Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber)

Chamber Ref: FTS/HPC/CV/20/2015

Re: Property at 111/5 Montgomery Street, Edinburgh, EH7 5EX ("the Property")

Parties:

Miss Phoebe Combe, Mr Christopher Isaacs, 111/5 Montgomery Street, Edinburgh, EH7 5EX ("the Applicants")

Faceworks Solutions & Technologies Limited, 2 NE Wing, Walton Manor, Walton Street, Walton-on-the-hill, Surrey, KT20 7SA ("the Respondents")

Tribunal Members:

Virgil Crawford (Legal Member)

Decision

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

BACKGROUND

1. The applicants are tenants of the property and remain so. The Respondents are the Landlords;
2. The property is a flatted dwelling within a tenement block containing 11 other flats;
3. The lease contains provisions in relation to repair and maintenance of the property. Clause 16.1 of the lease makes reference to the repairing standards. Although it does not make specific reference to Chapter 4 of the Housing (Scotland) 2006 ("the 2006 Act"), it was a matter of agreement that that clause of the lease related to those statutory provisions;
4. Clause 16.2 was a provision about habitability which provided that the Landlord agreed to maintain the property in a wind and water tight condition and fit for human habitation;

5. On 10th May 2019 the Applicants reported to the Respondents that there was water ingress in the bedroom of the property. Repairs were effected by 20th August 2020;
6. The Applicant submitted an application to the Tribunal seeking an abatement of rent (or compensation) due to the defect and the delay in it being repaired;
7. Prior to the Case Management Discussion the Respondents presented submissions in response to the application and requested that the proprietors of 11 other properties within the tenement block be added as additional Respondents. This request was refused by the Tribunal;

THE CASE MANAGEMENT DISCUSSION

8. The Case Management discussion was conducted by teleconference. The Applicants both participated. The Respondents were represented by their Director, Deborah Kol;
9. Miss Kol, at the start of the Case Management discussion, again indicated that she was of the view that the proprietors of the eleven other properties within the tenement block ought to be called as Respondents also as, in her view, they were equally liable for the fault. The Tribunal was not minded to vary its earlier decision to refuse such an application to add the numerous other proprietors as Respondents and the Case Management Discussion proceeded accordingly;
10. There was little dispute in relation to the facts. The parties were agreed:-
    a) that there was a defect in the property which resulted in water ingress at a window within the bedroom;
    b) this was reported to the Respondents on 10 May 2020;
    c) Miss Kol, on their behalf, quickly instructed a tradesman to inspect the property;
    d) it became apparent that the repair was a common repair, the property being one of 12 within the tenement block;
    e) the Respondents thereafter engaged with the other proprietors to obtain consent to effect the repair;
    f) when this was not immediately forthcoming the Respondents considered proceeding with the matter by way of a property insurance claim;
    g) ultimately, the repairs were effected by 20th August 2020 although some further remedial work was required thereafter;
11. The Respondents confirmed that they had received £75 as a form of compensation as a result of the defect. £50 was paid by the Respondents. £25 was paid by the proprietors of one of the other flats within the tenement;
12. Miss Kol, indicated that when the defect was drawn to her attention she dealt with matters as quickly as she could – the only delay being occasioned as a result of the lack of co-operation of the proprietors of the remaining flats within the tenement block. The Applicants did not dispute that. In essence, it was accepted by them that there was no fault on the part of Miss Kol but they maintained that, due to the length of time it took for the repair to be effected, some compensation ought to be awarded to them;

13. In submissions presented by the Respondent prior to the Case Management Discussion the Respondent made reference to s66 of the 2006 Act which provides as follows:-

> ***16 EXCEPTIONS TO LANDLORD'S REPAIRING DUTY***
> ***(1)The duty imposed by section 14(1) does not require—***
> ***(a)any work to be carried out which the tenant is required by the terms of the tenancy to carry out,***
> ***(b)any work to be carried out for which the tenant—***
> ***(i)is liable by virtue of the tenant's duty to use the house in a proper manner, or***
> ***(ii)would be so liable but for any express undertaking on the landlord's part,***
> ***(c)the house to be rebuilt or reinstated in the event of destruction or damage by fire or by storm, flood or other inevitable accident, or***
> ***(d)the repair or maintenance of anything that the tenant is entitled to remove from the house.***
> ***(2)The exception made by subsection (1)(a) applies only if the tenancy concerned is—***
> ***(a)for a period of not less than 3 years, and***
> ***(b)not determinable at the option of either party within 3 years of the start of the tenancy.***
> ***(3)Where the terms of a tenancy are not agreed until after the tenancy starts, the tenancy is, for the purposes of subsection (2), to be treated as starting on the date of agreement.***
> ***(4)A landlord is not to be treated as having failed to comply with the duty imposed by section 14(1) where the purported failure occurred only because the landlord lacked necessary rights (of access or otherwise) despite having taken reasonable steps for the purposes of acquiring those rights.***
> ***(5)For the purpose of subsection (4), in relation to any work intended to be carried out to parts owned in common with other owners but where a majority of the owners has not consented to the intended work, a landlord is to be treated as lacking necessary rights.***

