



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 16 of the Housing (Scotland)
Act 2014**

Chamber Ref: FTS/HPC/CV/20/0186

Re: Property at 16 Woodend Road, Alloway, Ayr, KA7 4QR (“the Property”)

Parties:

Mrs Marie Sharp, 1 Taybank Drive, Alloway, Ayr, KA7 4RL (“the Applicant”)

**Mr Narinder Pal Singh Sangha, Sea Haze Spring Garden, Dunure Road, South
Ayrshire, KA7 4LA (“the Respondent”)**

Tribunal Members:

Neil Kinnear (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

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

Background

[1] This is an application for a payment order dated 16th January 2020 and brought in terms of Rule 70 (Application for civil proceedings in relation to an assured tenancy under the 1988 Act) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[2] The Applicant sought payment of damages said to have been sustained through the fault of the Respondent of £8,300.00, and provided with her application copies of a short assured tenancy agreement and photographs of the Property.

[3] The Respondent had been validly served by sheriff officers with the notification, application, papers, guidance notes from the Tribunal on 25th June 2020, and the Tribunal was provided with the execution of service.

[4] On 13th July 2020, the Tribunal was advised by e-mail from Mr Walker, solicitor, that he was representing the Respondent, and he provided written representations at that time in advance of the Case Management Discussion.

[5] A Case Management Discussion was held at 10.00 on 4th August 2020 by Tele-Conference. The Applicant participated, and was represented by her husband, Mr Robert Sharp. The Respondent did not participate, and nor did his representative.

[6] The Tribunal made efforts to contact Mr Walker, but was unsuccessful, and the Case Management Discussion proceeded in the absence of the Respondent and his representative.

[7] The Tribunal was satisfied that the requirements of giving notice had been duly complied with, and proceeded with the application in terms of Rules 17 and 29 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[8] The Tribunal confirmed with the Applicant that she had received and looked over a copy of Mr Walker's written representations. The Tribunal explained to the Applicant the procedural rules that a party must provide sufficient detail of the allegations that he or she makes, with particular reference to dates and times, and must also supply evidence or vouching to seek to prove the amount of the losses which he or she alleges he or she has suffered.

[9] The Applicant advised the Tribunal that all of her numerous complaints over the years in relation to the Property had been made to the Respondent's letting agents, Homesure Property Management, 4 Carrick Street, Ayr KA7 1NS. That letting agent should have a file containing the details and dates of all her complaints, which she would like to see and use in evidence.

[10] The Tribunal noted that it had power to issue a direction that the letting agents' file of its dealings with her should be produced, and would do so.

[11] The Tribunal also advised that Applicant that it would issue a direction to her to provide a detailed written response to Mr Walker's written representations, dealing with the various points he identified and utilising the same paragraph numbering in her responses which Mr Walker used in his written representations.

[12] In responding, the Tribunal advised the Applicant that she should provide details of the dates when she alleged various of the matters she complained of occurred and the steps which she took to bring those to the attention of the Respondent's letting agent. She also required to provide evidence or vouching of any expenditure she incurred as a result of any fault on the part of the Respondent, and a detailed calculation disclosing how the figure of £8,300.00 she claimed was arrived at.

[13] The Applicant also advised the Tribunal that she believed that the Respondent was not, and never has been, registered as a landlord on the landlord's register. The Tribunal indicated that it would direct the Respondent to confirm the details of his registration to the Tribunal.

[14] In these circumstances, and for the further purpose of allowing Mr Walker to participate in the Case Management Discussion, the Tribunal considered that it would be appropriate to continue the Case Management Discussion to a further date.

[15] Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal discretion on its own initiative, or on an application by a party, to adjourn a Case Management Discussion.

[16] The Tribunal continued the Case Management Discussion to a further date, to allow Mr Walker to attend and to allow the parties to respond to the Tribunal's direction.

[17] Thereafter, both parties responded to the Tribunal's direction, and Mr Walker tendered his apologies for not attending due to a diarising error. A Hearing was set, and the Parties and the Respondent's representative were subsequently notified with the details of a Tele-Conference and provided with dial-in details

[18] A Hearing was held at 14.00 on 2nd September 2020 by Tele-Conference. The Applicant participated, and was represented by her husband, Mr Robert Sharp. The Respondent did not participate, and was represented by Mr Walker.

