



**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**

Property: 54e Hercus Loan, Musselburgh EH21 6AZ (“the Property”)

Title No: MID34643

Chamber Reference: FTS/HPC/RP/17/0187

Pauline Ewart Van Der Merwe, residing sometime at 54e Hercus Loan,
Musselburgh EH21 6AZ (“the Tenant”)

Peter Oliver, sometime care of Dragonlea, Dirleton, North Berwick EH39 5EP
and thereafter represented by his agents, D J Alexander, Estate Agents and
Property Managers, 52-54 Dundas Street, Edinburgh EH3 6QZ (“the
Landlord”)

Tribunal Members – George Clark (Legal Member) and Andrew Murray
(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) in relation to the house concerned, determined that the Landlord had not failed to comply with the duty imposed by Section 14 (1)(b) of the Act.

Background

1. By application received on 12 May 2017, the Tenant applied to the Housing and Property Chamber of the First-tier Tribunal for Scotland 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”).
2. The application stated that the Tenant considered that the Landlord had failed to comply with his duty to ensure that the house meets the repairing standard.

3. In particular, the Tenant stated that the Property was not wind and water tight. The inside of the bedroom wall was damp and that it was in an unfit condition for her to be expected to sleep there. In the paperwork supporting her application and in subsequent written representations, she included exchanges of e-mails with the Landlord and the Landlord's agents, which indicated that the problem emanated from the roof of the Property. In an e-mail to the Landlord dated 24 January 2017, the Tenant noted that attempts had been made to fix the flashings on the roof, but it appeared to the Tenant that a more intensive job was required to seal the roof. On the evening of 23 January, the Tenant, concerned for her health, had pulled her mattress into the living room and had slept there.
4. On 18 May 2017, the President of the Housing and Property Chamber intimated a decision to refer the application under Section 22 (1) of the Act to a tribunal.
5. The tribunal served Notice of Referral under and in terms of Schedule 2, Paragraph 1 of the Act upon the parties.
6. By e-mail dated 31 May 2017, the Tenant advised the tribunal that she was vacating the Property on 5 June 2017. The tribunal decided, however, on 9 June 2017, to continue to determine the application as the issue raised by the Tenant in the application, if established, caused significant health and safety risks to any occupant of the Property. Notification to that effect was sent to the Landlord.
7. The Landlord, by e-mail dated 22 June 2017, made written representations to the tribunal. In relation to the matter complained of, he stated his belief that the dampness issue was due to a lead flashing at the southern end of the eastern gable, just below roof level. He suspected that, prior to the adjacent sheltered housing complex being constructed, the terrace of which the Property formed part would have continued beyond the end of the Property. He believed that this was the reason for the unusual area of lead flashing having been necessary. This had, some years ago, first caused the same issue as was being complained about. It had been repaired by cleaning out and re-fitting lead mastic. When the Tenant had reported the issue, the Landlord had instructed the same company as had carried out the previous repair and they had cleaned out the old lead mastic and re-sealed the flashing. The Landlord had asked the Tenant to monitor the situation, as it would take some weeks for the wall to dry out fully, and to report to him if the issue persisted. The Tenant had advised him that the dampness had not gone and the Landlord had had the coping stones along the roof of the Property re-pointed. The roofer had at that time advised the Landlord that, while the flashing appeared water tight and would deal with the situation, in an ideal world it would be stripped out and a larger flashing put in.
8. After all the repairs were carried out, the Tenant had been asked to report to the Landlord or his agents should the problem persist and advice had been given to her regarding a separate issue of condensation in the

Property. The Tenant had not reported any continuing dampness issue in the area affected, but had instead referred the matter to the local authority and had become very difficult to deal with.

9. When the Tenant had vacated the Property, the Landlord had found no dampness and had, therefore, assumed that the repairs which had been carried out had been entirely successful.
10. The tribunal inspected the Property on the morning of 10 July 2017, and was admitted to the Property by the Landlord's parents. The Tenant, having vacated the Property, was no longer a party to the proceedings, so was not present or represented at the inspection or the subsequent hearing.
11. The tribunal comprised George Clark (Legal Member) and Andrew Murray (Ordinary Member)(surveyor).
12. A file of photographs, taken at the inspection, is attached to and forms part of this Statement of Decision.
13. Following the inspection of the Property the tribunal held a hearing at George House, 126 George Street, Edinburgh. Neither party was present or represented at the hearing.

Findings of Fact

The tribunal makes the following findings of fact:

- The Property comprises a top floor flat in a terrace of three storey custom-built tenements of flats in an established residential area.
- The tenancy commenced on 4 April 2005. It was a Short Assured Tenancy and it ended when the Tenant vacated the Property on 5 June 2017.
- There is evidence of past damp penetration above skirting level in the corner of the bedroom of the Property, adjacent to the gable wall.
- There is no evidence of an ongoing problem with penetrating dampness in the bedroom.
- The bedroom has very recently been redecorated, but there is no smell or other evidence to indicate ongoing dampness.

Reasons for the decision

14. The tribunal inspected, from ground level, the external rendered gable wall of the tenement of which the property forms part. There is an indented section of the wall on which there is lead flashing. The indent may have been a consequence of the taking down at some time in the past of an adjoining building.

15. The tribunal noted the terms of a report prepared by Create Building, e-mailed by the Landlord's agents to the Tenant and to the local authority on 13 April 2017. The report concluded that the problem was clearly being caused by penetrating damp from outside and recommended the fitting of a cavity drain damp-proofing membrane to isolate the damp external wall from the internal plaster, at a cost in the region of £2,250 plus VAT. The tribunal accepted that inserting such a membrane would be a more reliable long-term solution to the intermittent problem of dampness reaching the internal plaster in the bedroom, but was of the view that it could not justify making a Repairing Standard Enforcement Order in a situation where some lesser work had been done and appeared to have arrested the problem. The tribunal accepted that the flashing was an unusual detail and that repairs would have to be carried out on a regular basis, every few years, but was of the view that this did not justify requiring the Landlord to incur the expense of the insertion of a membrane.
16. The tribunal did not inspect the Property prior to the repair and re-pointing of the flashing and the redecoration of the bedroom, so did not see the Property in the condition it was at the time of the application, but the tribunal is satisfied that there are no current failures to meet the repairing standard in respect of any of the issues set out in the application.
17. The decision of the tribunal was unanimous.

Right of Appeal

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.

G Clark

Signed Legal Member/Chairperson
Date: 10 July 2017

This is the Schedule of photographs
referred to in the foregoing
Statement of Decision.

G Clark

10/4/17

(Megan Kemble/Char)

Photograph Schedule – Flat 54e, Hercus Loan, Musselburgh EH21 6AZ

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Date of Inspection: 10 April 2017



Front elevation of 54 Hercus Loan



View the rear bedroom wall taken facing the gable end of the property



View of the peeling wall covering at skirting level in the rear bedroom as a result of historic damp penetration



View of the gable end of the property showing the high level lead flashing RHS