



**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/22/1498**

**Re: Property at Langdyke, Waterside, KA3 6JA (“the Property”)**

**Parties:**

**Mr Chris Wareham, Mrs Debbie Wareham, 1916 19th Floor, One Sheikh Zayed Road, The H Office Tower Block, Dubai, United Arab Emirates, United Arab Emirates; 1916 19th Floor, The H Office Tower Block, One Sheikh Zayed Road, Dubai, United Arab Emirates, United Arab Emirates (“the Applicant”)**

**Mrs Carol McConnell, Mr Simon McConnell, 2 Shotlinn Cottage, Strathaven, Lanarkshire, ML10 6TY (“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 £5,000.**

**Background**

1. By application, received by the Tribunal on 22 March 2022, the Applicants sought an Order for Payment in respect of unpaid rent that had become lawfully due by the Respondents to the Applicants. The sum sought was £5,000.
2. The application was accompanied by a copy of a Short Assured Tenancy Agreement between the Parties commencing on 28 September 2017 at a rent of £1,000 per month, and a Rent Statement showing arrears as at 17 March 2022 of £5,000. No rent had been paid since 1 June 2021 and the amount paid per month from May to August 2020 had been £500.

3. The Applicants stated that the tenancy had ended 30 November 2021, at which point the arrears had been £6,500, but that the Applicants had since received in full the deposit of £1,500, leaving a balance of £5,000.
4. On 1 August 2022, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the Respondents were invited to make written representations by 22 August 2022.
5. The Respondents submitted written representations on 22 August 2022. They stated that they had withheld rent in a separate bank account following advice given to them by Citizens Advice Scotland, as the Applicants were in breach of the tenancy agreement by failing to keep the Property wind and water tight and to carry out repairs. In the winter of 2017, water had come through the ceiling of the downstairs bathroom and through a ceiling light fitting. This had been reported to the letting agents and at property inspections, but nothing had been done about this and other repairing issues.
6. In May 2021, the Respondents had reported to the letting agents water ingress in the kitchen and the fact that their bedroom carpet, in the room above the kitchen, was wet. Their bedroom wardrobe, which was only 7 months old, had collapsed due to water soaking into the wood. Water had run down the kitchen wall, where there was a light switch and an electric socket. There was also water ingress in the cupboard housing the central heating boiler. All of these issues had been reported to the letting agents. The letting agents had said that they had difficulty in accessing the Property on 3 occasions. This claim was false. They had not notified the Respondents in advance. The Respondents had 2 dogs in the Property and needed notice of such appointments. The Respondent, Mrs McConnell works in a hospital, and it is very difficult for her to take days off at short notice. Two contractors had, however, been at the Property and had provided quotes, but nothing was done.
7. As at October 2021, the repairs were still to be done. The letting agents told them that the repairs were very expensive and they were still to decide with the Applicants on the course of action to take. Meantime the rain was spreading across the roof and upstairs, where fungus was growing.
8. On the weekend of 23 October 2021, the Respondents had made the stressful decision to move out, as the ceiling had collapsed on to the kitchen floor and the upstairs hallway. The letting agents had said that there was damage to the Property caused by the Respondents, but this was false. Any damage had been there at the start of the tenancy and would be documented in the original report.
9. The Respondents contended that they had been unfairly treated and not looked after by the letting agents.

### **Case Management Discussion**

10. Following a Case Management Discussion on 15 November 2022, the Tribunal decided that further information was required before it could determine the application. In particular, the Respondents would have to provide evidence,

such as bank statements or screenshots of an online account in support of their statement that they had withheld the rent in a separate bank account. The Tribunal understood that details such the account number should be redacted but would expect to see evidence of regular payments or transfers equating to the rent payments as and when they fell due. The Tribunal would also require the Applicants to provide copies of email or other message exchanges with contractors in support of their contentions regarding the difficulty in gaining access to the Property to inspect it and prepare quotes for the repairs required to address the issues reported to them by the Applicants, and, in particular, the issue of rainwater penetration. The Tribunal decided, therefore, to adjourn the Case Management Discussion to a later date, to be intimated to the Parties and in the meantime to issue appropriate Directions.