[19] Mr Walker raised as a preliminary issue the fact that the Tribunal had continued this matter to a further Case Management Discussion. However, it had sent an intimation letter setting a Hearing, apparently in error. Mr Walker was not prepared for a Hearing, and had not anticipated one taking place as a consequence of the Tribunal's previous decision as narrated in its previous Case Management Discussion note.

[20] The Tribunal accepted that Mr Walker was quite correct. This had been set as a continued Case Management Discussion by the Tribunal on 4th August 2020, but had erroneously been intimated to the parties as a Hearing.

[21] In those unfortunate circumstances, the Tribunal dealt with the matter as a Case Management Discussion.

[22] The Tribunal noted that the Respondent had produced the file from his letting agents in response to the Tribunal's direction. The evidence apparently contained in that file appeared to diverge from the overall position advanced by the Respondent in his previous written responses in a number of respects.

[23] Mr Walker indicated that he would provide revised written responses, summarising his client's position in light of the material contained in his letting agent's file, in advance of the next Hearing.

[24] The Tribunal discussed with the Applicant and her representative the legal bases upon which she sought the amounts claimed. They advised that the claim for £4,800 in respect of rent was made on the basis that that was six months' rent which the Applicant should not have paid as the Property was effectively uninhabitable due to the absence of working smoke alarms and damp problems.

[25] The Applicant confirmed that she had no vouching for the costs of £1,000 for carpeting and white goods. The claim for £2,500 in respect of hazard caused to her and her family's health by dampness on the Property was simply an estimate of what she thought would be reasonable.

[26] The Tribunal explained that the Applicant would need at a Hearing to be able to provide a legal basis for the sums claimed, and might wish to take legal advice on that aspect. It also outlined the procedure involved at a Hearing to the Applicant and her representative.

[27] For these reasons, the Tribunal adjourned the Hearing and set a continued Hearing.

[28] Both parties subsequently lodged various further documents, and the Applicant by e-mail to the Tribunal dated 19th September 2020 intimated that she wished to amend her claim by removing the claim for repayment of £4,800.00 in respect of rent for the period of six months in 2019, and to replace it with a claim for pain, suffering and loss caused by dampness and lack of amenities for the whole period of the tenancy. The compensation sought in that regard she stated might vary from 25% to 100% of rental paid for the duration of the tenancy.

[29] A continued Hearing was held at 10.00 on 15th October 2020 by Tele-Conference. The Applicant again participated, and was again represented by her husband, Mr Robert Sharp. The Respondent participated, and was again represented by Mr Walker. The Respondent was accompanied by his son as a supporter.

[30] Mr Walker raised as a preliminary issue his objection to the amendment intimated by the Applicant in her e-mail of 19th September 2020. Mr Walker noted, and the Tribunal and the Applicant agreed, that in terms of Rule 13(1)(a) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, the Applicant had sought to amend her written representations more than 7 days prior to the Hearing date.

[31] The amendment sought was made in writing in terms of Rule 13(2)(a), and it had been duly intimated upon the Respondent by the Tribunal in terms of Rule 13(3).

[32] However, the effect of the amendment would be to introduce a new issue, and in terms of Rule 14(1), such amendment might only be made with the consent of the Tribunal and with any conditions it sees fit.

[33] The Applicant confirmed, once the procedure had been explained to her by the Tribunal, that she sought the Tribunal's consent to the amendment she intimated, and that her claim was based on the fault and negligence of the Respondent.

[34] Mr Walker opposed the amendment upon the basis it would be unjust to allow it at this late stage. If the Tribunal did consent to it, he noted that this Hearing would require to be adjourned in order to allow the Respondent the opportunity to make written representations in response to the amendment in terms of Rule 14(2).

[35] The Tribunal and the Applicant accepted that Mr Walker's procedural analysis was correct, and the Tribunal adjourned for a short period to consider whether it should consent to the proposed amendment or not.

[36] Upon resuming the Hearing, the Tribunal expressed its sympathy for the Respondent's position, but decided that having regard to the overriding objective and principles set out in Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended that it was in the interests of justice that the Tribunal consent to the amendment.

