



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/22/0595

Re: Property at 36 Dewar Street, Dunfermline, KY12 8AD (“the Property”)

Parties:

Mrs Justine Cumming, 14 Orwell Place, Dunfermline, KY12 7XP (“the Applicant”)

Mr Kenneth Morgan, 44 Dewar Street, Dunfermline, KY12 8AD (“the Respondent”)

Tribunal Members:

George Clark (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be decided without a Hearing and made an Order for Payment by the Respondent to the Applicant of the sum of £180.

Background

1. By application, received by the Tribunal on 2 March 2022, the Applicant sought an Order for Payment by way of abatement of rent for the period from 20 August 2020 to 9 November 2020, together with compensation in respect of her asthma symptoms having worsened during that period.
2. The Applicant stated that during the period in question, she had only had use of one bedroom, the kitchen and bathroom of the Property. The living room and second bedroom had been uninhabitable. She was also claiming for worsening asthma symptoms due to black mould and inadequate heating of the Property.
3. The sum sought was £723.49 by way of rent abatement, including three full days when she had to move out of the Property to allow the work to be carried out, together with compensation in respect of her worsening asthma

symptoms. The work had started on 20 August 2020, but she had only been given heaters on 5 November.

4. The application was accompanied by a copy of a Private Residential Tenancy Agreement between the Parties commencing on 29 March 2019 at a rent of £525 per month and a number of undated photographs which appeared to show plasterwork having been carried out at the lower level of a number of internal walls.
5. On 11 April 2022, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the Respondent was invited to make written representations by 2 May 2022.
6. The Respondent's written representations were received by the Tribunal on 28 April 2022 and comprised a copy of an email to him of the same date from his letting agents. In that email, the letting agents stated that the problem of damp in the "spare room" had first been brought to their attention by the Applicant on 13 July 2020. They had advised the Respondent, who had gone out to the Property on the same day. On 14 July, the Applicant advised that that the "damp guy" was coming the following day and she commented "that was quick". This was during the COVID-19 pandemic when the strictest lockdowns had just ended, and it was uncertain when contractors would be available to gain access to properties and to clear the backlog of repairs. The next communication had been from the Respondent who, on 7 September 2020, had confirmed that the damp proofing had been done and that he was now waiting for the plaster to dry out and would have the walls decorated "possibly in a couple of weeks". The Respondent had spoken to the Applicant, and she was happy with that.
7. On 29 October, the Applicant had told the letting agents that she was just waiting for the radiators to go back on and, following an inspection of the Property on 4 November, the letting agents reported that the Applicant was finding the Property very cold and wished the radiators to be fixed back on the wall as soon as possible. The Respondent replied on 5 November that he had instructed the plumbers the previous week. The letting agents had then suggested that the Respondent provide a spare heater and the Respondent confirmed on the following day that two heaters had been dropped off. On 9 December, the Applicant had contacted the letting agents asking for the heaters to be picked up.
8. The letting agents stated their view that the Respondent had reacted quickly at all points during the process, and they were not aware that the Property was in any way uninhabitable during the period in question. The Applicant had not suggested otherwise at the inspection on 4 November 2020. They had sympathy that the problem was not in any way the fault of the Applicant and the work, which had turned out to be a leaking pipe below floor level, would have been a considerable inconvenience for her, but they believed that the Respondent had acted responsibly during the period between the damp being reported and the work being carried out. Furthermore, whilst certain trades and works were allowed to continue to work at periods during the first

lockdown, many trades opted not to do so, and there was a considerable backlog of work in the building trade, the effects of which are still being felt today. They pointed out, for the record, that the Applicant had been a first-class tenant, but they believed that the Respondent had also been a first-class landlord, who had acted when requested and had tried to have the required repairs carried out competently and effectively. They believed that all Parties had tried, in difficult circumstances, to rectify the repairs and hoped that the Parties would be able to resolve the matter.