11. On 6 December 2022, the Applicants' agents provided the Tribunal with copies of emails related to attempts to gain access to the Property for the purpose of obtaining an Electrical Installation Condition Report ("EICR") and to obtain quotes for repair works. The emails indicated that the agents had instructed Gasman Energy on 13 April 2021 to inspect the Property for the EICR. When the agents chased up their instruction on 11 May, the contractors told them that it was still not booked in, as Mrs McConnell, with whom they were dealing, only gets her work rota one week in advance, and it had been exceptionally difficult to book in. The agents asked them to try one more time, after which they would suggest the contractors go in, using keys held by the agents. The contractors then confirmed, again on 11 May, that they had tried to contact the Respondents that day by text and email and would try again on the following day.
12. On 12 May, they reported that they had spoken with Mrs McConnell and had told her that they were willing to get their engineer to work overtime to slot in with her work schedule. They had suggested 26 May between 12.30 and 4.30pm, but she had said that she had to leave at 2.30 to collect her son from school. This was unmanageable for them, and she needed to be available for the whole afternoon. They stated "She is being very unaccommodating".
13. On 13 May, Mr McConnell had told the agents that he was not happy to let them come in with keys and stated that the Respondents had tried to accommodate the contractors several times, but they needed a 5-hour slot. His wife had a day off the following week, but she had to collect his son from school between 2.30 and 3pm.
14. On 7 June 2021, roofing contractors told the agents that they had called Mr McConnell to arrange access, but he was not able to accommodate them that week, He would speak to his wife regarding access the following week. On 17 June, they reported that he had not called them back, and on 28 June, they advised that they had arranged an appointment, but the tenant had cancelled it.
15. On 10 August 2021, the Applicants' agents chased another contractor that they had instructed to attend the Property. The contractors replied later that day that

they had arranged to attend the previous Friday, but were unable to inspect, as the tenant was going out.

16. On 14 December 2022, the Respondents replied to the Tribunal's Direction by emailing a screenshot of an account with Santander. It was, however, only a statement of the balance on the account at 21 November 2022 and did not show any record of transactions on the account, such as monthly deposits of sums equivalent to the rent they stated they were withholding.

## **Second Case Management Discussion**

17. The Second Case Management Discussion was held by means of a telephone conference call on the morning of 15 May 2023. The Applicants were represented by Mrs Sarah Stewart of Robb Residential, letting agents, Glasgow. The Respondent Mrs McConnell was also present. Mr McConnell was unable to participate as he is working offshore.
18. Asked by the Tribunal to explain why contractors had consistently reported that they had been unable to gain access to the Property, Mrs McConnell said that she had tried to work with contractors to arrange times when she was not at work, but they were unable to accommodate her. She had to travel 15 minutes to collect her son from school and the contractors were not able to come out within a timeframe that suited her. Mr McConnell works offshore, so could not always be there to let contractors in.
19. Miss Stewart told the Tribunal that, in her experience with the contractors used, if they arranged to attend the Property and nobody was in when they arrived, they would have called, in this instance, Mrs McConnell and would have been content to wait for a short time to allow her to return from the school run. Mrs McConnell replied that nobody had suggested that to her.
20. In relation to the bank account information provided by the Respondents following the Tribunal's Direction, Mrs McConnell said that she had not been aware that the information, which had been provided by her husband had not shown transactions on the account, but merely the balance at 21 November 2022. She said that she did not have access to the account and, whilst she could email her husband, she could not be sure that she would be able to hear from him before he returns in July from working offshore.
21. The Tribunal was very disappointed that, despite the clear reasoning set out in the previous Case Management Discussion Note, the Respondents had done no more than provide confirmation of the balance in an account with Santander. The Tribunal also noted that, despite Mrs McConnell having advised that her husband had provided the account information, it was in fact attached to an email from a Carol Fraser. On balance, however, the Tribunal decided that it was in the interests of justice to allow the Respondents one final opportunity to provide evidence that they had been depositing the equivalent of the rent in the account on a monthly basis. The Tribunal decided, therefore, to adjourn the Case Management Discussion to a later date, to be intimated to the Parties. The Tribunal did not consider it necessary to issue further Directions, but the

Respondents should be in no doubt that nothing short of a transaction history on the Santander account from 1 June to 30 November 2021 inclusive (with items not related to the rent for the Property being redacted at the Respondents' discretion) will be regarded as complying with the Tribunal's Direction of 15 November 2022.

