

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 71 of the Private Housing (Tenancies) (Scotland) Act 2016.

Chamber Ref: FTS/HPC/CV/20/0520

Re: Property at 7 Whitson Walk, Edinburgh, EH11 3BX (“the Property”)

Parties:

Mr Andrew McGuigan, 33 Hillview Crescent, Edinburgh, EH12 8QF (“the Applicant”)

Miss Erin Leigh Roberts, 139 Morvenside, Edinburgh, EH14 2AD (“the Respondent”)

Tribunal Members:

Martin McAllister (Legal Member) and Elaine Munroe (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that

The Respondent pay the sum of Three Thousand Three Hundred and Twenty Two Pounds 61 pence (£3,322.61) to the Applicant.

Background

Evidence on this matter was heard on 6th October and 25th November 2020.

This is an application for payment of funds in respect of rent arrears. The application is dated 11th February 2020. There was also an application in respect of eviction from the Property and with the same parties. That matter had previously been determined and a decree of eviction granted.

A case management discussion had been held on 18th August 2020 and a Direction had been made which required the Respondent to produce certain documentary evidence. The Respondent had submitted a letter to the Tribunal which was dated 2nd October 2020 in which she asked for the Hearing to be adjourned to allow her to take advice and produce evidence. The members of the Tribunal decided not to grant the

request but to allow the Respondent the opportunity to address them on the matter on 6th October 2020. Both parties made written submissions and lodged productions.

Hearing on 6th October 2020

The Hearing was conducted by audio conference because of the Covid-19 pandemic.

Both the Applicant and Respondent were present and each confirmed that they had no witnesses to lead.

The legal member outlined how the Hearing was to be conducted including protocols for the audio conference.

Preliminary Matters

The Respondent said that she wanted the Hearing to be adjourned to another date. She said that she had difficulty accessing advice since the last Hearing when the Direction had been issued and that, consequently she had not submitted documents. She said that she had sent emails to the Tribunal office over the previous twelve hours with various documents including bank statements. The members of the tribunal had no knowledge of these. She said that she had not sent copies of these to the Applicant. She said that she had also been unwell and that this had hindered her ability to prepare for the Hearing.

Mr McGuigan said that he had various documents which he would have wanted to submit and had held back from doing so because he had wanted to see what the Respondent would lodge in response to the Direction and that he would therefore be able to lodge documents which were relevant.

The Respondent was asked whether or not she accepted that any sum was due to the Applicant. This was put to her because of the reference in her letter of 2nd October to her getting time to pay. She said that the sum due for rent is £3,350 and that from that the deposit should be deducted leaving a balance of £2,500. She said that she should only pay half the rent because she only had use of half the house and, when pressed, she said that, in fact she thought nothing was due and that she did not want to pay anything.

The tribunal considered it appropriate to adjourn the Hearing until 11.30 for the Tribunal administration to have an opportunity to find the emails sent by the Respondent (It was subsequently discovered that these had been sent without any case reference) The adjournment also gave Mr McGuigan an opportunity to lodge any documents he considered appropriate.

Continuation of Hearing

When the tribunal reconvened, it was noted that it now had the documents lodged by the Respondent and that it now also had documents lodged that morning by the Applicant although it was clear that there were certain files and attachments submitted by the Applicant which the members of the tribunal could not open and therefore could not access.

The Respondent made a motion to adjourn the Hearing to another date. The tribunal considered matters and did not consider that it would be possible to determine the application without adjournment and that this was because of the need to deal with matters justly. It accepted that the Respondent had further information which she wanted to bring before the tribunal. Whilst it could be argued that she should have done this previously, the Tribunal accepted that she had had difficulty in achieving this because of illness and her difficulty in accessing appropriate advice.

The tribunal considered that there would be no prejudice to either party in part hearing evidence prior to continuing consideration to another date. It would also allow matters to be focused. The tribunal considered that it would be helpful to make a Direction so that parties are aware of documentation which they would require to produce. During the Hearing, both parties made reference to text messages and emails which were not before the tribunal.

