



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) arising from a tenancy under Section 1 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/22/1064

Re: Property at 3/1 5 Canting Way, Festival Park, Glasgow, G51 2QH (“the Property”)

Parties:

AFD U.K.SMSF Holding Property LTD, 28 Martin Street, Hunters Hill, Sydney, NSW 2110, Australia (“the Applicant”)

Mr Darren Shields, 3/1 5 Canting Way, Festival Park, Glasgow, G51 2QH (“the Respondent”)

Tribunal Members:

Susan Christie (Legal Member) and Elaine Munroe (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order is granted against the Respondent for payment of £6,074.90 to the Applicant.

Background

1. The application for a payment order was accepted by the tribunal on 28 April 2022.
2. The paperwork was served on the Respondent by Sheriff Officer service on 24 May 2022, the mode of service by letterbox.
3. On 23 May 2022 an updated rent report was submitted under reference CV/22/1064.
4. Written representations were invited from the Respondent by 11 June 2022.
5. Documents were submitted by the Respondent on 9 June 2022. These were e mail exchanges of the Parties between 20 December 2021 and 13 April 2022.

The Case Management Discussion (CMD)

6. The case called on 13 July by way of a Case Management Discussion (CMD). Ms Reid represented the Applicant and the Respondent represented himself. Ms Bruce, a colleague of Ms Reid, observed.
7. The Applicant was seeking an eviction order in a separate application based on the unpaid rent due and was seeking a payment order.
8. The issue identified for a Hearing in this application was what sum was due? Some of the evidence around that is common to both applications.

The Direction

9. Following on from the CMD the tribunal issued to the Parties a Joint case Direction on the following terms:

“The Applicant is required to provide:

1. *A copy of the proof of postage of the Notice to Leave to correspond with the tracking number on the signed for proof of delivery slip.*
2. *All relevant documents or communications in relation to the repair’s issues relied on, including dates when they were reported to the landlord and agent, and when the repairs were completed.*
3. *All documents or communications in relation to unresolved repairs including dates when they were reported to the landlord and agent and to include copies of any quotations for works obtained and any works scheduled or instructed.*
4. *An indexed and numbered bundle of documents and photographs, any emails or texts, all page numbered, of the items they intend to rely on at the Hearing including documents produced as required at parts 1-3 above.*
5. *The names of any witnesses they intend to call.*

The Respondent is required to provide:

1. *A document evidencing that he has set aside the rent due, showing the amount held and that it has been held separately, such as in a bank account for this purpose. The account number and sort code can be redacted from the document.*
2. *All documents or communications in relation to the repairs including dates when they were reported to the landlord or agent, and when the repairs were completed.*
3. *All documents or communications in relation to the unresolved/outstanding repairs including dates when they were reported to the landlord and agent.*
4. *An indexed and numbered bundle of documents and photographs, any emails or texts, all page numbered, of the items he intends to rely on at the Hearing including documents produced as required at parts 1-3 above.*
5. *The names of any witnesses he intends to call.”*

The documentation was to be lodged with the Chamber no later than close of business on 31 August 2022.

10. On 31 August 2022 the Applicant's Representative lodged the following with the tribunal:
- a) A Summary of Documents
 - b) A repairs timeline summary
 - c) An authorisation letter authorising Fineholm Letting to act on behalf of the landlord
 - d) Proof of delivery of the Notice to Leave, posted on 12 April 2022 and signed for on 13 April 2022.
 - e) A tenancy transaction Report with details of the rent entries
 - f) An Accounts contact with tenant for arrears sheet
 - g) Copy letters to the tenant dated 24 March 2022, 4 April 2022
 - h) E mail exchanges between the Parties 24 February 2022; 1, 9, 29 March 2022; 4, 7 April 2022
 - i) Inspection Report over the Property dated 15 August 2022 carried out by Ashley Williamson, Assessor.
 - j) Work order 31 March 2022
 - k) Invoice dated 8 April 2022 from GMR Contracts Scotland Limited
 - l) Work Order dated 23 December 2021
 - m) Works Order dated 12 July 2022
 - n) Works Order dated 11 August 2022
 - o) Quote request from
 - p) Work Order dated 13 April 2022
 - q) Invoice dated 2 March 2022 from GMR Contracts Scotland Limited
 - r) Works Order dated 11 January 2022-issue with rubbish dumped
 - s) Works Order dated 31 May 2022- Mice activity
 - t) Works Order dated 3 March 2022-Mouse in kitchen- floor is up and to be repaired
 - u) Works Order dated 17 March 2022-fill holes from mice.
11. There was no note of any documents being received by the tribunal from the Respondent, in response to the Direction.

