

**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 71(1) of the Private Housing
(Tenancies) (Scotland) act 2016**

Chamber Ref: FTS/HPC/CV/23/0107

Re: Property at 30/3 Newhaven Road, Edinburgh, EH6 5PY (“the Property”)

Parties:

**Mr Gerard Kielty, Kirsty Fiona Jones, 30/3 Newhaven Road, Edinburgh, EH6 5PY;
30/3 Newhaven Road, Edinburgh, EH6 5PY (“the Applicants”)**

**Mr Ewan MacAllan, Miss Melanie McAllan, Flat LC Floor 66 Tower 11, La
Splendeur of Le Prestige, No 1 LOHAS Park, Tseung Kwan O, New Territories,
Hong Kong; Flat LC Floor 66 Tower 11, La Splendeur of Le Prestige, No 1
LOHAS Park, Tseung Kwan O, New Territories, Hong Kong (“the
Respondents”)**

Tribunal Members:

Graham Harding (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that the Applicant was entitled to an order for payment by
the Respondent to the Respondent in the sum of £2450.00.**

Background

1. By application dated 10 January 2023 and as subsequently amended by email dated 27 February 2023 the Applicants applied to the Tribunal for an order for payment in respect of a claim for damages arising from the Respondents’ alleged breach of contract and failure to comply with the Housing (Scotland) Act 2006. The Applicants provided the Tribunal with copy emails and documentation between the Applicants and the Respondents’ letting agents together with a copy of the tenancy agreement, inventory and EPC Certificate in support of the application.

2. By Notice of Acceptance dated 21 March 2023 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion (“CMD”) was assigned.
3. By email dated 1 May 2023 the Respondents’ representatives Umega Lettings & Estate Agents, Edinburgh, submitted written representations.
4. A CMD was held by teleconference on 10 May 2023. The Applicants were represented by Mr Kielty, the Respondents did not attend but were represented by Mr Dick from the Respondents’ representatives. After hearing from both parties, the Tribunal adjourned the proceedings to a hearing and issued a CMD Note and Directions.
5. By email dated 26 June 2023 the Respondents’ representatives submitted further written representations to the Tribunal.
6. By email dated 3 July 2023 the Applicants submitted further written representations to the Tribunal.
7. By email dated 11 July 2023 one of the Applicants, Mr Kirsty Jones, confirmed she could not attend the hearing and authorised her husband to represent her interests at the hearing.

The Hearing

8. A hearing was held by teleconference on 12 July 2023. The Applicants were represented by Mr Kielty. The Respondents did not attend but were represented by Ms Caroline Franceschi and Mr William Riddell.
9. The Tribunal referred Mr Kielty to his written submissions of 3 July in which he provided a detailed summary of the Applicants case with references to the paginated Inventory of Productions. The Tribunal ascertained that these documents provided all the evidence the Applicants wished to submit to the Tribunal.
10. The Tribunal asked Ms Franceschi if she wished to cross-examine Mr Kielty which she did not but she explained that she wished to challenge some of the points made in the submissions. She went on to advise the Tribunal that whilst the Building Standards Regulations referred to the installation of mechanical ventilation systems it also made reference to ventilation being possible through opening doors and windows. For his part, Mr Kielty said that whilst he did not know the law, he had sought advice from Dr Stanley Howieson of Strathclyde University who had told him that in all new build properties mechanical ventilation systems were required in bathrooms and kitchens. Mr Kielty went on to say that as new windows had been installed in the bathroom and kitchen at the property that might mean that mechanical ventilation was required. He said he thought that was the case in England but was not sure about Scotland. He said he would have appreciated a discussion with the Respondents’ representatives about the issues in the bathroom and kitchen as the bathroom

window was quite inaccessible. He said that the Respondents representatives had been quite dismissive of his query simply saying that the windows were capable of being opened. He had never been provided with evidence that opening the window would provide the ventilation required in terms of the legislation. He also said that the window in the kitchen was not terribly accessible particularly for his wife.