Hearing on 25th November 2020

The Hearing was conducted by audio conference because of the Covid-19 pandemic.

Both the Applicant and Respondent were present and each confirmed that they had no witnesses to lead.

The legal member outlined how the Hearing was to be conducted including protocols for the audio conference.

Prior to the Hearing, both parties had responded to the Direction issued after the Hearing on 6th October 2020 by submitting various documents. These helpfully included copies of communications between the parties.

Prior to the Hearing commencing, the tribunal members were made aware that the Respondent had, that morning, started sending a number of emails with documents. By the time the Hearing commenced, almost sixty emails had arrived from the Respondent. When the Hearing convened, both the Applicant and Respondent were present on the conference call. The Respondent was advised that none of the emails had been considered by the members. Miss Roberts indicated that she sent these because she did not know what she had previously sent and that part of the reason these had been sent late was because of illness. She conceded that possibly the tribunal already had the documents which had been sent with these emails.

It was explained to the Respondent that, in terms of Rule 22 of the Tribunal Rules, any document which a party intends to rely on must be sent to the Tribunal at least seven days prior to a hearing and that, before allowing a document to be lodged late, the Tribunal must be satisfied that the party has a reasonable excuse.

The Respondent asked the tribunal to consider allowing the documents to be admitted. She said that she had tried to get them in on time but that, as well as illness, had experienced technical difficulties.

The tribunal adjourned to consider matters. In terms of the Tribunal Rules, the tribunal requires to deal with matters justly and it requires, in doing so, to consider the position of both parties. If the documents were to be allowed to be lodged late, an adjournment of the Hearing would be required to allow the Applicant and the members of the tribunal an opportunity to consider them. The application was dated 11th February 2020 and the Applicant was entitled to a determination. The tribunal did not consider that the Respondent had given an acceptable reason for the late submission of the documents. It also considered it significant that the Respondent could not be certain with regard to what she had already lodged. The tribunal also noted the contents of the documents which had been lodged by the Respondent and considered that she had lodged copies of communications which would be critical to her case and which therefore were before it.

The tribunal refused the Respondent's motion to allow the documents to be lodged late.

Findings in Fact

- I. The Applicant and the Respondent were parties to a private residential tenancy agreement in respect of the Property which was dated 31st May 2020.**
- II. The tenancy commenced on 31st May 2020 and ended on 13th October 2020.**
- III. In terms of the tenancy agreement, the monthly rent payable was £725.**
- IV. The Respondent has not paid all the rent due in terms of the private residential tenancy agreement.**
- V. As at 25th November 2020, the arrears of rent due were £ 3,222.61.**

Reasons

Matters of Agreement

1. During the course of consideration of the Application, the Applicant had lodged updated rent statements. Prior to the Hearing on 25th November 2020, he had lodged a statement showing a reconciliation after payments of Housing Benefit to him from City of Edinburgh Council. This statement

showed the level of arrears as at 13th October, 2020, the date of the tenancy's termination to be £3,222.61. The Respondent accepted that the level of rent unpaid was £3,222.61 albeit that she did not consider this sum to be due because of the condition of the Property and other matters which she would refer to in evidence.

2. There was a leaking radiator in a bedroom of the Property and this was reported to the Applicant on 13th May 2019 and was repaired by 15th May 2019.

The Issues

3. The Respondent's position was clear and focused and that was that she withheld rent because of the condition of the Property which was primarily defective in her eyes because of what she considered to be dampness caused by the leaking radiator. There also were other issues including a leaking communal foul water pipe in the garden.
4. The Applicant's position was that the issues in the Property which the Respondent identified as dampness were caused by condensation as a result of the Respondent's use of the Property and that the Respondent had no reason to withhold the rent and had no grounds to succeed in having any part of the rent abated.

