



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/19/3664

Re: Property at 8 Cochrane Place, Newmilns, KA16 9EY (“the Property”)

Parties:

Mr Gary Rundle, 58 Richardson Avenue, Hurlford, KA1 5DX (“the Applicant”)

Miss Wendy McMillan, 10 West Church Street, Newmilns, KA16 9EG (“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 11th November 2019 and brought in terms of Rule 111 (Application for civil proceedings in relation to a private residential tenancy) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[2] The Applicant originally sought in his application payment of arrears in rental payments, which at that time amounted to £2,240.00 due by the Respondent in respect of her tenancy of the Property, and provided with his application copies of the tenancy agreement, rent arrears statement, and e-mail correspondence.

[3] A Case Management Discussion was held on 20th February 2020 at Russell House, King Street, Ayr. The Applicant’s partner, Frances Denim, appeared on the Applicant’s behalf. The Respondent also appeared.

[4] The Tribunal conducted a detailed discussion with the parties, and produced an extremely thorough and helpful Case Management Discussion Note recording what took place, and exploring and noting the issues in dispute between the parties. The Tribunal also issued a helpful direction in light of the discussion, and set a Hearing.

[5] As a result of the coronavirus pandemic, and the lockdown imposed in the United Kingdom, there was a significant delay in setting a date for the Hearing.

[6] The afternoon before the day of the Hearing, the Tribunal received an e-mail from the Respondent, apparently in reply to a standard e-mail issued by the Tribunal clerk the day before a Hearing.

[7] The Respondent explained that she had just received an e-mail about the Hearing, which she said was the first notification which she had received of it. She advised that she was unable to participate at such short notice, and stated that she had productions and evidence which she wished to put to the Tribunal which she had not yet sent to it. She requested a postponement.

[8] The members of the Tribunal did not receive the postponement request till after business hours that evening, and accordingly agreed to reserve their position and to decide upon the request at the start of the Hearing.

[9] The Applicant e-mailed the Tribunal shortly before the commencement of the Hearing indicating his objections to the postponement request.

[10] A Hearing was held at 10.00 on 6th August 2020 by Tele-Conference. The Applicant participated, and was not represented. His partner, Frances Denim, also participated. The Respondent did not participate, and was not represented.

[11] The Applicant expressed his frustration with the Respondent, whom he believed was deliberately stalling and delaying the progress of this matter. He wished to proceed, but after discussing with the Tribunal the various issues involved, reluctantly accepted that an adjournment might be necessary.

[12] The Tribunal confirmed that the Respondent had been notified of the date of this Hearing by e-mail on 7th July 2020. That e-mail was sent to the Respondent's authorised e-mail address, and no response was received indicating that sending had failed.

[13] However, it is not the Tribunal's practice to seek delivery or read receipts, and no hard copy of the notification was sent in the postal service. The Tribunal simply cannot verify with certainty whether or not the Respondent received the notification.

[14] The Tribunal also noted that the Respondent has previously engaged with the Tribunal, attended the previous Case Management Discussion, has asserted a positive defence to this application, and has not previously sought to postpone or adjourn matters.

[15] Having regard to the Tribunal's overriding objective to deal with proceedings justly, and ensuring, so far as practicable, that the parties are able to participate fully in the

proceedings, the Tribunal considered that it should allow this Hearing to be adjourned to another date, in order to allow the Respondent to participate in it.

[16] 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 hearing.

[17] The Tribunal considered it to be reasonable to adjourn the Case Management Discussion in the circumstances, and consistent with the overriding objective of the Tribunal in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[18] The Tribunal issued a revised direction to the parties, which they required to comply with by 31st August 2020. The Tribunal suggested to the Applicant that it would assist if he consolidated his various responses to the points raised in the previous direction into one document, together with any documents, photographs or other evidence he might wish to put to the Tribunal.

[19] The Applicant mentioned that the rent arrears which he sought had increased since the date of his application. The Tribunal advised the Applicant that if he wished to seek an order for an increased amount, he would require to amend the sum sought in this application no later than 14 days in advance of the further Hearing and intimate that to both the Tribunal and the Respondent in terms of Rule 14A of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[20] The Applicant also advised the Tribunal that an eviction of the Respondent from the Property had been set for Friday 14th August 2020. If that proceeded, he might in due course wish to amend the address of the Respondent in this application to her new address.

[21] Thereafter, both parties responded in considerable detail to the Tribunal's direction.

[22] A continued Hearing was held at 10.00 on 22nd September 2020 by Tele-Conference. The Applicant did not participate, and was not represented. The Respondent participated, and was not represented.

