that the Respondent had financial issues which led to her rent payments being consistently late. The Tribunal thought it unlikely that the Respondent had set the money aside for works to be carried out, and no evidence has been provided to this effect. The Tribunal considered that the Respondent was not acting in good faith by withholding rent.

## **Decision**

51. The Tribunal grants an order for payment in favour of the Applicant in the sum of £3660.

## **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.**

Helen Forbes

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**Legal Member/Chair**

**3<sup>rd</sup> October 2022**  
**Date**