Evidence

5. Mr McGuigan referred to the most recent rent statement which he had lodged and referred to the various payments since the start of the tenancy. Payment of rent was made between June 2018 and April 2019. Mr McGuigan said that the rent was sometimes a few days late in this period but that this was not something which he was particularly bothered about. He directed the tribunal to the entry for 1st May 2019 which showed the rent due on that date to be £750. He said that the statement showed that there was a payment of £500 made on 7th May 2019 and he said that was the start of the arrears developing. He said that the statement showed that the rent of £725 due on 1st June 2019 was not paid until 20th June 2019 although it was paid in full. He said that the shortfall from the previous month had not been made up and that there were therefore arrears on 20th June 2019 of £250. He said that the next payment of rent which was due on 1st July 2019 was not paid and that the only payment made in that month was the sum of £250 which was paid on 16th July 2019. Mr McGuigan referred to the statement which showed that there was no payment made in August 2019 and that the next payment, one

for £725, was made on 2nd September 2019 in respect of the rent for that month. He said that the rent due on 1st October 2019 was paid on time. He said that no rent was paid during November and December 2019 and January 2020 and that he then started getting paid the rent by City of Edinburgh Council direct and that this commenced in February 2020. He said that initially only £668.55 was paid by the Council until April 2020 and monthly thereafter when payments of £725 were made. Mr McGuigan said that the most recent statement lodged by him showed all the rental payments made and the reconciliation at the end of the tenancy showing a final sum due of £3,322.61

6. Mr McGuigan said that Ms Roberts's position is that she did not pay rent because there was something wrong with the Property. He said that the rent arrears started on 1st May 2019 which was prior to the leaking radiator and that this was reported on 13th May 2019. He said that the rent for June 2109 was paid in full without any deduction. He said that, in response to the concern about arrears which he raised with the Respondent around that time, he was given reasons for non- payment which were other than issues with the Property. He said that this is reflected in the text messages of that period and referred the tribunal to a selection of them:

6.1 20th June 2019- Respondent to Applicant

“ Hi Andrew, I have a limit on my savings accouont on how much I can send tried the full amount last night wouldn't work tried this morning and its let me send 725 So I'll try again tomorrow for the remaining balance.”

6.2 22nd June 2019- Respondent to Applicant

“sorry I've not text got rushed into hospital yesterday.....maybe having to go into surgery today, just thought I'd update you on the money I do have the remaining amount in my bank just don't have a strong enough signal to sign into my banking I'll get my mum to try later..... If I'm not out by Monday morning Jordan can nip along to the bank to deposit it into your account.

6.3 1st July 2019- Respondent to Applicant

“Hi Andrew my banking blocked me out I have an app with the bank Wednesday am to sort it out.....rent may be a day or two late I will keep you posted.

6.4 9th July 2019- Applicant to Respondent

“Morning, Erin, any update on the rent please? Really putting me in a difficult financial position. Please let me know as a matter of urgency.”

Respondent to Applicant

“Hi Andrew I should have it all paid by Friday really sorry about this especially after last month, as the bank froze my account, my funds going

in bounced back but I've been ringing them all week they've been sent again so im just waiting on it clearing then I'll send it straight over

6.5 16th July 2019 - Applicant to Respondent

"Hi, Erin, please let me know as a matter of urgency if you will be paying the outstanding amount of 950."

Respondent to Applicant

"Hi Andrew sorry.....one of my payments cleared so ive transferred 250 just now the rest will follow as soon as it's in my account if it's not in by Friday I'll try taking out a loan on Friday morning to pay it meantime until its sorted, so sorry its not been cleared yet.'

6.6 19th July 2019- Respondent to Applicant

"I've managed to get 250 just now to send over will keep trying see if I can clear most of it....."

6.7 12th August 2019 -Applicant to Respondent

"Hi Erin. Can you give me an updated on the rent please. As it stands there is still a shortfall of £450 plus £725 therefore at today's date, £1175 is overdue. Please confirm that this will be paid as a matter of urgency as we are now into 3 months of irregular and late payments. Are you in tomorrow? I would like to meet with you to discuss maintenance items. Does 12 mid day work?"