[23] The Tribunal was surprised by the non-participation of the Applicant, standing the position he took at the previous Hearing. It noted that he had complied with the Tribunal's direction, and had been in regular contact with it by e-mail. The last communication received by the Tribunal from him was on 2nd September 2020, and he had given no indication that he was unable to attend or no longer wished to pursue this application.

[24] The Tribunal clerk made efforts to contact the Applicant both by telephone and by e-mail, but was unable to obtain any reply to either.

[25] It was the Respondent, on this occasion, who in turn expressed her frustration with the Applicant, whom she believed was deliberately stalling and delaying the

progress of this matter. On this occasion, she wished to proceed, but after discussing with the Tribunal the various issues involved, reluctantly accepted that an adjournment might be necessary.

[26] The Tribunal confirmed that the Applicant had been notified of the date of this Hearing by e-mail on 24th August 2020. That e-mail was sent to the Applicant's authorised e-mail address, and no response was received indicating that sending had failed.

[27] However, as earlier mentioned, it is not the Tribunal's practice to seek delivery or read receipts, and no hard copy of the notification was sent in the postal service.

[28] The Tribunal also noted that the Applicant has previously engaged with the Tribunal, attended the previous Case Management Discussion and Hearing, and has not previously sought to postpone or adjourn matters.

[29] Having regard to the Tribunal's overriding objective to deal with proceedings justly, and ensuring, so far as practicable, that the parties are able to participate fully in the proceedings, the Tribunal considered that it should allow this Hearing to be adjourned to another date, in order to allow the Applicant to participate in it.

[30] 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 hearing.

[31] The Tribunal considered it to be reasonable to adjourn the Case Management Discussion in the circumstances, and consistent with the overriding objective of the Tribunal in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, for one further occasion to allow the Applicant and/or his representative to participate.

The Hearing

[32] A Hearing was held at 10.00 on 9th November 2020 by Tele-Conference. The Applicant participated, and was not represented. His partner, Frances Denim, also participated as supporter. The Respondent participated, and was not represented.

[33] The Tribunal confirmed with the Applicant that the rent arrears figure which he sought in this application was £6,994.17, which is the revised figure outstanding up to the date of the Respondent's departure from the Property which he had intimated he wished to claim in his response dated 26th August 2020 to the Tribunal's direction.

[34] The Tribunal then confirmed with the Respondent that she accepted that the rent arrears figure sought by the Applicant was the correct amount which she had not paid to him in terms of the lease agreement. Her contention was, however, that there should be an abatement made to the figure sought of 50% in respect of the poor condition of the Property after flood damage which took place in the early hours of 14th July 2019.

[35] Thereafter, the Tribunal heard evidence from the parties. It became clear that very little of the factual history was in dispute between them. The issue in dispute was more the interpretation that each party put upon those facts, and the consequences which should flow from those.

[36] The Applicant confirmed the calculation of the sum which he sought with reference to the rent arrears calculation which he had provided to the Tribunal.

[37] The Applicant explained that whilst he was away from home, the Property suffered substantial flooding from a damaged mains water supply pipe to the lavatory cistern in the upstairs bathroom on or about the 14th July 2019.

[38] After the Respondent reported that to him, he arranged for an emergency plumber to attend the following day to repair the pipe. The plumber had subsequently given him the replaced failed section, which was a flexible supply pipe which had a small hole where it had failed and from which the water came out.

[39] The Applicant also explained that he had arranged for an emergency electrician to attend the following day to check the safety of the electrical system in the Property.

[40] The Applicant explained that he had made efforts to arrange access with the Respondent in order to allow the wet carpeting to be taken up and removed. The Respondent cancelled the scheduled visit to do that upon the basis that she had a very busy work schedule which would not permit her to allow access at the original time suggested.

[41] Thereafter, the Applicant made efforts to arrange repair and reinstatement work to be carried out. He had liaised with a loss adjuster provided by his insurer, who had explained the process to him and what work was required.

[42] The Applicant explained that after removing the carpets, the flooring in the upstairs bathroom and hall required to be lifted, as well as taking down the ceiling in the kitchen on the ground floor in order to allow the fabric of those areas to dry out before reinstatement work could commence. He described how when that work was done, one could look down through the floor beams upstairs and down into the kitchen below.

[43] It was obvious due to the nature and extent of the work, that the Property would have to be vacated whilst these works were carried out. The Applicant explained that he had attempted to arrange alternative accommodation for the Respondent which was suitable for her. This involved finding a property for rent in the local area which would also allow her to take her three dogs and other pets with her. The Property which he located had a higher rental, but the difference in rent would be covered by his insurance.