22. On 16 June 2023, the Second-named Respondent advised the Tribunal that he had not had a monthly payment going into the account for withheld rent. He had put the whole amount away. He did not understand what difference it made so long as he could show the amount available for withheld rent.

### **Third Case Management Discussion**

23. A Third Case Management Discussion, scheduled for 21 August 2023, was postponed at the request of one of the Parties and it was held by means of a telephone conference call on the morning of 5 September 2023. The Applicants were again represented by Mrs Sarah Stewart. The First-named Respondent, Mrs McConnell, was in attendance.

24. Mrs Stewart told the Tribunal that the Respondents had never intimated their intention to withhold rent and that the deposit had been paid in full to the Applicant at the end of the tenancy to reflect the rent arrears. Mrs McConnell said that the Respondents had told the Applicants' agents that they were going to withhold rent and that they had opposed the proposal that the deposit be paid in full to the Applicants.

25. The Tribunal Member advised the Parties that it was necessary for the Tribunal to decide whether it was dealing with a retention of rent or merely with rent arrears. Accordingly, it would be necessary to obtain from the Respondents a copy of the email or message in which, in advance of retaining any rent, they intimated their intention to do so. The fact that the Respondents had confirmed that they had not set aside the rent each month did not help their argument, as the Tribunal had to be satisfied that they were actually retaining the rent that they had not paid. The purpose of the equitable remedy of retention of rent by one party is to persuade the other party to fulfil the obligations imposed on them by the tenancy agreement between them, in this case to carry out repairs. In addition, however, the view of the Tribunal Member was that, at the point at which the tenancy terminated (30 November 2021), the Applicants' obligations to the Respondents in respect of repairs ceased and the whole amount of retained rent became payable by the Respondents to the Applicants.

26. This legal point came as news to the First-named Respondent and the Tribunal asked if she wished to request a postponement in order to obtain legal advice. Mrs McConnell confirmed that she would. Mrs Stewart replied that the Respondents had not gone down the relevant route as regards withholding rent, in that they had not notified their intention to do so and had not put the money aside each month. The case had also been ongoing since March 2022. The Tribunal sympathised with the position stated by Mrs Stewart but decided that it was in the interests of justice to allow a further postponement, as the Respondents were unrepresented. The Tribunal would, however, issue a

Direction to the Respondents to provide a copy email or message notifying the Applicant or his agents of their intention to withhold rent, dated prior to their having done so, and to provide details, with authorities, of any legal argument they intended to put forward that their right to retain rent continued after the tenancy ended.

27. On 2 October 2023, the Respondents provided the Tribunal with a copy of an email sent to them by the Applicants' letting agents on 6 July 2021, which referred to "your grievance regarding the condition of the property and your subsequent withholding of rent". It went on to set out issues regarding access to the Property experienced by AGM Roofing and stated that the letting agents had also been unable to gain urgent access for the 5-year electrical check which includes smoke alarms. The letting agents stressed their desire to address the situation "with the utmost urgency". The Respondents, in their submissions of 2 October 2023 restated that they had had to leave the Property a month early, as the family was being put at risk. They asked how it could be fair that they should have to pay the full amount for a property which was not fit to live in. They would have happily paid if the repairs had been carried out and his family had not had to live in horrific and dangerous conditions.