7. Mr McGuigan said that he tried to get an arrangement to meet with Ms Roberts and he referred the tribunal to the text messages which he said demonstrated the efforts he made. He said that he suggested many dates after the text message on 12th August but that none suited the Respondent and that the messages reflect that Ms Roberts could not meet because of commitments, illness, being in hospital and other reasons. He said that matters were starting to come to a head. He directed the tribunal to the Respondent's text message of 31st August 2019 which stated that the rent would be paid and that "the rest will be cleared as soon as possible.... Will message you soon to arrange a day to talk." Mr McGuigan said that he was becoming extremely concerned and that his text of 31st August reflects that: "Please arrange for the outstanding rent to be paid as a matter of urgency. This cannot continue. Tomorrow will be £1900 outstanding. I will have no option other than to pass this over to Scott and Co and the courts for collection as my mortgage company will not tolerate non payment of rent. I believe I have been relaxed on this matter with you but if this is not paid I'm afraid it will be out of my hands...."

Mr MCGuigan said that he chased the Respondent for payment of the outstanding sum and that she promised to make payment: text of the Respondent to the Applicant on 4th September- "Hi Andrew will get it to you as soon as I can."

8. Mr McGuigan said that he became aware of issues with the house on 10th September 2019 when the Respondent sent him a text message which referred to various matters which she said required attention. He referred the tribunal to this text. The text message refers to the Respondent's anxiety and said that her life is interfered with because of the house and refers to matters which she says require attention: the bedroom window, the leak which wasn't properly attended to, wet carpet, damage to a storage bed belonging to Ms Roberts and damage to its contents, mould, bath panels, the oven, crack in the front door.
Mr McGuigan referred the tribunal to his text response dated 10th September 2020:
'Erin, there is 2 parts to this. Firstly you are behind on your rent. I have sent you numerous letters, first class recorded and hand delivered. You are currently £1175 behind. I have sent these via email also. Zero response. Secondly, I have arranged on several occasions to visit and inspect any maintenance required however you keep cancelling. I have sent recorded delivery letters confirming the scheduled appointments also..... I look forward to receiving the outstanding rent and confirmation on a suitable time to inspect the property.'
9. Mr McGuigan said that there was an exchange of text messages between 10th September and 23rd September when he met with Ms Roberts at the Property. He referred the tribunal to them. They reflect that the Respondent did not accept that Scott and Co, Sheriff Officers, had served a letter on her in connection with arrears of rent. She was seeking proof with regard to them being sheriff officers. The text messages do indicate that the Respondent is making enquiry as to how she is to pay any sum due and on 21st September a text message from the Respondent reads "I can pay it (the rent) in instalments if your happy with that."
10. Both Mr McGuigan and Ms Roberts confirmed that they had a meeting at the Property on 23rd September 2019. In Mr McGuigan's words "it did not go well" and the evidence of both was that there were raised voices. Mr McGuigan said that it was at this meeting where he was told that rent had not been paid because of maintenance issues. He said that this was the first time Ms Roberts had told him that. He said that he was aware that the Respondent wanted to raise maintenance issues with him and that this was stated in the text message of 10th September 2019.
11. Both parties gave evidence that there was discussion at the meeting about matters regarding maintenance and damage. Both agreed that the carpet in the bedroom had been wet from the leak in the radiator. The Applicant said

that he had offered to pay for carpet cleaning and the Respondent said that she considered that the carpet had been ruined and required replacement. Ms Roberts said that she had told Mr McGuigan that her bed had been ruined as a result of the leak. She said that water had soaked into its fabric. Mr McGuigan said that Ms Roberts told him that she had been sleeping on a sofa bed and, as a goodwill gesture, he had offered to supply Ms Roberts with an a virtually new bed which he had available in one of his other properties. Ms Roberts said that she had rejected this offer because she did not want a second- hand bed. She also said that there was mould in the Property Mr McGuigan said that he had made the offer with regard to the bed but had told the Respondent that the damage to the bed and the existence of mould was due to condensation. He said that he is a chartered building surveyor and knows about dampness. He said that he found the bedroom to be dry and that there was staining on the carpet caused by the radiator leak but that there were a number of other stains on it which had nothing to do with water staining and he said that he though some had been caused by make up. He said that Ms McCormick, a support worker had been assisting the Respondent around the time of the meeting and he was hopeful that this would have assisted resolution of the matter.

