

Housing and Property Chamber
First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

Statement of Decision: Housing (Scotland) Act 2006 Section 24(1)

Chamber Ref: FTS/HPC/RP/19/1652

Flat 18/12 Abbey Lane, Abbeyhill, Edinburgh, being second floor house entering by 12 Abbey Lane, part of ground formerly 18/20 Abbey Lane, described in disposition to Trustees for Fullerton Son and Company recorded GRS Midlothian 28 August 1869

12/18 Abbey Lane, Edinburgh, EH8 8HH (“The Property”)

The Parties: -

Ian Meek, Dovers Gate, Edenhall, Penrith, Cumbria, CA11 8TD (“the Tenant”)

Mr Alasdair MacDonald and Mrs Evelyn MacDonald, 7/8 Brighthouse Park Crescent, Edinburgh, EH4 6QS (“the Landlord”)

Decision

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

The Tribunal comprised: -

Mrs Josephine Bonnar, Legal Member

Mr Andrew McFarlane, Ordinary Member

Background

1. By application dated 30 May 2019 the Tenant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of whether the Landlord had failed to comply with the duties imposed by Section 14(1)(b) of the Housing (Scotland) Act 2006 ("the Act"). The Tenant lodged a number of documents with the application including a copy email dated 5 December 2018 to the Landlord, copy private residential tenancy agreement, a timeline and three reports from Sysco Environmental dated 4 January 2019, 15 February 2019 and 25 March 2019. In terms of the application the Tenant states that there is a leak in the boiler cupboard, the floor in the living room should be replaced at least 1 metre beyond any visibly deteriorated or contaminated material, antifungal treatment should be applied to floors and remaining wooden joists to prevent the onset of fungal rot, the exposed floor cavity should be cleaned and vacuumed with a HEPA vacuum to remove any residual fungal contamination, the carpeting and underlay in the living room should be removed and the indoor air within the apartment should be cleaned and sterilised using ozone to HEPA filtration to remove airborne fungal spores..
2. The First-tier Tribunal for Scotland served Notice of Referral under and in terms of Schedule 2, Paragraph 1 of the Act upon the parties on 24 July 2019. The parties were notified that an inspection and hearing would take place on 30 August 2019.
3. The Tribunal inspected the property on the morning of 30 August 2019. The Tenant was present before the inspection took place but indicated that he could not go into the property. His representative, Mr Wilson attended the inspection on his behalf. The Landlord did not attend. His agent, Mr Puren of Pure Property Management attended on his behalf. Thereafter the Tribunal held a hearing at George House, 126 George Street, Edinburgh. The Tenant attended with his representative, Mr Wilson. The Landlord, Mr MacDonald, attended with his representative, Mr Puren. During the hearing the Tenant gave evidence and Mr Wilson made submissions on his behalf. Mr Puren provided both evidence and submissions on behalf of the Landlord.

The Inspection

4. At the time of the inspection the weather was dry and windy. The Tribunal noted that the property is a one bedroom second floor flat accessed by a common close and stair. The Tribunal first inspected a hall cupboard with water storage tank and hot water cylinder. No leak or dampness were identified. Thereafter the Tribunal inspected the floor in the living room and kitchen. The living room floor is carpeted. An area of loose carpeting allowed the flooring underneath the carpet and underlay to be inspected. The Tribunal noted that a section of flooring has been replaced with new flooring. Both underlay and carpet were dry. No mould was visible. The underlay was noted to be stained. The Tribunal were unable to inspect the kitchen flooring due to the fitted timber laminate covering. The kickboards below the cooker and kitchen units had been removed allowing inspection underneath that area. No dampness or mould were noted. A schedule of photographs taken at the inspection is attached to this decision.