11. For the Respondents Mr Riddell submitted that the windows had been replaced and they provided adequate ventilation. He went on to say that given the nature of the property the Respondents could not control the position of the windows. He referred the Tribunal to the email to Mr Kielty dated 3 March 2023 and Production number 115 on the Applicants' Inventory of Productions. For his part Mr Kielty submitted that although the position of the windows could not be altered it would be possible to install mechanical or passive ventilation in the bathroom and kitchen. He went on to explain that he had prior experience of agents telling him that things were compliant with regulations when they were not. For the Respondents Ms Franceschi commented that even with trickle vents being fitted to the windows in the bathroom and kitchen they would still be difficult to reach.
12. Ms Franceschi went on to say that although the Applicants had provided screenshots of how much they had paid for their electricity and gas they had not provided any evidence of usage. Given the very significant price increases between 2021 and 2023 whilst it could be seen that payments had gone up it could not be shown if usage had increased. For the Applicants, Mr Kielty said that he had been unable to provide details of usage as the energy suppliers had gone into liquidation and had been taken over by another supplier. He explained that when he went on to the company website the only information that he could obtain was that which he had produced. He said he had produced his calculations of extra costs on the estimate provided in the false Energy Performance Certificate and on running two humidifiers to ensure sufficient ventilation. He explained that due to problems with the boiler it had to run almost continually and he needed to use the dehumidifiers otherwise moisture would build up. He confirmed that one of the humidifiers had a rating of 210 watts and ran continuously and the other smaller one was no longer in use,
13. The Tribunal queried why the wrong EPC was provided to the Applicants. Mr Riddell advised the Tribunal that it had been provided by the Respondent and he did not know why it was incorrect but that it had been sent to the Applicants prior to the start of the tenancy and had not been queried at that time. The Tribunal queried why when the Applicants had pointed out in May 2021 it had taken until April 2023 to be produced. For the Respondents Ms Franceschi said that they held themselves accountable for that but the EPC only provided an estimate of energy usage.
14. Mr Riddell noted that at the CMD the Tribunal had commented that additional evidence would be required to support Mr Kielty's claim for loss of earnings but that no medical report had been submitted. Mr Kielty acknowledged that this was the case.

15. The Tribunal queried with Mr Kielty as to why if there were issues with regards to the property not meeting the repairing standard, the Applicants had not made an application to the Tribunal under the Housing (Scotland) Act 2006. Mr Kielty explained that he had been under the impression that matters were in hand and therefore an application had not been required and also because he had previous experience of reporting a landlord and that had resulted in him being evicted. He went on to say it was only in September 2022 that he became aware that nothing was being done and then by December 2022 repairs were being undertaken.
16. In response to a query from the Tribunal as regards complaining about the lack of mechanical ventilation, Mr Kielty said that he thought he had the damp and mould issues under control until February 2023 and the agents had assured him the property was compliant.
17. Mr Kielty confirmed there were 8 windows at the property 6 had been replaced in February 2023 and the other 2 had trickle vents fitted. Following some discussion, it was agreed with Mr Riddell that by 30 September 2022, the date of the report from Project Glass & Joinery Limited, (Inventory of Production Number 92) the property did not meet the repairing standard. Mr Riddell said that it was only when a colleague attended at the property in July 2022 that he was made aware there was still a problem with the windows.
18. For the Applicants Mr Kielty said that was not his understanding. He thought that Project Glass had prepared a report at the end of November 2021 but that report had never been made available to him. He said that an inspection on 16 December 2021 had been to look at the windows and he had then thought that matters were in hand. He went on to say that having resolved other safety issues as regards the doors he had been exhausted and had left matters until he became aware of winter 2022 approaching and again contacted the Applicants' representatives. Mr Riddell submitted that the inspection on 16 December had been a routine inspection and that although the windows would have been checked it was not arranged specifically for that purpose. The tribunal was referred to the Applicants' Inventory of Productions numbers 52-55 and the Respondents' written submissions of 26 June and the email chain between the Respondents representatives and Project Glass & Joinery dated between 6 July and 7 October 2021. It was submitted that if at that time the windows had needed to be replaced Project Glass & Joinery would have submitted a quote for the repair, which they had not.
19. Ms Franceschi confirmed that the Respondents had agreed to offer a reduction in rent of £200.00 per month for three months pending the installation of the replacement windows but that this offer had been refused by the Applicants. She suggested that the tenants could have come back with a counter offer but that this had not been forthcoming. This was disputed by Mr Kielty who referred the Tribunal to the Applicants' inventory of Productions number 83. Ms Franceschi acknowledged that a counter offer had been made by Mr Kielty.