[44] The Applicant explained that the Respondent simply refused to vacate the Property, and insisted that the work should be carried out whilst she still continued to occupy it and reside there. As that was impossible, the Applicant was unable to have the work carried out until the Respondent left voluntarily on 14th August 2020 to move to a different property.

[45] The Respondent gave evidence that after a disagreement between her and the Applicant's partner, Ms Denim, she felt that the Applicant was seeking to remove her from the Property. She was unwilling to leave, and the Applicant then sold the Property to a third party. After agreeing the sale, the pipe burst in the bathroom on the only night she had been away from the Property in a considerable period of time.

[46] The Respondent stated that neighbours in the street on which the Property was situated were reporting her movements to the Applicant. She strongly suspected that the Applicant had been informed that she was away from the Property the night she was away by one of those neighbours, and that the Applicant had then attended and taken access to the Property using his key to deliberately sabotage the bathroom supply pipe to cause a leak in an effort to cause a flood which would force her to have to leave the Property.

[47] The Respondent felt her suspicion was supported by the fact that the repair and reinstatement work was subsequently carried out by the third party who was in the process of buying the Property from the Applicant.

[48] The Respondent asserted that the Applicant did not take any steps to deal with the damage unless she pressed him to do so, and left her for over a week after the flood damage without sending an electrician to check that the Property was electrically safe.

[49] The Tribunal noted that the Applicant had lodged copies of text messages between the parties from the date when the flooding occurred to a number of days after that. The Tribunal noted a series of messages concerning the Applicant arranging both an emergency plumber to attend on the 15th July 2019 and also for an emergency electrician to attend, which culminated with a message from the Respondent to the Applicant on 15th July 2019 at 21.40 which stated:

"Guy came out and checked the lights and sockets, put the power back on helped dry out the hob and oven then tested the ignition on the hob once he was satisfied he said should be fine to leave on."

[50] The Respondent accepted that she had sent this message, but then stated that the electrician had only come after she had pestered the Applicant about sending one.

[51] The Respondent felt that she was entitled to remain in the Property in terms of her lease. She argued that she was entitled to demand that the repair and reinstatement work be carried out in her presence at a time which was suitable for her, in order to ensure that the work was carried out properly and to an appropriate standard. The Applicant disagreed, and insisted that she remove whilst the work was carried out.

[52] In response, the Applicant accepted that he had sold the Property, as he had decided he no longer wished to engage in renting the Property out. He denied that he entered the Property to sabotage the pipe, and noted that in his view it would be utterly stupid for him to deliberately damage his own property.

[53] He explained that the buyer was a builder, and that he was asked to tender for the work to repair the Property and produced the lowest quote. The insurance company accepted that, and it also made sense for the buyer to carry out the work as he would then be able to do things in a way which best suited him as the future owner of the Property.

[54] The Applicant explained that he was unable to carry out the repair and reinstatement work in circumstances where the Respondent refused to leave the Property in order for that work to be done. The work was only ultimately carried out after the Respondent quit the Property.

[55] The Applicant argued that he had fulfilled his obligations as landlord, and that accordingly there was no basis for the Respondent to seek to abate the rent due.

Statement of Reasons

[56] The jurisdiction of the Tribunal in relation to Private Residential Tenancies, such as that which applied to the Property, is set by statute. Section 71(1) of the *Private Housing (Tenancies) (Scotland) Act 2016* provides:

“First-tier Tribunal's jurisdiction

- (1) In relation to civil proceedings arising from a private residential tenancy—
- (a) the First-tier Tribunal has whatever competence and jurisdiction a sheriff would have but for paragraph (b),
 - (b) a sheriff does not have competence or jurisdiction.
- (2) For the purposes of subsection (1), civil proceedings are any proceedings other than—
- (a) the prosecution of a criminal offence,
 - (b) any proceedings related to such a prosecution.”

[57] The Tribunal accordingly has jurisdiction to hear civil proceedings arising from a private residential tenancy such as between the parties in this application.

[58] The Tribunal considered the terms of the private residential tenancy agreement and the updated rent arrears information provided, and the submissions made by the parties, and was satisfied that these disclosed an outstanding balance of rent arrears of the sum sought of £6,994.17, which sum remains outstanding.

[59] The question for the Tribunal, and which is the issue in dispute between the parties, is whether the Respondent is entitled to an abatement of the rent which would otherwise be due for the reasons she explained in her evidence.

[60] The Tribunal concludes that the Respondent is not entitled to any such abatement for the following reasons.