The Hearing

12. The case called for a hearing on 28 September 2022 and the evidence was common to both applications. Ms Williamson represented the Applicant and the Respondent represented himself.
- Preliminary matters
13. Ms Williamson advised that the Applicant had no witnesses, and she would be making representations herself.
14. Mr Shields advised that he had no witnesses, and he would be making representations himself.
15. It was undisputed in considering both applications that the rent arrears now stood at £8437.40 for the rent due up to 1 October 2022 (noting that there had been an abatement of 25% for a period as later discussed).
16. The Respondent when asked about his lack of response to the Direction, indicated that he had sent in a bank statement showing he had funds. This was not in the tribunal paperwork. He was unable to send this over during the

Hearing as he was at his workplace but could do this tomorrow, he said. The Applicant's Representative agreed that the tribunal could consider this if submitted by the next day. He also made mention of a photograph of a pigeon having been stuck in the window that needs repair, but it was unclear as to when and if this had been sent into the tribunal. Whilst the tribunal was disappointed in the lack of attention to sending in important documents in time for the Hearing, the tribunal explained the reasons behind the need for them and with some hesitation was the tribunal was open to a bank document being received late, on the strict condition that it is received by the tribunal caseworker by 29 August 2022.

Ms Williamson

17. Ms Williamson took the tribunal through the timeline information and stated:

- a) *The kitchen floor.* There were no further leaks and it had been badly fitted after previous works. Completed 23 March 2022. She states this was reported to them on 18 February 2022.
- b) *Rotten wood at window to the balcony in the lounge.* This was in hand. There had been three contractors who did not obtain access or could not do the job. The fourth contractor was scheduled to do the work on 13 and 14 October 2022. Two days' work consisting of removing the window, disposing the sill and fascia, replacing same and reinstalling the window and sealing it. The balcony was not in disrepair. The Property was the only one in the building with a balcony and it was the penthouse. This repair was reported in January 2022.
- c) *Leak to neighbour.* The works were completed on 2 March 2022. They had been reported by the tenant at the end of January 2022. It was a bath waste pipe at the Property that had caused this.
- d) *Cracked mirrored door on wardrobe in the bedroom.* This comprised of a small triangular hairline crack at the top lefthand corner. It had not been noted in the Inventory in December 2021 and it was unknown when it happened. There was nothing to suggest this had been caused by the Respondent. It had been reported by the tenant at the end of January 2022 and had never been actioned for a repair. The landlord was not keen to attempt a repair as there was also damage to a mirrored low level unit of the tenants' own and their conclusion was that the damage to the low level unit was more dangerous to the Respondent's child than the higher crack on the mirrored door.
- e) *Safety certificates.* The Property had these and they were up to date.
- f) *Lack of heating.* All heating had been checked and no issues were detected.
- g) *Rent abatement applied.* This had been applied by way of a credit to the rent account for three months by the landlord as a gesture of goodwill and covered the kitchen floor that was 'bouncy' and the teething problems encountered by the tenant such as the mice and pest control matter.
- h) *All repairs were carried out timeously in her view.*
- i) *The inspection of 15 August 2022.* Ms Williamson had carried this out herself and a colleague had been with her. It was done due to the matters raised and she wished to see the Property herself and its condition. She had 14 years in the industry. She took the tribunal

through the Report and highlighted that she had not noted any water ingress at the lounge window, not any damage to the sofa near it. The tenant had stated that this had been the case on occasion. Photographs had been taken that day and she considered they showed no water ingress to the carpet. It had been raining that day. The cracked mirror was shown in section 6. Section 14 showed the general comments and a summary noted that the tenant advised he needed the Property address for civil court family matters; that there had been discussions about contractor access and the window repair.