9. Both Parties provided the Tribunal with copies of text messages that had passed between them. On 15 September 2020, the Respondent indicated that someone was trying to contact the Applicant to arrange the redecoration. She replied that the plaster was not yet completely dry and confirmed this again on 5 and 20 October. The text messages also confirmed the delivery of two heaters and the refitting of the radiators.
10. On 11 May 2022, the Applicant provided the Tribunal with a copy of an email she had sent to the letting agents on 19 July 2021, forwarding an email to them of 23 June, in which she had set out her calculation of the rent abatement to which she felt entitled. The damp work had started on 20 August 2020, and she had moved out completely for three days, so should receive a full rebate for those three days. For the remaining 8 days in August, for September, October and up to 7 November, she should be refunded one-half of the rent, as she only had use of her bedroom, the kitchen and bathroom.

Case Management Discussion

11. A Case Management Discussion was held by means of a telephone conference call on the afternoon of 26 May 2022. Both Parties were in attendance.
12. The Applicant told the Tribunal that her tenancy had ended on 17 June 2021 and that she had first raised the question of abatement of rent with the letting agents when they were carrying out a final inspection of the Property as the tenancy was ending. She had not raised the matter earlier because she had understood that it would only take three weeks for the plaster drying, redecoration and reinstatement of the radiators. She had also thought that the Respondent would instigate a discussion on rent abatement, and she was not aware what the letting agents knew or did not know about the delays. She had not specifically told the letting agents that half of the Property was uninhabitable, as she had thought they were aware of it. She was dealing directly with the Respondent and assumed he was keeping the agents informed.
13. In relation to her worsening asthma symptoms, the Applicant stated that she had been in regular contact with her asthma nurse. She had spoken with her on 15 June 2020 and the nurse had asked if she was sure there were no damp/mould issues with the Property. The Applicant had not been aware of any such issues at that time, but three weeks later, the wallpaper fell off and the problem became apparent.

14. The Respondent told the Tribunal that this had all happened in the middle of a lockdown. He had been very lucky to find someone to inspect the damp problem the day after it was reported, but as regards the successive trades, he was entirely in their hands. He felt that he had done a good job as a landlord to fix the problem as soon as possible, chasing contractors as necessary. He had asked the plumbers on 29 October 2020 to re-hang the radiators and had assumed that they had done so. On the day he was made aware by the letting agents that the Applicant was finding the Property very cold, he had arranged for two heaters to be delivered to her. He owned the Property with his two brothers, and they were prepared to offer the Applicant one-half of the rent abatement that she was seeking, in order to resolve the matter.
15. The Applicant told the Tribunal that this offer was not acceptable to her. Her issue was that she had initially been told the work would take three weeks, but it had dragged on. The painter kept telling her that the plaster would not dry out because there was no heating. The Respondent could have given her heaters at the outset, but he only provided them one week before the radiators were re-hung. She confirmed to the Tribunal that she had throughout heating in the Property, apart from the living room and spare bedroom, where the work was carried out.
16. The Applicant made it clear that she had no issues with the speed with which the Respondent reacted to hearing of the damp problem and she fully understood that the COVID-19 restrictions had caused difficulties in obtaining tradesmen, but that did not alter the fact of the conditions in which she was living.
17. The Respondent said that the painter had not passed on to him any comment about the need for heaters in the Property to dry out the plaster. He had first been made aware of the damp problem on 13 July 2020. The plasterwork had been carried out on 7 September and, whilst there would have been moisture in the wall as it dried out, there would have been no rising damp or mould spores after the replastering was done.
18. The Applicant referred again to the effect on her health and said that this was the reason she had felt she had to give up the tenancy. She would like the opportunity to provide the Tribunal with a medical report which would illustrate that her condition worsened as a result of the damp and mould and that it had improved after she moved out of the Property.
19. The view of the Tribunal was that the Applicant should be afforded an opportunity to obtain a medical report, as it might be significant in her application for compensation. The Tribunal was satisfied that it was not necessary to adjourn the case to a full evidential Hearing, and that the appropriate outcome was to adjourn the Case Management Discussion to a later date, to allow the Applicant time to obtain a medical report in relation to her contention that her asthma symptoms had worsened as a result of the damp/mould which had been discovered in the Property. The Tribunal would issue a Direction in this regard.