The Hearing

5. Prior to the hearing the Landlord's representative lodged written representations together with photographs, a timeline, a report from Acorn Services dated 25 June 2019 and an email from Edinburgh City Council dated 16 July 2019. Immediately prior to the hearing the Tenant lodged two medical reports. The Tribunal noted that these documents were not lodged on time in accordance with Rule 22 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. Mr Puren objected to them being considered by the Tribunal, due to lack of notice and prejudice caused to the Landlord. Mr Wilson apologised but advised the Tribunal that he considered them to be relevant to the matter before the Tribunal. He indicated that, if the reports were not allowed, he would seek an adjournment of the hearing. The Tribunal considered the matter and concluded that Mr Wilson had not established that the reports were necessary for the Tribunal to determine whether the property meets the repairing standard. In the circumstances, the Tribunal refused both the request for the reports to be considered at the hearing and the request for an adjournment.
6. The Tribunal proceeded to discuss the matters raised in the application. The first complaint related to a leak from the boiler. Mr

Wilson and Mr Meek confirmed that this has now resolved. No order is therefore sought in relation to this matter. The Tribunal noted that the other repairing issues raised in the application all relate to the same complaint, that there is mould within the property which is harmful to health. The Tribunal noted that the source of the alleged mould is thought to be a leak from the bathroom, due to a damaged pipe, causing water damage to floors in the living room and kitchen. The parties are agreed that the pipe has been repaired and some damaged flooring replaced. The Tribunal advised parties that during inspection by the Tribunal, no visible evidence of mould was identified. The Tribunal also noted that a new section of flooring has been fitted and that both original and new flooring appeared dry. The underlay in the living room was stained, but dry. The carpet in the living room was clean and dry. No mould was noted from inspection of the area underneath the cooker. The parties confirmed that they agreed with the Tribunal's observations.

7. At the hearing Mr Meek advised the Tribunal that he is not currently occupying the property because of health issues. He stated that he moved out in December 2018, when the Landlord's insurance company arranged for work to be carried out to the property and provided him with temporary accommodation. When this came to an end he stayed with friends until he moved to Penrith to stay with his brother. He has not lived in the flat since December 2018. He has arranged for friends to check on the property, but he himself does not go into the flat, as he has been advised that he should not do so by his doctor. He explained that he developed health issues after becoming the tenant of the property. At first, he did not associate his symptoms with his occupation of the property, but gradually became aware that the symptoms were only problematic when he returned to stay at the property after an absence.
8. Mr Meek advised the Tribunal that he first became aware of a repair issue at the property in August 2018. He had been away from the property over the summer months so is not sure how long the problem had existed. He noticed that a section of the kitchen floor was wet and spongy. He notified Mr MacDonald. Eventually repair work was arranged by his insurance company and alternative accommodation provided, although not until December 2018. A leak from the bathroom had been identified as the cause of the spongy floor. Before the work was carried out, Mr Meek obtained a report from Sysco Environmental. This was dated 4 January 2019 but based on a survey carried out on 21 December

2018. The report states that the purpose of the survey was to “carry out an assessment indoor air quality in relation to selected biological contaminants” (Paragraph 1.1). Paragraph 1.2 states “The objective of the investigation was to evaluate indoor air contamination by fungal spores, identify any areas of existing fungal growth and water ingress and if required recommend required remediation solutions”. The report concludes “1.5. It is our opinion that after the evaluation of the general state of the property, the extent of mould contamination, microbiological analysis and the information provided by the property occupant into the perceived indoor air quality problems that: i. The indoor air quality in the property in respect to mould contamination can be described as poor. ii. The extent of mould contamination is likely to be >20m² and iii. Overall risk to health from exposure to fungal spores can be considered as very high.” The report recommended certain remedial work and states that “It is our opinion that the adverse health symptoms experienced by the occupant are likely to be caused by exposure to fungal spores within the living environment”. In January 2019 Acorn Services carried out repair work at the property. This included the replacement of flooring damaged by the leak. Mr Meek was concerned that as Acorn Services are not mould specialists, the Sysco Environmental recommendations had not been carried out. He commissioned a further report from Sysco in March 2019. The same technical assessor carried out the survey. The conclusions in relation to air quality and the risk to health are very similar to those reached in the previous survey. Both reports contain tables showing spore counts which are classed as marginally or significantly elevated and therefore may indicate a source of contamination. The second report states at paragraph 7.3 “The water damaged floorboards in the living room and kitchen have been removed. However, the floorboards immediately beyond the damaged areas remain in place despite showing sign of damage and contamination. Some of the fungal contamination in the kitchen has not been removed. The underlay and carpeting are heavily stained by water and fungal growth” The report goes on to recommend the replacement of the living room floor at least 1 metre beyond any visibly deteriorated or contaminated material, antifungal treatment applied to floors and joists, the exposed floor cavity cleaned and vacuumed with a HEPA vacuum to remove residual fungal contamination, removal of the carpet and underlay and the indoor air to be cleaned and sterilized.(Paragraph 7.4). Paragraph 7.5 recommends that the floorboards in the kitchen be cleaned and any mould contamination removed.