[37] The Applicant had from the outset raised the issue of longstanding dampness in the Property, and narrated that it had affected the health of her and her family. However, she had not previously formulated or expressed a claim to be one of negligence under the law of delict, nor had she sought to claim damages based on a proportion of the rental paid over the entire duration of the lease.

[38] That being the case, there was no doubt that the amendment introduced a new issue, which the Applicant candidly conceded was the case, and that accordingly the Respondent required to be allowed the opportunity to make written representations in response to the amendment in terms of Rule 14(2).

[39] For that reason, the Tribunal adjourned the continued Hearing and set a further continued Hearing.

[40] The Tribunal explained to the Applicant that she required to state a specific figure of the sum she sought in the new element of her claim. She confirmed that she would accept whatever the Tribunal deemed appropriate, but that she sought a maximum of 50% of the entire rental paid for the duration of the lease.

[41] The Tribunal advised the Applicant that she needed to e-mail the Tribunal seeking to add by amendment a specific figure for her claim once she had calculated that. The Applicant also requires to set out the basis of her calculation, and the legal basis upon which she asserted she was entitled to claim the amount sought from the Respondent.

[42] The Applicant undertook that she would e-mail the Tribunal with those details by 5pm on 16th October 2020. The Tribunal noted that her claim was legally complicated, and that she might wish to seek legal advice upon it, and in due course upon Mr Walker's written representations in response.

[43] Mr Walker suggested to the Tribunal that the further continued Hearing should be set as a legal debate upon the Applicant's claim, and not as an evidential hearing. He anticipated that he would have legal challenges to make that the claim was not legally valid, and that at the very least substantial parts of it should not be allowed to proceed to an evidential hearing for that reason. Disposing of his arguments as a preliminary issue would potentially avoid wasted time and cost in leading unnecessary evidence at length on matters which the Tribunal might reject if his arguments were accepted.

[44] The Applicant and the Tribunal agreed that this was a sensible approach, and accordingly the further continued Hearing was set as a legal debate with submissions

by both parties upon the legal validity of the Applicant's claim as a preliminary issue, with no evidence to be heard at it for that reason.

[45] The Applicant e-mailed the Tribunal on the evening of 15th October 2020 with details of her amended claim. In that e-mail, she stated that she wished to claim 50% of the rent paid to the Respondent for the full term of the tenancy.

[46] The Applicant provided a calculation of the whole rent paid by her for the duration of the tenancy from 17th April 2009 to 17th December 2019 amounting to £87,800.00. 50% of that figure comes to £43,900.00.

[47] She went on to state that "This payment is for compensation regarding pain, suffering and loss from april 2017 – dec 2019 regarding dampness that was not treated and repairs which were not done causing health issues and danger to mrs sharp and her family's well being"

[48] The e-mail then goes on to state that "these claims are brought to the tribunal's attention as part of the housing Scotland act section 25(1)(a)", parts of which section she then quotes. She continued "it is mrs sharp's opinion that mr sangha had failed to comply with these regulations "and that he was well aware of the issues and did nothing to fix them.

[49] Mr Walker helpfully provided a written outline argument to the Tribunal on 27th November 2020, in which he submitted that this application should be dismissed for a number of reasons which he set out.

Continued Hearing

[50] A further continued Hearing was held at 10.00 on 4th December 2020 by Tele-Conference. The Applicant again participated, and was again represented by her husband, Mr Robert Sharp. The Respondent participated, and was again represented by Mr Walker.

[51] Mr Walker made detailed legal submissions with reference to his written outline arguments. These can be summarised as follows.

[52] The Applicant's amended claim appeared to be in respect of a breach of the repairing standard obligation and a delictual claim for injury. The contractual claim appeared to have been removed.

[53] The Applicant had failed to provide any proper detail specifying and identifying the extent of any dampness, and failed to follow the steps required of her in terms of section 22 of the *Housing (Scotland) Act 2006*. The claim in terms of the *Housing (Scotland) Act 2006* should be dismissed.

[54] In any event, this statutory claim was a new issue in terms of Rule 14(2). The Applicant had not sought the Tribunal's consent as she was required to do. In the event that the Tribunal allowed the amendment in this respect, the claim failed to seek

to quantify the amount of loss which the Applicant claimed in respect of the failure and was completely lacking in specification and should be dismissed.