12. Parties agreed that the oven was replaced and that it was agreed that painting work would be carried out in the bedroom. Mr McGuigan said that painting work was subsequently carried out.
13. Mr McGuigan said that he did not understand how a radiator leak could cause dampness which would damage a mattress but that it was entirely possible that condensation could cause mould and he firmly believed that the main issues in the property were caused by condensation. He said that shortly before the tenancy was terminated, he had arranged for a contractor, Lance Contract Services to provide an estimate for refurbishment works he intended to carry out on the Property. He said that, after the tenancy had been terminated, he had arranged for a dampness specialist, Apex Property Care, to inspect the Property and he referred the tribunal to the reports.
14. The report from Lance Contract Services is dated 7th October 2019 and deals with a number of proposed repairs in the Property. In relation to the rear bedroom, it states: "Whilst we have already carried out repair works to this room, we suspect that there is a high degree of condensation and surface moisture issues created from internal living conditions and lack of ventilation due to windows not being properly opened." Ms Roberts said that the contractor had never entered the bedroom and she therefore did not know how these comments could be made.

15. The report from Apex Property Care is dated 4th November 2020 and states that an inspection was carried out following instructions to check for dampness/condensation in the rear bedroom and bathroom. The report details tests which were carried out including a disruptive investigation on the walls, calcium carbide tests and tests using a conductivity moisture meter. It states "Black spot mould growths were noted on the double-glazed window seals, a characteristic of condensation." The report states that "we conclude that there is no damp issue in the brickwork." It further states "You should advise any new tenants to heat and ventilate the property to reduce the risk of mould forming on walls and damaging personal items." The report does not specify any specialist work which requires to be carried out in the bedroom.
16. Ms Roberts said that there had been a major incident of dampness in the bedroom and she disputed that it had been caused by condensation. She said that, as a result of the leak and the dampness, her bed was ruined and she had to sleep on a sofa in the living room. She said that she had had to buy a second hand sofa bed. She said that she lost many personal and household items as a result of the dampness and leak. Ms Roberts said that she had submitted details of her losses to the tribunal. Mr McGuigan disputed that there was any need to reimburse the Respondent in respect of the cost of replacements. He said that, as far as the radiator leak was concerned, it had been attended to promptly and he would have expected the Respondent to remove items from the area of the leak so that damage was avoided. He also said that he could not understand why the Respondent had refused his offer of a second hand bed but had purchased a second hand sofa bed.
17. Ms Roberts said that she trusted Mr McGuigan to attend to matters after the meeting on 23rd September 2019 and that this was why she paid the rent on 1st October 2019 and that she made no more payments because she was not happy with the condition of the Property.
18. Mr McGuigan said that there was an issue with a common external drain at the Property which he called Scottish Water about after the Respondent had alerted him to the matter and that it had been resolved. Ms Roberts said that this was a serious issue and involved sewage. She said that, as a consequence of this, she had been put into financial difficulties in May 2019 because she had to replace some of her children's belongings which had been in the garden. She said that there has also been a significant unpleasant smell. She said that this was why the payment of rent in July 2019 had been £225 short.
19. Mr McGuigan referred the tribunal to text messages in relation to the drainage issue. The text message from the Respondent to the Applicant on 3rd April

2019 referred to a drain in the back garden which was flooding. On 6th April 2019, the Applicant texted the Respondent and said that Scottish Water had meant to be out the previous day and asked the Respondent if the problem had been resolved. On the same day, the Respondent sent a text to the Applicant in which she said that the person from Scottish Water had told her that it was a Council problem but then goes on to state that she had been told that it would be dealt with by Scottish Water and her text to the Applicant on 7th April states that Scottish Water had left a message with her stating that the work had been done and that they would return to clear any mess.