[61] The essence of the Respondent's complaints appears to be that:

- (a) the Applicant did not fulfil his duties as landlord by failing to arrange for swift inspection and repair to be carried out to the Property immediately after the flood damage had occurred; and
- (b) the Applicant was not entitled to ask her to vacate the Property for repair and reinstatement work to be carried out to it, and that she was entitled to remain in occupation and supervise that work to ensure that it was carried out fully and to a standard which was acceptable to her.

[62] Upon the first issue, the Tribunal noted that the Respondent's original position in her evidence was that the Applicant had left her for about a week in the damaged Property without arranging for its electrical safety to be checked.

[63] Upon it being put to her by the Tribunal that her own text message to the Applicant the day after the flood was reported confirmed that the emergency electrician arranged by the Applicant had attended, she then changed her position. She accepted that she had sent the text message, and sought to argue instead that the electrician's attendance had only been secured by her persistent requests to the Applicant to arrange that.

[64] On any view, it is clear that the Applicant arranged for both an emergency plumber and an emergency electrician to attend the day after the flood was reported, which in the Tribunal's view fulfilled his duties as landlord in that regard.

[65] Upon the second issue, the Tribunal would note that the Respondent's arguments appear to be based on a fundamental misunderstanding of the nature of the contract of lease.

[66] A lease is a contract by which a person, known as a tenant, is allowed by the owner of a property to occupy and use that owner's property in return for the periodical payment of money to that owner, known as rent.

[67] A tenant never acquires by virtue of the tenancy agreement any right of ownership over the property which he or she rents. What a tenant acquires is the right to occupy and use the property in terms of the contract of lease.

[68] For that reason, the Respondent could never have any legal right to insist that she supervise and approve the repair and reinstatement work to the Property. The instruction and control of any such work remains with the owner of the Property, namely the landlord.

[69] It is abundantly clear that the nature of the work required could not be carried out whilst anyone was resident in the Property. The flooring in much of the upstairs, and the ceiling in the downstairs kitchen had to be removed, and those areas fully exposed and dried out.

[70] Whilst the work was carried out the Property would be left without the use of both the upstairs bathroom and the downstairs kitchen, and the Property would be manifestly unsafe to occupy during the course of the work. In these circumstances, the Applicant had little option but to seek to temporarily relocate the Respondent for the duration of the work.

[71] The Respondent's refusal to temporarily leave the Property and move elsewhere, as the Respondent sought to arrange, effectively prohibited the Respondent from fulfilling his obligations as landlord with regard to maintaining the Property in good order and reasonably fit for occupation, and carrying out the essential repair work required.

[72] As a result, the Respondent has no factual basis to argue for an abatement of the rent otherwise due, and accordingly the Tribunal need not consider the legal tests regarding the circumstances in which an abatement may be allowed.

[73] The Tribunal further notes that the Respondent's position in evidence was contradictory on this issue. On the one hand, she argued that she was entitled to remain in occupation of the Property in order that the repair work be carried out in her presence in order that she could confirm that it was being carried out properly and to her satisfaction. On the other, she repeatedly stated in evidence her unavailability to provide access due to the long hours she worked at her business.

[74] The Respondent gave no satisfactory explanation as to how the work might have been carried out in her presence by tradesmen during normal business hours, in circumstances where she stated that she herself worked long hours beyond normal business hours in her own employment.

[75] If the Respondent had temporarily vacated the Property in order that the work be carried out, then she would have been entitled to return to it when the work was complete in the absence of the Applicant taking any steps to terminate the lease.

[76] If she had done this, and then found that the condition of the Property after repair was unsatisfactory, she might well have had legal remedies in terms of the lease agreement and the landlord's repairing standard obligation. However, she did not have any right to control and supervise the carrying out of the work as tenant.

[77] Finally, the Tribunal did not find any reasonable basis for the Respondent's submissions of sabotage by the Applicant. It would be quite irrational for the owner of the Property to seek to deliberately cause substantial damage to his own premises, and the Respondent could point to no evidence to substantiate her suspicions in that regard.

[78] In any event, in circumstances where the Applicant was in the process of concluding a sale of the Property, he would have no need to resort to sabotage in order to remove the Respondent, as he would have been entitled to bring an application to the Tribunal to evict her on the ground that he intended to sell the Property.

[79] For these reasons, the Tribunal rejected the Respondent's submissions and accepted the Applicant's submissions based upon the evidence it heard, and accordingly granted an order for payment of the sum of £6,994.17.

Decision

[80] In these circumstances, the Tribunal will make an order for payment by the Respondent to the Applicant of the sum of £6,994.17.

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

25/11/20

Date