

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Repairing Standard Enforcement Order (RSEO): Housing (Scotland) Act 2006 Section 24

Chamber Reference: FTS/HPC/RP/17/0120

Re : The Apartment, Three Crofts Farm, Lochfoot, Dumfries, DG2 8NX ("the Property")

The Parties:-

Debby Booth, formerly residing at The Apartment, Three Crofts Farm, Lochfoot, Dumfries, DG2 8NX ("the Tenant")

Martin Edgar, Three Crofts Farm, Lochfoot, Dumfries, DG2 8NX ("the Landlord")

Whereas in terms of their decision dated 13 September 2017, the First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal') determined that the Landlord had failed to comply with the duty imposed by section 14(1)(b) of the Housing (Scotland) Act 2006 ("The Act") and in particular that the Landlord had failed to ensure at all times during the tenancy that the house has satisfactory provision for detecting fires and for giving warning in the event of fire or suspected fire (section 13(1)(f)); the Tribunal now requires the Landlord to carry out such work as is necessary for the purposes of ensuring that the house concerned meets the repairing standard and that any damage caused by the carrying out of any work in terms of this Order is made good.

In particular, the Tribunal requires the Landlord to instruct a suitably qualified electrical contractor to install in the Property:

- (a) at least one functioning smoke alarm in the ground floor open plan living area;**
- (b) at least one functioning smoke alarm in the upper floor landing;**
- (c) a heat alarm in the kitchen area;**

and that all of the alarms are interlinked and mains powered in accordance with the Revised Domestic Technical Handbook guidance and the Scottish Government revised statutory guidance on the requirements for smoke alarms.

The Tribunal orders that the works specified in this Order must be carried out and completed within the period of **four weeks** from the date of service of this Notice.

In terms of section 46 of the Tribunals (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.

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.

Please note that in terms of section 28(1) of the Act, a landlord who, without reasonable excuse, fails to comply with a RSEO commits an offence liable on summary conviction to a fine not exceeding level 3 on the standard scale. A landlord (and that includes any landlord's successor in title) also commits an offence if he or she enters into a tenancy or occupancy arrangement in relation to a house at any time during which a RSEO has effect in relation to the house. This is in terms of Section 28(5) of the Act.

In witness whereof these presents type written on this and the preceding page(s) are executed by Adrian Stalker, advocate, Advocates Library, Parliament House, Edinburgh, chairperson of the Tribunal at Glasgow on 13 September 2017, before this witness:-

A Stalker

—A Spooner— witness

ABIGAIL SPOONER name in full

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QUAY, 45 ROBERTSON STREET
GLASGOW G2 8RB

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 Reference: FTS/HPC/RP/17/0120

**Re : The Apartment, Three Crofts Farm, Lochfoot, Dumfries, DG2 8NX
("the Property")**

The Parties:-

**Debby Booth, formerly residing at The Apartment, Three Crofts Farm,
Lochfoot, Dumfries, DG2 8NX ("the Tenant")**

**Martin Edgar, Three Crofts Farm, Lochfoot, Dumfries, DG2 8NX ("the
Landlord")**

Tribunal Members:

Adrian Stalker (Chairman) and Donald Wooley (Ordinary Member)

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, to ensure that the property meets the repairing standard under section 13, determined that the Landlord had failed to comply with the duty imposed by section 14(1)(b) of the Act.

Background

1. By an application to the Housing and Property Chamber received on 28 March 2017, the Tenant sought a determination of whether the Landlord had failed to comply with the duty imposed by section 14(1)(b) of the Housing (Scotland) Act 2006 ("the Act"). The application was accompanied by a letter from her solicitors, Messrs John Henderson & Sons, Dumfries, describing the basis of her complaints.
2. The application contended that the Landlord had failed to comply with his duty to ensure that the house meets the repairing standard under section

13 of the 2006 Act, and in particular, that the Landlord had failed to ensure, at all times during the tenancy, that:-

- a) the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order (section 13(1)(c));
- b) the house has satisfactory provision for detecting fires and for giving warning in the event of fire or suspected fire (section 13(1)(f));
- c) the house has satisfactory provision for giving warning if carbon monoxide is present in a concentration that is hazardous to health (section 13(1)(g)).