20. The Case Management Discussion was adjourned, and the Tribunal issued appropriate Directions to the Parties.
21. On 6 June 2022, the Applicant re-sent to the Tribunal photographs that had accompanied her application, but which had not been considered by the Tribunal thus far, as they related to the bathroom of the Property and not the rooms which had been subject to the repairs works. They appeared to show evidence of mould behind a section of peeled wallpaper and on the underside of the vinyl flooring around the toilet. This problem had been discovered by the Applicant on 3 May 2021.
22. On 23 August 2022, the Applicant provided the Tribunal with copies of notes forming part of her medical records. They indicated that, on 4 February 2020, she had reported to her asthma nurse that her condition had worsened since Christmas and included notes of a consultation on 15 June 2021, when the Applicant had told the nurse that the house in which she was resident “has a lot of damp and walls have just been treated and radiators were all mouldy.” In her covering letter of 23 August 2022, the Applicant corrected the information to say that the mould had been found behind the radiators when they had been removed to allow the repairs to be carried out. The asthma nurse had noted that the condition of the Property would not be helping the Applicant’s asthma and certain changes in medication were recorded. There was also a record of a consultation on 3 December 2019 which said “had damp flat and furniture and not sure if this is still in system”.
23. On 1 September 2022, the Applicant sent the Tribunal information relating to lead piping in part of the water supply to the Property.
24. On 5 September 2022, the Respondent told the Tribunal that the issue with the bathroom was not part of the Applicant’s claim and that, after reporting it, she had given 28 days’ notice and it had been agreed by the Respondent with his letting agents that, in light of that, the remedial work in the bathroom would be better left until the Applicant had moved out.

Continued Case Management Discussion

25. The Continued Case Management Discussion was held by means of a telephone conference call on the morning of 12 September 2022. Again, both Parties were present. The Tribunal reminded the Parties that the primary function of the adjournment had been to allow the Applicant time to provide medical evidence, which she had now done.
26. The Applicant told the Tribunal that she had first noticed a worsening in her condition on 3 December 2019, a few months before she became aware of the dampness problem. Following the virtual meeting with the asthma nurse on 15 June 2021, she had been put on stronger medication. She also referred the Tribunal to the issue regarding the damp in the bathroom. She accepted that this occurred after the repair works were carried out elsewhere, so she was not seeking any further abatement of rent, but her view was that it explained why she was still experiencing symptoms after the work was done.

27. The Respondent asked the Tribunal to determine that the issue regarding lead water pipes was irrelevant to the application. There was lead piping leading to almost every house in the street. The Tribunal agreed that it was not relevant to the present application, and did not consider it further.

Reasons for Decision

28. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it was able, on the basis of the information and documentation provided by the Parties, to decide the application without a Hearing.

29. The application asks the Tribunal to make an Order for Payment under two heads, the first being an abatement of rent in respect of the period taken to complete repair works and the second being compensation in respect of a deterioration in the Applicant's health caused by the presence of mould in the Property and inadequate heating. The Tribunal considered each of these in turn.

30. In relation to abatement of rent, the sum sought was £723.49, including three full days when she had to move out of the Property to allow the work to be carried out. The Applicant stated in her application that from 20 August 2020 until 9 November 2020, she only had use of one bedroom, the kitchen and bathroom. Her view was that the living room and second bedroom were uninhabitable. In an email to the Respondent's letting agents of 19 July 2021, she itemised the abatement claim as being 3 full days from 20 August 2020, when the work began, and one half of the daily rent for the remaining 8 days of August, the whole of September and October and up to 7 November, when she resumed full use of the Property.

31. The Tribunal also considered the view of the Respondent's letting agents, contained in an email to him of 28 April 2022, that they felt that he had reacted quickly at all points through the process and that they were not aware of the Property being in any way uninhabitable during this period. The Applicant had not suggested otherwise when they carried out an inspection of the Property on 4 November 2020. The Applicant had pointed out that the radiators had not yet been fixed back on the wall after redecoration and that she was finding the Property very cold. The Respondent had replied on the following day to say that he had instructed the plumbers the previous week, and, on 6 November 2020, had confirmed that his brother had dropped off two heaters. The Tribunal noted that the radiators had been reinstated on 7 November 2020.