9. Mr Wilson advised the Tribunal that the Tenant's application is essentially based on the Sysco reports which confirm that the property is affected by mould. This mould has caused the Tenant to experience health problems. The Landlord had the opportunity to rectify the defects at the property, in accordance with the Sysco Environmental recommendations in their first report and failed to do so. The repairs carried out by Acorn Services did not rectify the defects. He advised the Tribunal that the Tenant considers the landlord to be in breach of Section 13(1)(a) of the 2006 Act, in that the property is not "in all other respects reasonably fit for human habitation". He referred the Tribunal to the case of *Morgan v Liverpool Corporation* 1927 2 KB 131, and to the remarks of Atkin LJ in paragraph 145 "if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation". He submitted that that the Sysco reports establish that the property is affected by mould and that this has proved detrimental to the health of the Tenant.

10. Mr Meek concluded his evidence by advising the Tribunal that prior to becoming the tenant of the property, he enjoyed good health. He now suffers from multiple health problems. At first these included a dry cough, tingle in his back, watery eyes. He became twitchy and restless. He has since been diagnosed with an auto immune disease called sarcoidosis which affects the skin, lungs and eyes. He is undergoing heart investigations. He cannot work. In response to questions from the Tribunal he conceded that he cannot be certain that these health issues are directly caused by mould, as there are other possible medical causes, but he believes that they are, and the Sysco reports support that belief.

11. Mr Puren advised the Tribunal that his company took over the management of the property for the Landlord in January 2019. The timeline lodged by him only goes back to January for this reason. He referred the Tribunal to a number of documents. These included an email from the local authority who inspected the property in July 2019 and considered it to be fit for human habitation. He also referred the Tribunal to a further Sysco Environmental report dated 14 February 2019. This report was commissioned by Mr Puren, although it was submitted to the Tribunal by Mr Wilson with the two other Sysco reports. The Tribunal was advised that due to the highly specialised nature of the work carried out by Sysco, it had not been possible to find another expert. The report appears to relate to analysis of samples taken from the property. This report states at paragraph viii "The air

quality assessment within the apartment 18 indicates that the indoor air is not affected by elevated number of fungal spores. The risk to the occupants from the exposure to fungal spores is currently very low.” And concludes “The assessment indicates that the apartments (sic) 18 is not affected by elevated numbers of fungal spores and specialist remediation within this apartment is not required”. Mr Puren also referred the Tribunal to a report from the contractor, Acorn Services, in June 2019. They concluded that the work they carried out in January 2019, had been carried out properly. Mr Puren advised the Tribunal that the landlord disputes the claim that the property is not reasonably fit for human habitation. He pointed out that the standard is that the property is “reasonably fit”. There is no requirement that the property be in perfect condition. He argued that in the absence of clear evidence that the property is affected by mould or that mould present in the property has caused the Tenant to suffer health problems, the Tribunal cannot conclude that the property does not meet the repairing standard.

12. The Tribunal asked both parties whether they could offer any explanation for different conclusions reached in the Sysco reports. Mr Meek advised the Tribunal that following completion of the repair work by Acorn Services, an air purifier was installed at the property for a short period of time. In his view, this may have led to the improved readings at the property. He acknowledged that, although he has carried out his own research, he is not an expert and could not be certain that this was the reason. Mr Puren did not have an explanation for the conflict between the reports.