At part 8 of the Form A application, the Tenant also ticked the box indicating that the Landlord had failed to comply with section 13(1)(d) of the Act: "Any fixtures, fittings and appliances provided by the landlord under the tenancy are in a reasonable state of repair and in proper working order". However, the basis of that complaint was not set out in the application, or in the accompanying material. Therefore, the Tribunal has not treated it as part of this application.

3. Subsequently the Tenant's solicitors intimated to the Housing and Property Chamber that the tenancy had been lawfully terminated, and that the Tenant no longer resided there. On 9 May 2017, a Convener having delegated powers under section 23A of the Act made a decision, under schedule 2 paragraph 7(1), to treat the Tenant as having withdrawn the application. However, she also decided, under paragraph 7(2)(b), to continue to refer the case to the First-tier Tribunal. Her reason for doing so was: "The application raises issues which the Convener considers may raise health and safety issues for any future tenants, including a lack of functional smoke detectors and carbon monoxide detectors." Accordingly, the Convener made a further decision by minute, under section 23(1) of the Act, referring the application to the First-tier Tribunal.
4. The Housing and Property Chamber served Notice of Referral under and in terms of schedule 2, paragraph 1 of the Act upon the Landlord by letter dated 16 May 2017. This notified the Landlord that an inspection and hearing had been fixed for 27 June 2017. Shortly before that hearing, Landlord applied to have the hearing adjourned, as he was attending in funeral in Eastbourne, Sussex. That application was granted by the Tribunal, under rule 48 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016. A further inspection and hearing was fixed for 25 August 2017.
5. By a Direction made on 16 July 2017, the Tribunal directed the Landlord to produce, no later than 21 August, an Electrical Installation Condition Report ("EICR"), and a Report of Portable Appliance Testing ("PAT"), completed by a suitably competent person.

Inspection

6. The Tribunal inspected the property on the morning of 25 August 2017. The Landlord was present at both the inspection. There was no appearance by the Tenant.
7. The Property is a two-storey self-contained dwelling situated within a two-storey rear projection forming part of the original "Three Crofts" farmhouse. Access to the subjects is taken through an entrance door leading directly from the garden area to the rear of the main farmhouse. At both the date of the Application and date of inspection the main farmhouse was occupied by the Landlord.
8. Estimated to be well in excess of 200 years in age, the outer walls are of painted stone construction and the main roof is pitched clad externally with slates. The accommodation comprises an open plan living area/kitchen with a separate wet room/shower room on the ground floor and the bedroom, located on the upper floor, is accessed by a relatively steep internal timber stair.
9. There is no direct internal communication at ground floor level between the Property and the main farmhouse. However, a door located in the first-floor bedroom of the Property leads directly to the upper landing of the farmhouse.
10. There is a mains gas supply to Three Crofts Farmhouse although no gas fittings are located within the Property. Mains electricity is provided to the subjects although this is not separately metered.
11. Space heating is provided via a multi-fuel "Rayburn Nouvelle" situated within the kitchen area, supported by two individual portable electrical heaters, one on each floor. The Landlord stated that these were present during the period the property was occupied by the Tenant. Hot water to the property is provided directly from a gas fired boiler situated within the main dwelling house. Within the kitchen there is an electric hob and separate microwave. The Rayburn also provides a hotplate and oven facility.
12. The Tribunal was satisfied, as a result of its inspection, that the installations in the Property for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order. The Tribunal considered this aspect of the Tenant's complaint to be questionable, in any event. The substance of that complaint in the application was that the Landlord had, from time to time, withdrawn services, during the course of a dispute between them. The Tribunal doubted whether that amounted to a complaint that the installations for the supply of those services were not in proper working order. In any event, no defects were evident affecting the services or installations during the inspection.

