



Statement of Decision of the Housing and Property Chamber of the First-tier Tribunal for Scotland under Section 26 (1) of the Housing (Scotland) Act 2006

Chamber Reference number: FTS/HPC/RP/21/0782

Re: Property at Flat 5/43, Elfin Square, Edinburgh, EH11 3AW (“the Property”)

The Parties:

Mr Kristopher Kimmett (“the Tenant”)

Spindlehawk Limited, Third Floor, Building 2, Universal Square, Devonshire Street N, Manchester, M12 6JH, represented by MCR Property Group of the same address (“the Landlords”)

**Tribunal Members: George Clark, Legal Member
Mike Links, Ordinary (Surveyor) Member**

Decision

The First-tier Tribunal for Scotland Housing and Property Chamber, having made such enquiries as it saw fit for the purposes of determining whether the Landlords have complied with the duty imposed by Section 14(1)(b) of the Housing (Scotland) Act 2006 determined that the Landlords had not failed to comply with that duty.

Background

1. By application, dated 26 March 2021, the Tenant applied to the Housing and Property Chamber of the First-tier Tribunal for Scotland (“the Tribunal”) for a determination of whether the Landlords had failed to comply with the duties imposed by Section 14 (1)(b) of the Housing (Scotland) Act 2006 (“the Act”).
2. The application stated that the windows in the Property were leaking air, making the Property freezing cold and that the filters on the top of the windows also occasionally leaked water, causing damage to personal effects over the 13-months duration of the tenancy. The windows needed to be sealed properly, inside and outside.

3. The application was accompanied by copies of a Private Residential Tenancy Agreement between the Parties, commencing on 14 February 2020, at a rent of £875 per month and of email exchanges between the Tenant and the Landlords' representatives, MCR Property Group, which indicated that the Tenant had first reported the issue of the windows ten days after the tenancy began. There were no emails provided for the period between 24 February 2020 and 15 January 2021 but the Tribunal was given a large number of emails between that latter date and the date of the application.
4. A significant number of the emails after 15 January 2021 related to the different interpretation by the Parties of an agreed rent rebate, the Tenant arguing that it was intended to be a permanent reduction of rent pending resolution of the issue regarding the windows, the Landlords' representatives saying that it was a one-off rebate in full and final settlement of the Tenant's complaint. The emails also, however, covered appointments made for contractors to inspect the windows and they appeared to indicate that the contractor would be carrying out work during the week commencing 5 April 2021 (which did not happen), then on 19 April 2021, the work to take 2 hours. On 26 April 2021, the Tenant expressed to the Landlords' representatives his disappointment that the contractor had told him that he had instructions to carry out work on one window only, to see if his solution worked.
5. Under normal circumstances, the Tribunal would have intimated to the Parties a date and time for an inspection of the Property followed by a Hearing, but present COVID-19 restrictions meant that an inspection was not possible. Accordingly, a Case Management Discussion was set down for the morning of 3 June 2021. This was intimated to the Parties on 23 April 2021, when the Tribunal advised the Parties that the President had decided to refer the application to a Tribunal for determination and the Landlords were invited to make written representations by 14 May 2021.
6. On 13 May 2021, the Landlords' representatives provided written representations in which they stated that they were awaiting reports from the contractor who had most recently attended the Property and from the company which originally installed the windows. They said that they would forward these reports prior to the date of the Case Management Discussion. No reports were received by the Tribunal.
7. A Case Management Discussion was held by way of a telephone conference call on the morning of 3 June 2021. The Tenant participated in the call and the Landlords were represented by Mr William Dodd and Ms Stephanie Hilditch of MCR Property Group.
8. The Tribunal Chair advised the Parties that the Tribunal proposed to accept an amendment to the application, to the effect of amending the name of the Landlords to Spindlehawk Limited, with MCR Property Group being their representatives. The Parties present were content with the proposed amendment.
9. The Tribunal Chair also advised the Parties that, whilst much of the email correspondence between them related to a rebate of rent, this was not a matter that would be considered by the Tribunal, whose sole purpose was to determine

whether the Property meets the repairing standard and, if it does not, to consider whether to make a Repairing Standard Enforcement Order.

10. The Tenant told the Tribunal that there were six windows in the Property and all of them were defective. The Landlords' representatives told the Tribunal that they had received two weeks ago a report from the company that installed the windows. The Landlords believed from that report that the windows are wind and watertight and that no repairs or renewals are required. The other contractor who had attended the Property had not yet provided a written report, but he had told the Landlords' representatives by text that he had pulled back the plasterboard and had found that the windows were foam sealed from the outside, and that he could not see anything to suggest the windows in the Property are not watertight. There are 165 flats in the building and there had been no other complaints.
11. The Tenant contested this claim, saying that the contractor had been in the Property a few times and that when he had removed the insulation, he had said that he felt air coming in and there was no self-expanding foam around the outside of the window frame. Two or three contractors sent by the Landlords' representatives in 2020 had also confirmed that they felt air coming through the windows.
12. The Landlords' representatives told the Tribunal that a contractor had attended the Property on 17 March 2020 had not put forward any recommendations.
13. The Landlords' representatives said that they had not seen any issues at an inspection carried out in September or December 2020, following which one or two trickle vents were replaced and a few windows had insulation added. The Tenant responded that the original installers had been at the development in December, but they had not been in the Tenant's flat and he had received an apology for his having been missed off the list of properties that they inspected.
14. The view of the Tribunal was that the fact that there had clearly been an inspection in December 2020, followed by work, by the company that installed the windows did not tally with the Landlords' representatives' assertion that nobody else had complained about their windows. The Tribunal could not understand why the Tenant's flat was not inspected at that time, if, as it appeared, the problems he had reported must have been the most significant issue regarding windows in the development. The Tribunal was also disappointed that the Landlords' representatives had had a report for two weeks but had not thought it appropriate to share it with the Tenant and the Tribunal. The Tribunal also felt that the Landlords' representatives should have provided the Tribunal with a copy of the report of 17 March 2020.
15. The Tribunal told the Parties that it was unable to reach any conclusion on the basis of the evidence provided thus far. The Tenant's comments on what had been said by contractors who had been in the Property were hearsay, as were the contentions of the Landlords' representatives that the company that installed the windows had told them that no repairs to or replacements of windows were required and that another company had reported in March 2020 that no work was