Findings in Fact

13. The property is a one bedroom second floor flat in the centre of Edinburgh

14. The Applicant is the tenant of the property.

15. There is no leak from the boiler located within a hall cupboard at the property.

16. There is no visible mould within the property.

Reason for decision

17. The Tribunal considered the issues of disrepair set out in the Application and noted at the inspection and the evidence led at the hearing.
18. Section 14(1) of the 2006 Act states "The landlord in a tenancy must ensure that the house meets the repairing standard – (a) at the start of the tenancy, and (b) at all times during the tenancy." In terms of Section 3 of the 2006 Act " The duty imposed by subsection (1)(b) applies only where – (a) the tenant notifies the landlord, or (b) the landlord otherwise becomes aware, that work requires to be carried out for the purposes of complying with it" The Tribunal is satisfied that the Tenant notified the Landlord of repairs issues at the property.
19. The Tribunal found the Tenant and Mr Puren to be both credible and reliable. The Tribunal accepted the evidence of Mr Meek that he has developed health issues and that these have arisen since he became the tenant of the property. It also accepted that he has chosen not to occupy the property in recent times due to his belief that the property has caused those problems and that his doctor has recommended that he stay away from the property. In terms of the history of the repair issues, the parties seemed to be in agreement about most matters. It is accepted that a repair issue arose as a result of a leak from the bathroom and that a repair was carried out which involved fixing the leak and replacing some flooring. It is not disputed by the Landlord that this took some months from the date of notification. The Tribunal noted that the repair involved an insurance claim which may have contributed to the delay. Subsequently, there was a further leak from the hot water installation in the Boiler Cupboard which was remedied. Where the parties disagree is in relation to the extent of the damage to the property and the condition of the property since repairs were carried out. Both parties accepted the Tribunal's findings at inspection of the property, namely that on visual inspection no dampness or mould was noted. The Landlord's position is that the repair carried out resolved the damage and the property now meets the repairing standard, The Tenant's claim that the property is still in need of repair is essentially based upon two reports from Sysco Environmental and his health problems.
20. The Tribunal has to be satisfied that at the date of the inspection and hearing the property fails to meet the repairing standard. In order to reach that conclusion, the Tribunal must determine that the property is currently affected by mould, that the mould has the potential to cause health problems and that the problem can be

addressed by remedial work by the Landlord. The Tribunal notes that the Tenant relies exclusively on the two reports commissioned by him from Sysco Environmental and on the fact that he developed health problems while living in the property. However, the Tribunal notes the following: -

- a. The information as to air quality, mould contamination and the effect of these on health in the two reports is stated to be the opinion of the technician compiling the reports. The conclusions reached are partly based on information provided by the Tenant.
 - b. There is no explanation in the 3rd report (March 2019) for the completely contradictory findings of the 2nd report (February 2019). If, as is suggested by the Tenant, the short-term use of an air purifier is the reason for this, there is no explanation for the extensive remedial work recommended.
 - c. There is no information in the reports as to the effect of heat, ventilation or occupation of the property (or a lack of such) on the air quality.
 - d. The comparator in the reports appears to be external air quality. There is no comment on average or usual air quality in dwelling houses.
 - e. The 3rd report is several months old and no updated information has been provided as to the current condition of the property.
21. The Tribunal notes that it is for the Tenant to satisfy the Tribunal, on the balance of probabilities that the Landlord has failed to ensure that the property meets the repairing standard at the time of an inspection and hearing. Based on the inspection and the evidence produced at the hearing the Tribunal is not persuaded that the Tenant has established this. In the absence of clear, reliable information which establishes the presence of harmful mould within the property, the Tribunal determines that the property does comply with the repairing standard.

Decision

22. The Tribunal determined that the Landlord had not failed to comply with the duty imposed by Section 14 (1)(b) of the Act.
23. The decision of the Tribunal is unanimous

Right of Appeal.

A Landlord, Tenant or Third-party applicant 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.

In terms of Section 63 of the Act, where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Signed... **J Bonnar**12 September 2019

Josephine Bonnar, Legal Member