13. The Tribunal was also satisfied that the Property has satisfactory provision for giving warning if carbon monoxide is present in a concentration that is hazardous to health. There are appropriately positioned carbon monoxide detectors on both the ground and first floors.

14. Battery operated smoke alarms have been fitted in the living area on the ground floor and the upper floor bedroom ceilings. The Landlord stated that these replaced previous fittings removed by the Tenant. There is no heat detection device within the kitchen area. Accordingly, the Tribunal was not satisfied that the Property has, or had, satisfactory provision for detecting fires and for giving warning in the event of fire or suspected fire. In particular, the requirement regarding smoke and heat detectors as outlined in the revised Domestic Technical Handbook regarding private rented property states there should be at least:

- one functioning smoke alarm in the room which is frequently used by occupants for general daytime living purposes;
- one functioning smoke alarm in every circulation space, such as hallways and landings;
- one heat alarm in every kitchen;
- all alarms should be interlinked; and
- the alarms should be mains powered.

15. The Landlord supplied the Tribunal, by email prior to the inspection, with documentation comprising an EICR dated 21 August 2017 and a PAT testing certificate dated 28 July 2017. With the exception of one category C3 in the EICR, both were satisfactory, raising no significant issues. The C3 definition recommends that while not categorised as “dangerous” or “potentially dangerous” the issue (circuits not RCD protected) should be “improved as soon as practicable”.

16. The Landlord also provided a gas safety certificate relating to gas appliances in the main dwelling house. This raised no significant issues.

Hearing

17. Subsequently a hearing took place at 11:30am on 25 August, in Auldgrith Village Hall. Again, the Landlord was present at the hearing, and made representations on his own behalf. There was no appearance by the Tenant.

18. At the hearing, the Landlord’s position was as follows. He had never intended to let the property to Ms Booth under a tenancy. He had not let out the Property before. He did not seek legal advice before agreeing to let her take up occupation. He thought she was a lodger. However, he also told the Tribunal that he had offered Ms Booth a tenancy agreement prior to her taking entry, which she refused to sign. It was his understanding that they agreed she would stay at the property for one month, with the option to stay for a longer period if, after one month, both parties were happy with the arrangement. However, have taken possession of the

Property, Ms Booth then maintained that she was an assured tenant under the Housing (Scotland) Act 1988. Thereafter their relationship deteriorated. He became anxious that, if Ms Booth were correct, he was obliged to be registered as a landlord. He accordingly arranged to be registered. Her tenancy, and the resulting dispute, was an unhappy experience for him. He said, "I would never have another tenant". He had learned his lesson. After Ms Booth left, he arranged to de-register in June 2017.

19. Since then, the Landlord has arranged for the property to be occupied on short-term arrangements, as a "holiday flat" through the website Airbnb. These arrangements are usually no longer than three or four days. He typically charges £37 per night. The longest arrangement has been for two weeks. He would not agree to any arrangement which was longer than a month. When the property is occupied, the connecting door between the Property's bedroom and the farmhouse landing is locked. The Tribunal does not understand the Landlord to be under any obligation, in terms of these arrangements, to provide services. However, the Landlord indicated that, in the case of longer stays, he "might provide clean towels and send a cleaner in". He also sometimes gives occupiers produce, such as tomatoes and cucumbers, though again, he does not do so as a matter of obligation. The Tribunal was satisfied that the Landlord's evidence on these matters was given honestly, and it finds in fact that the Property is being used in the manner that he described.

20. Against that background, it came to be the Landlord's position, at the hearing, that the property was not subject to the repairing standard under section 13 of the Act, given its current use.

Decision

21. The part of the 2006 Act that concerns the repairing standard (being chapter 4 of part 1) begins with section 12, subsection (1) of which states:

12 Tenancies to which repairing standard duty applies

(1) This Chapter applies to any *tenancy* of a house let for human habitation unless it is—

[There follow various exceptions to section 12, none of which is applicable in this case]

...