20. Mr Kielty went on to say that he remained unclear about the legal position with regards to trickle vents and the building regulations but that he was looking for a decision from the Tribunal that the Respondents had failed in their duties. He said that if the Respondents had denied there was a problem when there was and had somehow made out it was his fault. He said if the correct EPC had been provided, he would have been better prepared for larger bills both mentally and physically.

Findings in Fact

21. The parties entered into a Private Residential tenancy that commenced on 24 May 2021 at an initial rent of £845.00 per calendar month.

22. The Applicants were provided with a Schedule of Conditions at the commencement of the tenancy and signed it with comments on 31 May 2021.

23. The Applicants were provided with an Energy Performance Certificate purporting to be in respect of the property and dated 31 March 2016. Said certificate erroneously said that the property was located on the ground floor and was fully double glazed with a total floor area of 113 square metres.

24. The Applicants advised the Respondents' representatives of the errors in the EPC by email on 24 May 2021 and subsequent occasions in May and June 2021, December 2022 and January 2023.

25. A new EPC was produced on behalf of the Respondents dated 13 April 2023.

26. The Respondents installed new double-glazed windows in the bathroom and kitchen of the property prior to the commencement of the tenancy.

27. The windows in both the bathroom and kitchen are capable of opening to provide ventilation although not easy to access.

28. Trickle vents were fitted to the bathroom and kitchen windows in February 2023.

29. By 30 September 2022 the remaining windows at the property were in need of substantial repair with sills and cases starting to rot.

30. The lounge window frame showed signs of rot in July 2021.

31. Six new windows were installed in the property on 22 February 2023.

32. The gas boiler at the property had a fault identified at a Gas Safety Inspection in January 2022 in that the air release valve was faulty and needed to be replaced. Said fault was noted as advisory not mandatory.

33. The fault in the gas boiler was repaired in January 2023.

34. The Applicants reported an infestation of moths to the Applicants' representatives on 24 May 2021. The issue was resolved by mid-July 2021.
35. The Applicants reported concerns about glass doors not being fitted with safety glass in May 2021. Doors were replaced with safety glass in late November 2021.