20. Ms Roberts said that she often dealt often with Ronnie, the Applicant's brother in relation to matters about the Property. She said that she frequently contacted him about the dampness issues and she said that she did not accept that this was condensation rather than dampness. She said that, after the radiator leak, the mould in the bedroom expanded and that the issue pushed her into severe financial difficulties which meant that she had to get food parcels and clothing grants. When pressed on this matter, Ms Roberts said that the financial issues were caused by her requiring to replace items that had been damaged by the dampness. She said that Ronnie had apologised to her for the condition of the property and that he said he would try and get things sorted. Ms Roberts indicated that, in the spring and summer of 2019, she had been severely unwell and that she had a support worker, Ms McCormick, who was helping her to cope with things.
21. Ms Roberts said that, after the meeting on 23rd September 2019, works had been done including the replacement of the oven and that some work had been done in the bedroom but that the skirting had not been replaced after the mould on the wall had been treated. She said that she did not accept that any issues were due to condensation and that there had been no previous issues with dampness until the radiator leak. Ms Roberts said that she had told Mr McGuigan that she would pay the rent due when she had full use of her bedroom and that her messages to him reflect that. The text message of 30th October 2019 to the Applicant from the Respondent stated " I've said a million times I'm had to start paying it soon as im back in room."
22. Ms Roberts confirmed that there had been no issue with regard to payment of Housing Benefit and that she had received this for the period during which she had not paid rent. She said that she held back the rent because of the condition of the Property and had given the money to her father to put in an account to keep safe. She said that she wanted the mould removed from the flooring and the walls and also the damp removed from the carpet before she paid the rent due.

23. Ms Roberts said that her illness got worse in October 2019 and that she had real difficulties in coping and taking the actions she needed to take. When asked about why, if the Property was not of a suitable standard, she had not made an application to the Tribunal to determine whether the Property was being maintained to the repairing standard, she said that her illness prevented her doing this and that her support worker was not a housing support worker. She said that her support worker and health visitor could provide information on the difficulties that she was having.
24. Mr McGuigan said that he spoke with Ms McCormick, the support worker, a few times in November 2019. He said that he welcomed her involvement because the relationship with Ms Roberts had broken down. He said that Ms McCormick said that the file for the Respondent had been closed because of non engagement. Mr McGuigan said that he had suggested to Ms McCormick that he deduct £50 from the arrears of rent to allow the carpet to be cleaned. He said that Ms McCormick said that the Respondent had not agreed to this. Mr McGuigan said that Ms McCormick had said that she had advised Ms Roberts not to withhold rent. Ms Roberts said that she had difficulties at that time because of her health condition and that, when she is ill, she tends to withdraw from things. She also said that Ms McCormick was her support worker not Mr McGuigan's. She did not accept that Ms McCormick had told Mr McGuigan that advice had been given not to withhold rent.
25. The Respondent lodged a considerable number of photographs and some showed black marks on walls and on the floor. There were also photographs of items which she said she had to replace because of damage. She also lodged copies of screenshots of extracts from catalogues for various items and copies of bank statements showing payments to Argos and Home Bargains. She said that these were in respect of replacement items which she had to purchase. The Respondent also lodged copies of bank statements showing payments marked "Dad." She said that these showed payments made to her father in respect of rent she was withholding. The statements showed payments from 2nd September 2020 to 31st January 2020 and totalled £1,005.

Submissions

26. The Applicant's position was clearly stated and that was that the rent arrears were due by the Respondent who had no reason to withhold the payment of rent. His written submissions provided detail of this position and the reasons for it. They stated that the issue with the radiator leak was dealt with promptly. Mr McGuigan states that the non payment of rent commenced on 1st May 2019 and that he had urged the Respondent to take advice. The submissions state that if the text messages between the Respondent and Applicant are

analysed, it would be noted that at no point was there a suggestion that the Respondent intended to withhold rent payments until a number of months had passed. The submissions state that the Applicant considers that the Property had problems because of condensation and that there were housekeeping issues. The submissions also refer to the difficulties the Applicant experienced in trying to arrange the meeting which eventually occurred on 23rd September 2019. They refer to the work carried out on the Applicant's instructions and his offer to the Respondent with regard to the replacement bed. The submissions also refer to the Applicant's experience as a chartered building surveyor and therefore able to comment on the condition of the Property.