18. The Respondent put to Ms Williamson

- j) *Did she consider that having no kitchen floor for 7 weeks was acceptable?* Ms Williamson referred to the 25% reduction in rent. It was not the full floor only a section of the floor.
- k) *That contractors had not turned up and that was not his fault?* Ms Williamson answered that they needed to ask four different contractors (*for the balcony window*), and some were put off by how big the job was; that they needed the right contractor with the right tools.
- l) *It was going on for 10 months and the balcony window still hadn't been fixed. Why had it not been repaired since January 2022?* Ms Williamson replied it was a big job and it was not for her firm to assess it. The Property was a penthouse flat, and one contractor turned it down due to the height. It was getting repaired on 13th and 14th October 2022 and the Respondent had been told of that the day before the hearing. The Respondent stated that he had not been told this and he was in London on those dates. Access may be able to be given by a third party.
- m) *The Respondent stated that there had been water damage and that he had suggested this to Ms Williamson at the Inspection.* She did recollect him saying this, but she had not seen evidence of this herself.

19. The Respondent gave his own evidence in a summary format as follows:

- a) He had taken entry on 17 December 2022.
- b) When he was trying to move in the keys did not fit and his belongings needed to be stored in a hired removal van overnight until new keys were cut for him
- c) The Property was a two level home. When it was causing flooding to the downstairs neighbour the contractors employed by the Applicant ripped up the kitchen floor on the top level which made no sense to him and ultimately did not fix the fault. It was self-evident that a leak in the kitchen would flood the downstairs of his home if it had been a fault in the kitchen. He had no kitchen floor over 90% of it until that was eventually fixed. The kitchen taps were still loose.
- d) The mirrored wardrobe door had not been fixed despite him reporting it. Whilst the Applicant says that the glass table in the same room that is damaged poses more of a risk to his child than the wardrobe door, his son has not been in the Property since the glass table has been placed there.
- e) He had had pigeons accessing the living room and flooding due to the disrepair.

- f) If they were not prepared to do the repairs, they should have just said that rather than his time being taken up waiting in the Property for contractors to arrive.
 - g) The Property is his main residence, but he does stay with his girlfriend sometimes as that is more convenient as she does not drive.
20. *Ms Williamson put to the Respondent:*
- h) *That the glass unit was more dangerous to a child than the crack in the mirrored wardrobe due to it being at a lower height. That it was in any event not a priority for the landlord to repair.* The Respondent answered that this had been going on since December 2021 and it was intended to be his son's room so it would have been an issue had he been using it from when reported.
 - i) *That the balcony window repair was the only repair outstanding and that she was concerned that access might not be given on the scheduled repair dates.* The Respondent suggested someone else might give access and in any event, it had taken too long to arrange the repair and that he noted that it was being suggested it was a big repair needing scaffolding but now turned out only to be a window that needed replaced.
21. An adjournment took place to allow the Applicant to check whether the Respondent had been told the scheduled repair dates and the Respondent was told that it would be useful to the tribunal if he could provide the evidence of him having funds to pay the rent.
22. After the adjournment it was established that Ms Williamson had checked with her office, and it appeared that the contractor might not have called the Respondent yet to tell him of the scheduled dates for the outstanding repair. The Respondent advised the tribunal that as he was at his place of work, he could not provide the necessary evidence he had the money to pay the rent but stated that the funds were not an issue, he had savings of around £8,000 and that he also bred dogs and could achieve £10,000 readily. The tribunal agreed to accept any vouching received within 24 hours and the Applicant's Representative had no objection to that approach.
23. When the Parties were asked about the considerations for the tribunal around abatement of rent, the Applicant's Representative considered no abatement was due and the Respondent was unable to assist the tribunal in amounts. The Parties were advised a written decision would follow.