14. Again, it was not disputed by the Applicants that the delay in effecting repairs was due to a lack of consent by the majority of owners within the tenement block and that, in terms of s16(4) and (5) of the 2006 Act, the Respondents did not have the necessary rights of access;
15. Discussion took place in relation to Clause 16.2 of the Lease which made provision for the Respondents maintaining the accommodation in a wind and water tight condition and reasonably fit for human habitation. While there was water ingress, it was accepted that the Applicants remained in occupation of the premises throughout the entire period although it was not disputed by the Respondents that there was some inconvenience occasioned to them as a result of the defect. Again, however, there was no delay on the part of the Respondents in dealing with the defect;

FINDINGS IN FACT

16. The Tribunal found the following facts to be admitted or proved;
    a) The Applicants are tenants of the property and the Respondents are the Landlords;
    b) At the start of May 2020 the tenants noted that water was entering the property at the window within the bedroom;
    c) The problem was intimated to the Respondents on 10th May 2020; The Respondents quickly arranged for a tradesman to inspect the premises. The inspection confirmed that the defect was, in fact, a defect in the guttering of the tenement block and that this would be a common repair;
    d) The Respondents thereafter took steps to secure the consent of a majority of the proprietors of the properties within the tenement to effect the common repairs. There was a delay in a majority of proprietors consenting but this was through no fault on the part of the Respondents; separately, the Respondents indicated an intention to make a claim on the property insurance policy to have the repair effect in the absence of consent of the majority of the proprietors;
    e) The repairs were effected by 20th August 2020;
    f) The applicants remained in occupation of the property throughout;
    g) There was no fault nor delay on the part of the Respondents in taking steps to remedy the defect once it was drawn to their attention;
    h) The defect was a common repair in relation to the tenement block; a majority of owners of the properties within the tenement block had not consented to the necessary work being carried out until August 2020. In the circumstances, the Respondents did not have the necessary rights of access to effect the necessary repairs despite having taken reasonable steps to acquire those rights;
    i) While there was water ingress at the property from 10th May 2020 until 20th August 2020, the property remained habitable and the Applicants remained in occupation of it throughout that period;

REASONS FOR DECISION

17. Somewhat unusually, there was little or no disagreement between the parties in relation to all relevant facts in connection with this case. It was clear in the course of the Case Management Discussion that the Applicants and the Respondent remained on good terms with one another. It was clear also that the Respondents was keen to be doing what they (or what Miss Kol, their Director) considered to be morally correct. To that end, Miss Kol was anxious

to have the proprietors of the other properties within the tenement block added as respondents with a view to them being ordered to be responsible for payment of compensation to the Applicants;

18. While the Tribunal considered the views of the Respondents to be commendable, it was pointed out that the Tribunal had to consider the application on the basis of the law relating to the case and not on the basis of what anyone considered to be morally right or wrong. As a matter of law, there was no fault on the part of the Respondents. As a matter of law, the Respondents did not have the necessary rights of access required to effect the repair, despite having, by agreement, taken all necessary steps to secure those rights as quickly as possible. In the circumstances, while there was clearly no dispute about the fact that there was a defect which subsisted for a period of approximately 3 months, in the absence of there being any fault or delay on the part of the Respondents, it was not appropriate that there be any award of compensation, particularly given that the Applicants remained in occupation of the property throughout and that they had, by agreement, already received £75 in ex gratia payments from the Respondents and the proprietor of one of the other properties within the tenement;
19. Miss Kol again raised the issue of the other proprietors of the properties within the tenement block being called as respondents and being found liable also. She referred to this as a "jurisdictional issue". She considered that there was a lacuna, or loophole in the relevant legislation relating to the Tribunal and its processes and procedures if there was no provision for the numerous proprietors being added as Respondents;
20. The Tribunal did not agree that there was such an issue. The Tribunal generally deals with disputes between Landlords and tenants. The Tribunal can, in appropriate cases, add additional parties to an application. In this case, however, there is no legal connection between the tenants and the proprietors of other properties within the tenement block. Any legal relationship which exists with the tenants is between the them and the Respondents. In the event that there was any order for payment made against the Respondents, the Respondents would then have a right of relief against the proprietors of the other properties within the tenement block. They do not require to be party to these proceedings for that right of relief to be effective;
21. Separately, however, given that the Tribunal found that it was not appropriate to make any order for payment against the Respondents, there can have been no basis for there being any order against any of the other proprietors either. In such circumstances, there was no basis for adding numerous additional respondents and certainly no basis for delaying the proceedings to enable that to happen. The desire of the Respondents to have the other proprietors added as respondents was well intentioned but, in the circumstances, misconceived. For the reasons stated above, there was no proper basis for adding such persons as additional Respondents;

DECISION

The Tribunal dismisses 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.

Virgil Crawford

4 December 2020

Legal Member/Chair **Date**