27. The Respondent's position was also clear and that was that she was entitled to withhold rent as a result of the condition of the Property.

The written representations, to some extent, were a repetition of the evidence given by Ms Roberts but some additional points were made. There were also some matters contained in the submission which the Respondent had not led in evidence. The representations state that the Applicant had failed to fulfil his obligation under the Housing (Scotland) Act 2006 to ensure that, at all times during the tenancy, the Property met the repairing standard. Specific reference was made to the radiator leak and the external drainage problem. The representations state that the condition of the Property was such that the Respondent did not have full enjoyment of it primarily because of the damp conditions.

The representations state that the Respondent accepts that she withheld some rent for the period from August 2019 to January 2020 amounting to £2,900 and that this was to force the Applicant to fulfil his duties as landlord. The representations state that £1,815 has been placed against the arrears in a separate account controlled by the Respondent's father. The representations state that, because of the condition of the Property and the effect it was having on the health of the Respondent, she did not oppose the granting of the order of eviction. The representations state that the extensive works proposed in the quotation by Lance Contract Services was consistent with the Respondent's position that a lot of work had to be done to bring the Property to a proper standard, particularly to the main bedroom and flooring. The representations state that, had the Applicant responded timeously to the issues reported by the Respondent, the work now requiring to be done would not be as extensive.

Discussion and Determination

28. There was no issue between the parties that there are arrears and that these amount to £3,222.61. This was therefore not a matter which required to be determined by the tribunal.

29. The tribunal had to determine whether or not it was reasonable for the Respondent to withhold payment of rent. It considered the law on the matter. It is an established principle that a tenant has the right to retain rent against performance of the landlord. This is under the general law of contract. Professor Rennie in his publication "Leases" (SULI 2015) at page 262 and 263 states that a tenant will want to use the remedy of retention in two situations. "In the first place it may be used to force the landlord to fulfil the obligations concerned, such as to carry out repairs. In the second place it may be used to set off a damages claim."

30. The tribunal considered some authorities in relation to retention of rent. In *Renfrew District Council v. Gray* 1987 S.L.T. (Sh.Ct.)70, the Sheriff Principal determined that a tenant had no obligation to pay rent where a house was uninhabitable. The Sheriff Principal states that there are three remedies open to a tenant "who does not get full or effective possession of the subjects leased." The first remedy is to retain rent to secure performance. The second remedy is to claim damages if loss is incurred due to the landlord's breach of contract and the third remedy is that the tenant can claim abatement of rent and damages for loss due to breach of the lease. Sheriff Principal Caplan stated that the principle must be that the tenant must not be expected to pay for the benefits of occupancy which he did not enjoy. In that case the Sheriff at first instance had found that the house was completely uninhabitable.

In *William Campbell Muir v John McIntyre and Others* (1887) 14R. 470, it was held that a tenant is not bound to pay the full rent is, during possession, through no fault of his own, he loses the beneficial enjoyment of part of the tenanted property. It states that a tenant's right to abatement may be stated by way of defence to an action for payment of the full rent.

In *Fingland v Mitchell and Howie* 1926 S.C.319 (1926), it was held that a landlord's claim for rent was liquid only if he had fulfilled his obligations under the mutual contract of lease and the law which was applied was that there must be mutuality of contractual obligation and that one party to a contract can only insist on the contract being fulfilled if that party has fulfilled his/her contractual obligations. It further states that a tenant, if it is established that the lessor has not performed his contractual obligations, has a good answer to the claim. Lord Anderson in that case states that a tenant cannot retain the rent indefinitely: "The retention of rent seems to me to be warranted for one of two purposes-(1) to act as a compulsitor on the lessor in obtaining performance by him of his contractual obligation, such as to make the house habitable; or (2) to satisfy pro tanto any counter-claim which the tenant is

maintaining.” The tribunal accepted the principle that a tenant should not pay have to pay rent for a property which is uninhabitable.