[55] Mr Walker went on to submit that the Tribunal did not have jurisdiction to deal with delictual claims, as its jurisdiction relates to matters arising out of an assured tenancy under the *Housing (Scotland) Act 1988*.

[56] The delictual claim did not arise from the assured tenancy, but was rather a personal injury claim said to have arisen as a result of the presence of dampness in a dwelling house. Mr Walker drew support from the case of *Parker v Inkersall Investments Ltd* 2019 SLT (Sh Ct) 41.

[57] Mr Walker argued that the Tribunal had no jurisdiction in respect of a delictual claim such as this, and accordingly it should be dismissed. In the event that the claim was not dismissed, the amount sought was excessive and the claim was frivolous. There was no causal link given between any dampness and any illness of the Applicant. There was no information given about the Applicant's health, and the basis on which the amount sought was claimed was not related to the Applicant's state of health. On that basis too, the claim should be dismissed.

[58] Finally, Mr Walker submitted that the Applicant had failed to specify or to produce any evidence or vouching to support a claim for any loss, and that in the event that the Tribunal did make any award, it should be reduced on the basis of contributory negligence as the Applicant had made no attempt to mitigate her loss.

[59] In response, the Applicant and her representative clarified that the Applicant did not seek damages for personal injury. The Applicant sought compensation in respect of the Respondent's breach of contract and breach of statutory duty. The measure of that loss was 50% of the rental the Applicant paid for the entire duration of the lease. In response to questioning by the Tribunal, the Applicant stated that she sought 50% of the entire rent paid as this just seemed to be reasonable to her.

[60] The Tribunal noted that the issues raised in the submissions were legally complex, and asked if the Applicant had sought and obtained legal advice, and if not, whether she wanted the opportunity to do so. The Applicant confirmed that she had obtained legal advice on her claim, and did not wish to seek further legal advice.

Statement of Reasons

[61] Section 16 of the *Housing (Scotland) Act 2014* provides as follows:

“16. Regulated and assured tenancies etc.

(1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal -

(a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),

(b) a Part VII contract (within the meaning of section 63 of that Act),

(c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).

(2) But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

(3) Part 1 of schedule 1 makes minor and consequential amendments.”

[62] Accordingly, the Tribunal has jurisdiction in relation to actions arising from a short assured tenancy such as this. The first question which the Tribunal requires to answer is whether the claim which the Applicant makes arises from the tenancy agreement.

[63] The Upper Tribunal for Scotland considered the extent of the Tribunal’s jurisdiction “arising from” a tenancy agreement in the case of *Anderson v First-tier Tribunal for Scotland Housing and Property Chamber* [2019] UT 48. Albeit that decision concerned a private residential tenancy agreement, the principles applied to the similar wording conferring jurisdiction on the Tribunal appear equally applicable here.

[64] The Upper Tribunal concluded at paragraph 14 of its decision that “the natural and ordinary effect of the words “*arising from*” is unrestricted and imprecise, and invites a wide, inclusive approach. It is quite the opposite of a defined award. It tends to show that the legislature intended the FtT to deal with all PRT-related events, to the exclusion of the sheriff court, and not just the core lease”.

[65] The Tribunal accordingly concludes that this claim does arise from the tenancy agreement, and the Tribunal does have jurisdiction to deal with it.

[66] The Applicant, who has no legal training, has specifically confirmed that she is not seeking to make a claim for personal injury in this application. She has also specifically confirmed that she does not wish to make a delictual claim.

[67] The Applicant seeks in this application to make a contractual claim for damages, and a claim for damages based upon an alleged breach of statutory duty. The Tribunal will address each basis of claim in turn.

[68] The contractual claim is said to arise from a breach by the Respondent of his obligations as landlord under the lease to fulfil the landlord’s repairing obligations contained in clause 29 of the lease agreement. This clause obliges the Respondent to maintain the subjects wind and water tight, to carry out repairs to the premises, and to provide and maintain the premises in a condition which is tenantable and habitable and which is in all respects reasonably fit for human habitation.