22. Section 194 (the interpretation section) states:

"tenancy" includes—

(a) a sub-tenancy,

(b) any occupation of living accommodation by a person under that person's terms of employment,

but does not otherwise include any occupation under an occupancy arrangement.

Under the same section:

“occupancy arrangement” means an arrangement other than a lease under which a person is entitled, by way of contract or otherwise, to occupy any land or premises.

23. Standing the current use of the Property described by the Landlord, as a holiday flat, the issue for determination is whether his agreements with Airbnb clients are short-term tenancies, in which the Property is leased to the client, or occupancy arrangements, in which the contract between the parties is not a lease. In the former case, the repairing standard applies to the Property under section 12. In the latter case, it does not.
24. The terms “tenancy” and “lease” are not further defined in section 194 of the Act. They should accordingly be given their meaning at common law. At common law, the terms may be regarded as synonymous. In the recently published “Leases” (Scottish Universities Law Institute, 2015), the authors state, at paragraph 2.01:
- A lease is a contract whereby one party who owns heritable property cedes the right of possession to another for a set period in exchange for a return. There are of course many situations where the owner of heritable property grants some sort of subsidiary right in that property to another, but these are not necessarily leases.
25. The authors go on to discuss the distinction, which is not always easy to make, between a lease and a licence. A licence, in this context, is an agreement under which a person is entitled to use heritable subjects, but which is less than a lease. In the Tribunal’s view, an “occupancy arrangement”, under section 194 of the Act, is a form of licence, in which the use of the heritable subjects is one of occupation, the agreement not being a lease.
26. In their discussion (which the Tribunal finds persuasive) the authors describe certain key factors that, whilst not conclusive, are indicative of whether a contract may be regarded as a lease or a licence. These include: whether the occupant does not have exclusive possession, such that the other party can take access at will; whether one of the cardinal elements of a lease (in particular, rent) is missing; whether occupation is tied to the provision of other services (paragraphs 2-12, 2-13, 2-15). These elements all point to a licence, rather than a lease.
27. A consideration of these elements in this case points, in the Tribunal’s view, to the Airbnb contracts being short-term holiday lets, in which occupation is under a tenancy. On the Landlord’s evidence, the occupants have exclusive possession. He does not take access at will. The cardinal elements of lease (subjects, parties, rent, duration) all exist. Although the Landlord seems to provide services from time to time, these do not appear to be significant, in the context of the agreements, and in any event, appear to lie at his discretion, rather than being a matter of right.

28. This does not mean that the tenancies are assured tenancies under the Housing (Scotland) Act 1988. They would be excepted from coverage by the 1988 Act under section 12(2) and schedule 4 paragraphs 8 (holiday lettings) and 9 (resident landlord). Also, it is not the Tribunal's view that Airbnb contracts are necessarily tenancies at Scots law. That would require to be determined on a case by case basis, with regard to the elements described in paragraph 26.
29. For these reasons, the Tribunal concludes that the Landlord is continuing to let the Property under tenancies in which the house is let for human habitation, for the purposes of section 12(1) of the 2006 Act. Therefore, the repairing standard applies, and the Tribunal has the jurisdiction to make an order, requiring the Landlord to make satisfactory provision for detecting fires and for giving warning in the event of fire or suspected fire under section 13(1)(f), as described in paragraph 14 of this decision.
30. The Tribunal proceeded to make a Repairing Standard Enforcement Order as required by section 24(2) of the 2006 Act, which Order is referred to for its terms.
31. The decision of the Tribunal was unanimous.
- 32. In terms of section 46 of the Tribunals (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.**
33. 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.

A Stalker

Signed

Date 13/9/17

Chairman

The Apartment, Three Crofts Farm, Lochfoot, Dumfries DG2 8NX
Schedule of Photographs taken at the inspection on 28th August 2017



Photograph 1:- Entrance & External View



Photograph 2
"Rayburn Nouvelle" & Portable Heater



Photograph 3
Bedroom Portable Heater



Photograph 4
Battery Smoke Alarm - Ground Floor



Photograph 5
Battery Smoke Alarm - First Floor