required. It would be necessary for the Landlords' representatives to produce the report of 17 March 2020 and the recent report from the company that installed the windows. The Tribunal also noted that the windows are still under warranty and decided that it would require a further report, prepared by an independent third party. The Landlords' representatives confirmed that this was acceptable to them, and the Tenant confirmed that he would have no issue with Mr Dodd accompanying the person instructed to carry out such report, so that both Parties could hear first-hand any verbal comments made during the inspection.

16. The Tribunal then advised the Parties that it did not feel any further progress could be made at this time and that it would adjourn the Case Management Discussion to a later date and would issue Directions as to the requirement to provide prior to that date any documentary evidence on which the Parties intended to rely.

17. The Tribunal then issued Directions to the Parties in the following terms:

- (i) The Landlord is required to provide, no later than close of business fourteen days prior to the adjourned Case Management Discussion:-
 - (a) complete copies of any reports or other documents relating to the condition of the windows in the Property on which the Landlord intends to rely, including the report received following an inspection on or about 17 March 2020, the report from the contractor who carried out work to one window in the Property in April 2021 and the report following the recent inspection by the company that installed the windows at the Property; and
 - (b) a report by a suitably qualified and independent professional with expertise in windows on the condition of the windows in the Property and, in particular, whether that person is of the view that they are wind and watertight, with recommendations for any remedial or replacement work that the person providing the report considers necessary.
- (ii) The Tenant is required to provide, no later than close of business fourteen days prior to the adjourned Case Management Discussion, copies of any emails that passed between the Parties during the period from 25 January 2020 to 14 January 2021.

18. The Landlords provided the Tribunal with copies of a report from Alba Glass & Glazing, Wallyford dated 7 July 2021, prepared following an inspection of the Property on 11 June. The report stated that they had tested all the windows to ensure they had been fitted in accordance with the manufacturers' instructions and were satisfied that they had been fitted correctly. There was no evidence of water ingress either around the window frames or the window cills. They recommended replacing any defective silicon seals which might split or become damaged over time, but they did not indicate that they had found any such defective seals during their inspection. The report did not make any specific reference to the condition of the external silicone seals.

19. The Landlords also provided a copy of an email from Mr Shaun Nelson dated 9 July 2021, in which Mr Nelson confirmed that he had first been contacted about

this Property about a year ago, His first thought had been that there was a ventilation problem or that the windows were not properly insulated, but his inspection found that the windows were in fact sealed properly internally with expanding foam and that the correct insulated plasterboard had been used. As the Property was three flights up, he was not able to check the silicone seal around the external part of the window but from what he could feel with his hands, his opinion was that it was not sealed properly, so was open to the elements.

20. The Tenant did not provide the Tribunal with any documentation in response to the Direction.

Second Case Management Discussion

21. The second Case Management Discussion was held by means of a telephone conference call on the morning of 3 August 2021. The Tenant was not present or represented. The Landlords were again represented by Mr William Dodd and Ms Stephanie Hilditch of MCR Property Group.

22. The Tribunal asked the Landlords' representatives if they were able to reconcile the two reports that they had provided in response to the Tribunal's Direction. Mr Dodd confirmed that he had been present, as had the Tenant and his partner, at the inspection by Alba Glass & Glazing, He had not, however, been present when Mr Nelson carried out his inspection. Alba Glass & Glazing had carried out a wind and watertight test on all the windows. Mr Dodd added that the Tenant had not made any further complaints following recent very heavy rainfall. He pointed out the side of the building where the windows were was west-facing, so would face the prevailing wind. The block was eight storeys high, and the present complaint was the only one they had received about the windows. He wondered if the repairs to the trickle vents had resolved any issue of wind penetration.

23. Ms Hilditch confirmed that the company that installed the windows is based in Manchester and that the windows are still under warranty. That company had looked generally at the building at the end of 2020 and been quite happy with it. The Landlords were happy to do whatever it might take to resolve issues with the building, but the report from Alba Glass & Glazing had not disclosed any present problems with the windows in the Property.

Reasons for Decision

24. The Tribunal was disappointed that the Tenant had not chosen to participate in the Case Management Discussion, as that would have given him an opportunity to comment on and, if appropriate, challenge the report from Alba Glass & Glazing and to tell the Tribunal whether the problem of which he had complained still persisted or had been resolved.

25. The Tribunal considered whether there would be any advantage in the Tribunal inspecting the Property, but decided that, as the issues related to the external

silicone sealant of windows three floors up from the ground, the Tribunal would not be able to discern anything from a visual inspection from ground level.

26. It is for an Applicant to make his case and, whilst the two reports seen by the Tribunal had arrived at differing conclusions, the view of the Tribunal was that if there had been a problem which had persisted for more than a year with the west-facing windows of a third storey flat, there would in all probability have been evidence of dampness caused by water penetration. Alba Glass & Glazing had not found any such evidence when they inspected the Property in June of this year.

Decision

27. Having considered carefully all the evidence before it, on the balance of probabilities, the Tribunal did not make a finding that the Landlords had failed to comply with the duties imposed by Section 14(1)(b) of the 2006 Act. Accordingly, the application was not granted.

G Clark

Legal Member

3 August 2021
Date