[69] The Applicant claims that whilst she and her family occupied and resided in the Property, the Respondent failed to carry out repairs which resulted in dampness. The consequence of the failures to repair and the continued presence of dampness is that it is said to have caused health issues and danger to the Applicant and her family’s well being.

[70] The Respondent denies this breach of contract. However, if after hearing evidence on that matter, the Tribunal were to conclude that he was in breach, then it would fall to the Applicant to show that the breach caused the loss of which she complains, for

it is a basic principle of damages that only those injuries which were caused by the breach can figure in the assessment (see, for example, *Stair Memorial Encyclopedia Volume 15 "Obligations"* at paragraph 893).

[71] The Applicant provides absolutely no detail or specification of what health issues and danger to her and her family's well being she alleges any breach by the Respondent caused, let alone how any such health issues and danger resulted from any breach by the Respondent. At the very least, the Applicant would need to say what health issues and danger to her and her family's well being she and they have suffered, and then to set out the basis upon which she asserts that any breach of contract by the Respondent has caused those.

[72] Further, the Applicant would even then still have to demonstrate that the loss suffered is not too remote, and that the measure of damages should be such as may fairly and reasonably be considered, either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it (see, for example, *Stair Memorial Encyclopedia Volume 15 "Obligations"* at paragraph 903 and the cases referred to therein).

[73] In the event that the Applicant was able to show that the loss claimed was not too remote, then the Tribunal would need to address the question of how damages fall to be assessed. The general principle is that of restoration, that is to put the injured party in the same position as he or she would have been in had the wrong never occurred. Where a breach of contract causes personal injury, then damages, including *solatium* and compensation for consequent pecuniary loss, will be assessed in the normal way (see for example, *Stair Memorial Encyclopedia Volume 15 "Obligations"* at paragraph 913 and the cases referred to therein).

[74] The Applicant here seeks repayment of 50% of the entire rental paid by her for the duration of the lease, rather than seeking or offering to quantify any loss she may have suffered to her and her family's health and well-being. No legally valid explanation is given as to why the measure of any loss should be quantified by reference to the rental paid where the loss complained of is personal injury.

[75] A further difficulty in the Applicant's position, is that she and her family remained living in the Property for a period of 10 years during which they allege they suffered ongoing damage to their health and well being. If they were aware of such damage, they ought to have made some attempt to mitigate their loss rather than simply remaining there and continuing to suffer such damage.

[76] The repayment of rental paid might be an appropriate measure of loss sustained in certain circumstances and certain types of claim under a contract of lease, but it is not the appropriate measure of loss in a claim such as this.

[77] In the absence of any attempt to give notice of, or even to appropriately quantify, the loss complained of and to link that to the alleged breach of contract by the Respondent, then this aspect of the Applicant's claim must be dismissed.

[78] That leaves the claim for damages based upon an alleged breach of statutory duty. The same difficulties arise regarding causation, remoteness and appropriate measure of loss as in the contractual claim.

[79] However, a further difficulty is that the statutory provisions upon which the Applicant relies do not, in the Tribunal's opinion, confer civil liability upon a party such as the Respondent if he is in breach of those. The mechanism for a tenant to enforce the obligation of a landlord to repair and maintain a property imposed by section 14 of the *Housing (Scotland) Act 2006* is specifically set out in that Act as being by application to the Tribunal in respect of the repairing standard in terms of section 22.

[80] The Applicant did not follow that statutory mechanism, and did not bring an application to the Tribunal in respect of the repairing standard. It is a general rule that where a statute creates an obligation and enforces the performance in a specified manner, performance cannot be enforced in any other manner (see, for example, *Stair Memorial Encyclopedia Volume 15 "Obligations"* at paragraph 157 and the case of *Lonrho Ltd v Shell Petroleum Co Ltd* (No 2) [1982] AC 173).

[81] For that reason also, this aspect of the Applicant's claim must also be dismissed.

[82] Standing the Tribunal's decision on the above grounds, it is unnecessary for it to consider any remaining grounds of challenge made by Mr Walker which have not already been dealt with, and the Tribunal will not do so.

Decision

[83] For the above reasons, the Tribunal dismissed the application.

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.

Neil Kinnear
Legal Member/Chair

28 December 2020

Date