Findings in Fact

- I. A Private Residential Tenancy (PRT) was entered into between the Parties with a start date of 17 December 2021.
- II. The rent is £1350 per calendar month payable in advance on 1st of the month.
- III. The Respondent being in arrears of rent over the period in question is partly as a consequence of rent being withheld for necessary repairs for the period to the end of March 2022.
- IV. From March 2022, two payments of rent each of £1350 had been made by the Respondent on 12 April and 5 May 2022.

- V. No further payments of rent have been made by the Respondent since May 2022.
- VI. The rent arrears are £8437.40 for the rent due up to 1 October 2022. This includes in its calculation an abatement of rent of 25% for January, February, and March 2022 credited to the rent account by the landlord.
- VII. The tribunal determined that an abatement of rent of 40% applies for December 2021 to March 2022 inclusive for the substantial loss of enjoyment of the kitchen, the bathroom and the lounge and balcony, along with partial loss of heating mainly affecting a bedroom. This equates to £2160.
- VIII. The tribunal determines from April 2022 to September 2022 inclusive that an abatement of 15% applies as the Respondent has not had full enjoyment of the lounge or the balcony as the wooden door/window frame leading to the balcony is rotten, is not fit for purpose and lets in the weather. This equates to £1215.
- IX. The rent lawfully due is determined at £6,074.90.
- X. A necessary repair to the door/window leading to the balcony of the Property has not yet been carried out. Dates have been identified by the contractor to carry out this work in October 2022.
- XI. The Tribunal grants a payment Order for £6,074.90.

Reasons for Decision

24. This application, and the associated payment order application, raise the issues of whether the Respondent as the tenant was entitled to withhold or retain rent pending performance of the Applicant's repairing obligations as a landlord; and separately whether the Respondent is entitled to an abatement of rent. The right to abate is a common law right arising from the equitable principle of failure of consideration.
25. The tribunal had regard to the case of *Renfrew District Council v Gray* 1987 SLT (Sh Ct) 70 which considers some of the issues, that are also for the tribunal to consider in this application.
- "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 rent for it is inequitable that he should be contractually bound to pay such rent. This position results even if*

the failure to enjoy the subjects is through accident rather than breach of contract and the abatement really is based on the fact that the tenant should not pay for rights he never enjoyed rather than loss suffered although in certain cases loss sustained may be a suitable measure of the abatement due. The foregoing views are, I think, supported by Muir v. McIntyres (1887) 14 R. 470. In that case the difference between abatement of rent and compensation by way of damages was clearly recognised. Moreover, while it was acknowledged that a claim for compensation would require to be constituted by separate action, a claim for abatement could be advanced by way of a defence to an action for the rent for it is in essence a claim that the rent is not due. The law was summed up by the Lord President at p. 472 when he observed: "it is quite settled in law that an abatement is to be allowed if a tenant loses the beneficial enjoyment of any part of the subject let to him either through the fault of the landlord or through some unforeseen calamity".

26. The tribunal considered whether the rent was being withheld in good faith.

27. It examined the paperwork produced by the Parties. The paperwork shows that the Respondent had been e mailing the Applicant's Representative about matters of disrepair and the withholding of rent. Specifically, the tribunal had regard to the following communications:

- (1) On 13 January 2022 the Respondent stated he was '*withholding rent to ongoing issues that have not been fixed or dealt with*'. He had e mailed them on 20 January 2022 to say '*I have lived in the house for a month now. I have no heating in my bedroom, my kitchen floor is coming up, I can't bath my kids cause it floods the neighbours..my balcony is falling apart and the wind comes through the balcony window.I have smashed mirrors..wardrobe doors that come off the rail..rubbish at my front door..taking all that into consideration do you think that is worth £100 a month..*'
- (2) On 23 January 2022 the Respondent stated '*I really want to speak to someone in charge ..about how unhappy I am..for somebody to tell me its not a big deal that I can't use my bath..I also flood the woman down the stairs..and no heating in the bedroom..and rotten wood that brings in the wind..it's been over a month like this..*'
- (3) On 7 February 2022 the Respondent stated '*it's worse than ever am still flooding my neighbour and my kitchen floor has been pulled up and my toilet has smashed tiles..to heat downstairs I have to run*'
- (4) On 24 February 2022 the Respondent stated '*it's not a financial matter, its more depressing coming into a house that's such a bad state..the heating down upstairs..I shouldn't need to chase you to fix this how many times do I need to phone..*'
- (5) On 3 March 2022 the Respondent stated '*my neighbour came to the door about her roof I have told her to contact you I have been using my water all week and her roof is about to collapse I said that you told me it wasn't me that was flooding her it had nothing to do with me*'.

28. The Respondent stated to the Applicant's Representative in e mails that he had the funds to pay the rent. The tribunal has not been provided with any vouching from the Respondent to show where the rent has been retained. He was given the opportunity to do so by the Direction and then at the Hearing. The tribunal notes that some rent has been paid. Two payments of £1350 had been made by the Respondent on 12 April and 5 May 2022. He stated to the

tribunal that he had sufficient funds to pay what was owed once that was established by the tribunal. Part of his grievance of the Applicant was that the percentage of abatement had not been referred to an independent person to determine and he says the Applicant decided on 25% and served a Notice to Leave on him.

29. He also suggested in his evidence that he was not sure if the Applicant was going to carry out the remaining repairs given the passage of time.
30. The tribunal taking the evidence as a whole is satisfied that the Respondent has exercised the remedy of retention of rent in good faith until around the end of March 2022. From March 2022, two payments of rent each of £1350 had been made by the Respondent on 12 April and 5 May 2022. No further payments of rent have been made by the Respondent since May 2022.
31. Had the Respondent been acting in good faith from May 2022 in not paying rent until the final repair was done, he could have evidenced to the tribunal that he had the money set aside. He was given more than one opportunity to evidence this to the tribunal, but he did not.

Abatements

32. All repairs identified have not been completed. The need for replacement of the rotten door/window frame at the balcony is recorded by the Applicant's Representative as far back as 23 December 2021, yet it has not been repaired or replaced.
33. The tribunal considered that an abatement of rent is appropriate. Effectively it seemed to the tribunal the Respondent had been faced with a catalogue of necessary repairs in a tenancy from the outset. The tenancy commenced on 17 December 2022. For the first 24 hours of the tenancy, he could not obtain access to the Property as the keys did not fit the locks. He lost the beneficial enjoyment of the Property in various respects. His use of the kitchen was materially impacted on due to the damage to the kitchen floor caused by it being ripped up to do a repair. The fault that was being investigated turned out to be a bath waste defect, not a kitchen defect. He could not use the bathroom lest the bath flooded the downstairs neighbour, until the fault was traced and repaired. He had radiators that needed attention to allow them to work properly in the bedroom. He alluded to having to operate the heating on one level of the duplex apartment at one time for a period. He has not had full enjoyment of the lounge as the door/window frame leading to the balcony is rotten and let the wind in, and on occasion the wet. Due to the question of safety, he also could not use the balcony itself. Ms Williamson suggested that the ingress of water at the rotten window did not occur. The tribunal disagreed and preferred the evidence of the Respondent that that wind and water ingress had occurred on occasion through the rotten wooden frame on the balcony door/window. Given that the rotten door/window frame to the balcony was evident as far back as December 2021 the impact on the Respondent's enjoyment of the lounge and balcony is self-evident. The Respondent had even gone so far as to suggest pigeons had gotten into the lounge.
34. The tribunal considered dates taken from the paperwork produced by the Applicant.
35. From 23 December 2021- "*quote-kitchen floor seems spongy raising and bouncy underfoot, gaps , feels like previous leak; balcony wood rotting and gap under door causing a draft, curtain pole bedroom down; tenant has*

advised he has some other maintenance issues...17 January 2022 -there are quite a few issues in this property the main three being the kitchen floor is selling from under the laminate flooring which would suggest there is water getting into the chipboard flooring or could be from a previous leak as no water visible on my visit. The bath in the bathroom currently not being used as it is leaking water downstairs isn't even fixed to the floor and the wood surrounding the patio doors is rotten and need replaced or better replaced with UPV as wood not treated will always deteriorate."