32. The Tribunal also noted that the contractors instructed to deal with the damp problem had visited the Property very quickly after the Applicant reported the problem on 13 July 2020, and that this had been acknowledged by the Respondent. The work, including replastering, was completed by 7 September 2020, the delay in completing the job by redecoration and re-hanging radiators

having been caused by the plaster taking longer than expected to dry. The Applicant stated that she had expected that period to be about 3 weeks. Text messages between the Parties indicated that, on 15 September 2020, the Respondent said that someone was trying to contact the Applicant to arrange the redecoration. She replied that the plaster was not yet completely dry and confirmed this again on 5 and 20 October.

33. The Tribunal accepted that the Applicant should be entitled to a refund of rent for the 3-day period during which she was unable to remain in the Property, but did not accept that thereafter the rooms which had been treated were uninhabitable until the radiators were reinstated on 7 November 2020. There would, naturally, have been a degree of inconvenience and some limitation on her use of the space, but once the specialist treatment and replastering were complete, the rooms would not have represented a health and safety issue for the Applicant. Accordingly, the Tribunal did not consider that an abatement of 50% of the rent was justifiable. There was no precise method of calculating the cost of the Applicant's reduced enjoyment of the Property between 20 August 2020 and 7 November 2020, but the Tribunal's view was that the rooms were not uninhabitable and determined that only a modest abatement of 10% of the rent should be given in respect of the period after 22 August 2020. The Tribunal calculated the rent at £17 per day, so the reduction of 10% for the 76 days from 23 August 2020 to 7 September 2020 would be £129, to which should be added £51, being the full rent from 20-22 August 2020.
34. With regard to the second element of claim, namely that the Applicant's asthma condition had worsened as a result of the presence of black mould in the Property and inadequate heating, the Tribunal noted the medical evidence that she had produced. It indicated that the Applicant's medication levels were increased following the consultation with the asthma nurse on 15 June 2020. The Applicant had advised the Tribunal that it was the damp and mould in the Property that had aggravated her condition. The treatment and replastering completed by 7 September 2022 would have eliminated any mould spores in the affected areas, but the medical evidence had not included any indication that the Applicant's health had improved after she vacated the Property. In addition, the Applicant had stated that she had first noticed a worsening in her condition on 3 December 2019, but the entry in her medical records for that date stated that she had said that she had "had damp flat and furniture and not sure if this is still in system." The flat referred to must have been a property in which she had previously lived, as her evidence was that she had first reported damp in the present Property on 13 July 2020. The Tribunal accepted that the Applicant had provided photographic evidence of mould, discovered on 3 May 2021, on the underside of the vinyl flooring around the toilet bowl and that this had not been treated as part of the original works, but this was very minor, possibly resulting from condensation of water vapour on the toilet bowl, and the Tribunal was not able to conclude that this had contributed to any deterioration in the Applicant's asthma condition. As regards inadequate heating, the Applicant had told the Tribunal that she had heating in the areas of the Property not affected by the repair works.

35. Having considered carefully all the evidence presented to it, the Tribunal decided that it could not hold that, on the balance of probabilities, the standard of evidence that the Tribunal had to apply, there was a direct causal link between the existence, prior to its discovery on 13 July 2020, of black mould in the Property and a worsening of the Applicant's asthma condition. The Tribunal could not rule out the possibility that there was such a link, but it was for the Applicant to establish it and the medical evidence, whilst it included an increase in medication dosage on 15 June 2020, also included a reference on 3 December 2019 to the possibility of its being at least partially attributable to dampness in the previous property in which the Applicant had lived. The references in the medical records to damp living conditions had been based on information provided by the Applicant and not on personal observation by a healthcare professional. The Tribunal accepted that this had all happened during a period of COVID-19 pandemic restrictions which might have made a home visit impossible, but there was no supporting evidence, such as that based on a home visit might have provided, to enable the Tribunal to decide that any worsening in the Applicant's health was directly attributable to the damp issue discovered in the Property on 13 July 2020 or to the mould in the bathroom discovered on 3 May 2021. Accordingly, the Tribunal did not uphold the Applicant's claim for damages under this head.

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.

G. Clark

Legal Member/Chair

12 September 2022
Date