Reasons for Decision

36. The Applicants claimed damages under three separate headings namely;-
1. Abatement of rent for the period from June 2021 to August 2022 in the sum of £4192.65 and from September 2022 to February 2023 in the sum of £3465.00 making a total of £7657.65.
 2. Contribution towards excess fuel bill from May 2021 to February 2023 in the sum of £752.12; and
 3. Loss of earnings and stress and inconvenience the sum of £858.22.
37. It was apparent that the EPC provided to the Applicants was either for an entirely different property or was wildly inaccurate. Either way on having the inaccuracies pointed out it was incumbent on the Respondents or their representatives to provide as soon as possible a valid EPC. A delay of some 23 months is totally unacceptable. Having said that although the Applicants may well have been better informed had they been provided with a valid EPC at the commencement of the tenancy it is very difficult to say what impact it would have had on their decision to rent the property given that it is impossible to say what the rating of the property would have been prior to the new windows being installed. Therefore, all that the Tribunal can find in this regard is that throughout the period from the commencement of the tenancy until 13 April 2023 the Respondents were in breach of Condition 18 of the Tenancy agreement. That would entitle the Applicants to a measure of compensation.
38. The Applicants argued that there was a requirement to provide mechanical ventilation or ducted passive ventilation in the kitchen and bathroom following the installation of new double-glazed windows and have referred the Tribunal to Part 3.14 of the Building Standards Technical Handbook 2017. The Respondents submitted that as the windows in both areas opened there was no need for additional mechanical ventilation. Ultimately it is for the Applicants to prove their case and to provide the Tribunal with any relevant authorities upon which they intend to rely. Mr Kielty was quite frank when he said he did not know the law but that Dr Howieson had told him that all new build properties required mechanical ventilation in kitchens and bathrooms and that may well be the case. However, the property is not a new build and it is up to the Applicants to show that the installation of mechanical ventilation is a requirement if new windows are installed and put bluntly the Applicants have failed to provide the Tribunal with the necessary evidence to support such an assertion.
39. The Applicants have also argued that the boiler was faulty and that this contributed to additional heating costs. It was accepted by the Respondents' representatives that at the Gas Safety Inspection in January 2022 the engineer

noted that the air release valve was faulty and needed to be replaced however as this was not a safety issue and was not mandatory the work was not undertaken until after the inspection the following year. The Applicants have argued that simply by virtue of there being a fault in the boiler that is sufficient to conclude that the property does not meet the repairing standard. The difficulty for the Applicants is that the Housing (Scotland) Act 2006 requires appliances to be in a reasonable state of repair and proper working order. The information before the Tribunal was that the boiler did work and in the absence of some independent report from a third party as to what impact the faulty air release valve would have on the operation of the boiler the Tribunal is unable to conclude it was not in proper working order given that the engineer had considered the repair to be advisory only. The Tribunal is therefore not satisfied that the Applicants have proved their case in this regard.

40. The Applicants clearly had concerns about various issues from the beginning of the tenancy and some of these such as the moth infestation were addressed if not entirely to the Applicants' satisfaction at least within a period of time that was reasonably acceptable. Other issues such as the lack of safety glass in the doors took demonstrably longer to resolve than was acceptable. Mr Kiely raised the issue of what appeared to him to be signs of rot in the living room window in July 2021 and commented to the Respondents' agents following an inspection by Project Glass & Joinery in the same month that "the guy confirmed the wood was rotten". For whatever reason that information was not passed on by Project Glass & Joinery to the Respondents' representatives nor it would seem did the representatives take any steps to follow it up themselves. As a result, nothing happens about the windows for over a year although Mr Kiely in his evidence said that the matter was again raised in December 2021. On the whole the Tribunal found Mr Kiely to be a credible and well organised witness. It therefore has no reason to doubt that there was an issue with the living room window as early as July 2021 and it has been conceded by the Respondents' agents that by the time of the inspection in September 2022 the windows did not meet the repairing standard.
41. The Applicants have sought to argue that they are entitled to compensation based on the anticipated cost of additional heating due to the invalid EPC, the faulty boiler and the issues with the windows and the failure of the Respondents to deal with the issues within a reasonable period of time. They have argued that they are entitled to claim both an abatement of rent and a contribution towards the additional cost of heating and compensation for loss of earnings and stress and inconvenience.
42. The Respondents' agents correctly pointed out that the Applicants failed to produce itemised bills showing their actual usage of gas and electricity. They did not dispute that the Applicants had used dehumidifiers and therefore that might beg the question are such appliances normally required in properties such as the Applicants if they are being adequately heated and ventilated but neither party has sought to provide the Tribunal with any evidence in that regard. Nevertheless, the Applicants evidence as regards additional use is fundamentally flawed by relying on the estimate provided in the invalid EPC and applying a percentage of the excess as the basis of the claim. The EPC