#### **Fourth Case Management Discussion**

28. A fourth Case Management Discussion was held on the afternoon of 20 November 2023. The Applicants were again represented by Mrs Sarah Stewart of Robb Residential. The Respondent, Mr Simon McConnell was also present.
29. Mr McConnell confirmed that the rental payment due on 1 July 2021 was the first one that had been withheld. When asked about the arrears at that time of £1,500, he replied that this was due to his not having been able to work offshore during the COVID-19 lockdown restrictions and that the Applicants had agreed that it could be paid back over time. He stated that the Applicants had not sorted out the issue of smoke detectors from day 1 of the tenancy. He had not realised that he should be putting the withheld rent aside monthly, as long as the money was available when the repairs were done.
30. Mrs Stewart told the Tribunal that it was recognised that extensive repairs were required to the Property but referred to the various emails that had already been submitted indicating the difficulties they had in gaining access to the Property. Mr McConnell said that access was not a problem. It was simply that certain times did not suit. Mrs Stewart's response was that if the situation was so bad that the Respondents were considering withholding rent, she would have expected them to do more to ensure access was not a problem.

#### **Reasons for Decision**

31. The Tribunal considered carefully all the evidence, oral and written, presented to it. The Tribunal noted that the Respondents accepted that the first payment of rent that had been withheld was due on 1 July 2021. The intimation to the Applicants' letting agents of their intention to do so was acknowledged in an email of 6 July 2021. By then, however, there were already arrears of £1,500,

which went back to the COVID-19 outbreak of 2020. The Applicants may have had an agreement with the Respondents to provide them with temporary relief of rent, but it remained due to the Applicants. Mr McConnell stated in an email of 12 July 2020 that, when he returned home the following month, he would make a plan for paying back the arrears. Accordingly, irrespective of the Tribunal's decision on whether the Respondents were entitled to withhold rent as they did from July 2021, this sum was due to the Applicants.

32. The Tribunal then considered the issue of withholding rent. The Tribunal noted the reason stated for doing so was the failure of the Applicants to carry out necessary repairs. The Parties did not dispute the fact that extensive repairs were required. The Tribunal examined in particular the copy emails provided by the Applicants on 6 December 2022 and summarised in Paragraphs 11-15 of this Decision. The view of the Tribunal was that it was incumbent on the Respondents to use their best endeavours to permit access to the Property for the purposes of inspection, preparation of estimates and the carrying out of work. The Tribunal accepted that Mr McConnell works away from home and that Mrs McConnell had family commitments, but there was a consistent pattern of failure to allow access. The Respondents may not have been deliberately obstructive, but the attempts of the Applicants to carry out legally required electrical inspections and to assess and arrange for repair works was, to a significant extent, hampered by the failure of the Respondents to agree access arrangements. Accordingly, the Tribunal was not prepared to hold that the Respondents had been entitled to withhold rent.
33. Even if the Tribunal had made a different finding on the withholding of rent, the Respondents did not satisfy the Tribunal that they had actually retained the rent that they had not paid. The fact that the Respondents provided a Bank Statement showing sufficient funds in a Santander Account on 21 November 2022 was not sufficient and the Tribunal had clearly indicated to the Respondents that nothing short of a transaction history on the Santander account from 1 June to 30 November 2021 inclusive (with items not related to the rent for the Property being redacted at the Respondents' discretion) would be regarded as complying with the Tribunal's Direction of 15 November 2022. In this part of its Decision, the Tribunal adopted the reasoning in *McGill v Brebner* (EV/18/3471).
34. Finally, the Tribunal considered the impact of termination of a tenancy on withheld rent. The purpose of the equitable remedy of retention of rent by one party is to persuade the other party to fulfil the obligations imposed on them by the tenancy agreement between them. It follows that the monies withheld became payable when the contract between the Parties ended, as the remedy is only available for so long as the other party is in breach of contract and the obligation on the Applicants to comply with the repair and maintenance obligations imposed on them as landlords by Paragraph 15 of the Tenancy Agreement ended when the tenancy itself came to an end.
35. For the reasons set out in the foregoing paragraphs, the Tribunal held that it was not satisfied that the Respondents were entitled to withhold rent or that they had effectively done so, rather than simply failing to pay and accruing

arrears, but that, even if they were so entitled, the monies withheld became payable to the Applicants when the tenancy ended. The Tribunal, therefore, upheld the application for an Order for Payment.

### **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.**

# George Clark

Legal Member/Chair

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**20 November 2023**  
Date