36. Given those comments from the Applicant's own contractor, it did not appear likely that the Property had been in good repair in all respects early on in the tenancy. A pre-tenancy check is required in terms of Clause 20 of the Parties Private Residential Tenancy Agreement, and it was surprising that some of the matters of disrepair had not been picked up at a pre-tenancy check such as the rotten window frame in the lounge. The Applicant as the landlord has a contractual duty to repair and maintain the Property from the start date and throughout the tenancy and contractually on becoming aware of a defect must complete the work within a reasonable time.
37. It was not suggested that any of the repairs needed were the responsibility of the Respondent as tenant.
38. The failure to repair the rotten wooden frame on the balcony door/window from December 2021 to the expected scheduled work dates of 13th and 14th October 2022 is in the tribunals view not 'a reasonable time' within which to carry out the repair or replacement of the rotten door/window frame. The tribunal did not accept the evidence of Ms Williamson suggesting otherwise.
39. The first contractor appears to have gone out on 17 January 2022.
40. The tribunal notes that the Applicant's Representative states that there was 'no access' on 12 July 2022 and 11 August 2022. From the paperwork produced it seems the contractor's line was only raised on 12 July 2022 for 'repair to balcony floor-wood is rotted' and the contractor's line states in handwriting '15 July 2022 contractor advised too big a job CC', so it is not clear if the contractor viewed it or even contacted the Respondent to view it. Another contractor's line was raised on 11 August 2022 'please quote for repair balcony-urgent'. So, from this it was not clear if access had been asked for and if it was, refused.
41. The tribunal preferred the evidence of the Respondent that he had not obstructed access for repairs to the rotten balcony door/window. It seemed to the tribunal that he had been asked to co-operate with numerous contractors about a number of repairs issues by telephone and by the giving of access. Whilst he might not have been able to meet all demands on him due to his own commitments, the evidence did not show categorically that he was the main or sole reason for the delay in effecting the repair.
42. Ms Williamson stated that a 25% abatement had been applied for January, February, and March 2022 for what was described as minor issues for the tenant such as the kitchen floor issue and for pest control and other 'teething problems.' However there appeared to be no recognition for the ongoing essential repair needed to the balcony access window and that in the tribunal's view affected the enjoyment of the lounge as well as the balcony. Ms Williamson considered this not to be an issue that justified abatement and did not consider the time it had taken to attend to this repair to be

unreasonable citing its complexity and the number of contractors approached. The tribunal did not share her view. The tribunal considered that the repair to the balcony door/window had not been attended to in a timely manner commensurate with the extent of the disrepair. It was described as more complex than it was.

43. The tribunal determines that an abatement of rent of 40% applies for December 2021 to March 2022 for the substantial loss of enjoyment of the use of the kitchen, the bathroom and the lounge and balcony, along with partial loss of heating facility mainly affecting one bedroom. This equates to £2160.
44. The tribunal determines from April 2022 to September 2022 that an abatement of rent of 15% applies as the Respondent has not had full enjoyment of the lounge or the balcony as the door/window frame leading to the balcony is rotten and lets in the weather. This equates to £1215.
45. The total amount of rent marked on the rent account at the date of the Hearing is £8437.40 which includes an abatement applied by the landlord of £1012.50.
46. The tribunal determines the rent lawfully due at the date of the Hearing (recognising in the final calculation that 25% had been applied for a part period as a voluntary abatement) is £6,074.90.
47. A payment order is granted.
48. The decision of the tribunal is unanimous.

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.

S. Christie

Legal Member/Chair

28 September 2022

Date