provided to the Applicants appears to relate to a much larger ground floor property that is fully double glazed. It is simply meaningless when it comes to calculating what costs the Applicants' property might have been expected to incur if they had been provided with a valid EPC or if the windows had been in good condition throughout the tenancy. The Applicants failed to provide the Tribunal with any evidence as regards the cost of gas and electricity in 2016 compared to costs in 2021 and 2022. Perhaps if the Applicants had compared their fuel costs between March 2023 and June 2023 and the same period the previous year the Tribunal might have had some more accurate figure to work with but in the absence of a relevant comparator the Tribunal is unable to make any award in respect of additional heating costs. The Tribunal therefore refuses this head of claim.

43. The Tribunal noted that the Respondents accepted that by the end of September 2022 the property did not meet the repairing standard. The Tribunal also noted that the Respondents were prepared to offer a reduction in rent of £200.00 per month for the months of December 2022 and January and February 2023 to reflect the loss of amenity suffered by the Applicants pending the new windows being installed. The Tribunal having taken account of the submissions made by the Applicants is satisfied that certainly by July 2022 when Mr Kielty again raised the issue of the windows, the property did not meet the repairing standard and therefore the Applicants are entitled to an abatement of rent to reflect their loss of amenity. In the circumstances the Tribunal has to weigh up the extent to which the Applicants enjoyment of the property was affected by the poor condition of the windows. The Applicants have suggested that the property has only ever been 50% habitable but at times only 33%. The Tribunal whilst acknowledging that there were undoubtedly issues with the property did not accept that the property was only 50% usable as suggested by the Applicants. The Respondents had offered a reduction of £200.00 per month for three months. The Tribunal has carefully considered the evidence both by way of the written representations and the oral submissions and considers that there were issues from July 2021 onwards with the living room window that were not addressed by the Respondents or their representatives and although the extent of the problem has been difficult for the Tribunal to ascertain it is satisfied that an award of £50.00 per month by way of an abatement is justified for the period from July 2021 to July 2022 making it 13 months and a total of £650.00. By July 2021 the property did not meet the repairing standard. Despite this the property remained clearly habitable and therefore finds a reasonable deduction from the rent of £200 per month for the period from August 2022 until February 2023 a total of seven months making an award of £1400.00. The Tribunal therefore awards a total of £2050.00 under this head of claim.
44. The Tribunal was not satisfied that the evidence provided by Mr Kielty in support of his claim for loss of earnings was sufficient in law to support such a claim. He was unable to provide any medical evidence from his doctor to support the claim and correspondence from work colleagues who are unqualified is not sufficient. The Tribunal therefore makes no award for loss of earnings.
45. The Tribunal was satisfied that as a result of the breach of contract on the part of the Respondents with regards to the EPC and the concerns the Respondents

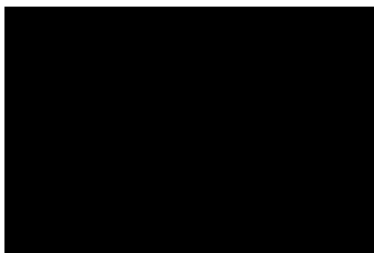
and in particular Mr Kielty had with respect to the condition of the property that they have suffered a degree of distress and inconvenience that warrants a financial award. Such awards of compensation are generally not high in Scotland and the Applicants have provided little by way of explicit evidence. However, the Tribunal considered that a modest award was appropriate in the circumstances given the length of time it took for the Respondents to correct the invalid EPC in April 2023 and deal with the Applicants other complaints and awarded the Respondents a total of £460.00 being 23 months at £20.00 per month.

Decision

46. The Tribunal finds the Applicants entitled to an order for payment by the Respondents in the sum of £2510.00.

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.



Graham Harding
Legal Member/Chair

12 July 2023
Date