The Renfrew District Council case refers to the earlier case of Euman Trs.v. Smith (1930) 46 Sh. Ct. Rep 165 where the sheriff stated “While the house is not reasonably fit for human habitation the tenant is not getting his *quid pro quo* for the rent.” The Muir case sets out the principle of the possibility of abatement of rent and the Fingland case the possibility of retention of rent in the event of non- performance.

31. In the particular case before the Tribunal, the Respondent was arguing that the rent was being held back to make the Applicant maintain the house to the repairing standard as set out in the Housing (Scotland) Act 2006. It seemed to the tribunal that the difficulty the Respondent had in succeeding in this argument is two -fold. The first is that she fell into arrears before the incident with the leaking radiator and the second is that from May to 10th September 2019, her reasons for not paying the rent as communicated to the Applicant were not to do with the condition of the Property but rather for reasons such as illness, signal problems or banking issues.

32. The Respondent stated that £1,815 had been retained in an account controlled by her father. No evidence was produced to support this and the copy bank statements did not evidence this. The tribunal was prepared to accept this to be the case and that a copy of the relevant bank statement may have been included in one of the fifty eight emails the Respondent had attempted to send on the second day of the Hearing. Ms Roberts accepted that there are arrears of £3,222.16 so it was clear to the tribunal that she had not set aside the whole rent. It was concerning to the tribunal that the Respondent had used public funds (Housing Benefit) which she had received and applied them to other matters and had not applied them for the purpose for which they were intended. For example, the Respondent had received Housing Benefit for November and December 2019 and January 2020 but had not paid rent to the Applicant. She had lodged a letter which she had sent to City of Edinburgh Council complaining about the fact that, from February 2020, they were paying rent direct to the Applicant so presumably she wanted to continue receiving Housing Benefit but not pay rent. The tribunal were not persuaded that it was reasonable or appropriate that one of the reasons the Respondent was having financial difficulties was because she had to replace items used by her children (presumably toys) which had been contaminated by the drainage issue rather than pay rent.

33. It is the case that the authorities are clear that a tenant can seek to have rent abated because s/he does not have full enjoyment of the leased premises but that does not entitle a tenant to necessarily withhold all the rent. It is also a high threshold to meet- that the condition of a property is such that a tenant's contractual obligation is set aside or suspended.
34. It is difficult for a tribunal to make a determination on the condition of a property without an inspection or without expert evidence. It is a pity that, if the Respondent considered that the Property did not meet the repairing standard, she had not made an appropriate application to the Tribunal. She had a support worker and she could have been referred to the appropriate charity or service where she could have been assisted in this regard. In the absence of an inspection, or expert evidence led by the Respondent, the tribunal accepted the Applicant's evidence. He is a chartered building surveyor with knowledge of the structures of buildings and the importance of ventilation and the tribunal found him credible. The tribunal found the quotation from Lance of some assistance although it accepted the Respondent's evidence that the contractor had not entered the bedroom in question although it expressed a view based on its previous work on the Property. The report of Apex was extremely persuasive. They are experts in the field of dampness and determined that there was none. The tribunal did not find that the Property did not meet the repairing standard. It accepted that some minor damage may have been caused by the radiator leak but the Respondent chose to refuse the Applicant's offer with regard to carpet cleaning and replacement of the bed.
35. In view of the fact that the tribunal could not find that there was dampness, it was not required to consider any claim for "offset" in respect of any items which the Respondent said were replaced.
36. The tribunal accepted that the Respondent had health issues and that this must have made dealing with matters very difficult but, had she decided to retain rent for reasons with regard to the condition of the Property she would have been required to formally intimate this to her landlord and retain all rent and kept it available to pay once any defects had been rectified. She chose not to do so and, in addition had not provided evidence that retention or abatement of rent was appropriate. The tribunal appreciated that the Respondent was upset by the situation she found herself in but, on the balance of probabilities, did not find that she was entitled to withhold payment of rent to the Applicant.

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.



Martin J. McAllister, Legal Member, 9th December 2020.