Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71(1) of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/20/2084

Re: Property at 12 Caley Brae, Uddingston, G71 7TA ("the Property")

Parties:
Ms Tamara Garcia Fernandez, Mr Juan Martin Bailo, 0/2, 159 Wellshot Road, Glasgow, G32 7AU ("the Applicants")

Mr Graham Devine, 4 Gailes Park, Bothwell, G71 8TS ("the Respondent")

Tribunal Members:

Ms H Forbes (Legal Member) and Mrs M Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment should be granted in favour of the Applicants in the sum of £1344.45.

Background

1. This is an application received in the period from 30th September to 28th October 2020, made in terms of Rule 111 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended ("the Rules"). The Applicant is seeking an order for payment in respect of a tenancy deposit of £350 that was not returned and excessive heating costs in the sum of £1525.59, allegedly attributable to a faulty boiler within the Property. There was a private residential tenancy agreement between the Applicant Mr Bailo and the Respondent commencing on 20th November 2018 and ending on 19th July 2020. Both parties have lodged representations and productions.

2. A Case Management Discussion ("CMD") for this and the case FTS/HPC/PR/20/2199 took place by telephone conference on 5th January 2021. The Applicant and Ms Fernandez were in attendance. The Respondent was not in attendance, having informed the Housing and Property Chamber ("HPC") that he would not be attending. The case was continued to a hearing on 12th February 2021.

3. Following representations from parties on the matter of whether Ms Fernandez should have been included as an applicant, the Tribunal decided to convert the hearing to a preliminary hearing on the matter of whether or not Ms Fernandez was a joint tenant and entitled to be an applicant, with a further hearing to be set down thereafter to deal with substantive matters.

4. A hearing took place by telephone conference on 12th February 2021. The Applicants were in attendance. A Spanish interpreter was in attendance. The Respondent was not in attendance, having informed the HPC that he would not attend. The Tribunal heard evidence and found that Ms Fernandez was a joint tenant from 19th September 2021 and entitled to be an applicant.

5. On 12th February 2021, a hearing also took place for the case FTS/HPC/PR/20/2199. In that case, a decision was made by the Tribunal to order the Respondent to lodge the tenancy deposit with a tenancy deposit scheme to allow adjudication to take place. Consequently, the matter of the return of the tenancy deposit is not considered as part of this case.

The Hearing

6. A hearing took place by video conference on 12th March 2021. All parties were in attendance. An interpreter was in attendance.

Findings in Fact

7.

(i) Mr Bailo and the Respondent entered into a tenancy agreement in respect of the Property that commenced on 20th November 2018. Ms Fernandez became a joint tenant of the Property on 19th September 2019. The tenancy ended on 19th July 2020.

(ii) A replacement boiler was fitted in the Property on 6th September 2019.

(iii) On 9th November 2019, Mr Bailo emailed the Respondent to report that the boiler was running constantly and had to be switched off completely in order to stop the problem.

(iv) On 10th November 2019, the Respondent reported the issue to the gas engineer that had installed the boiler.

(v) On 22nd November 2019, the gas engineer installed a new heating motorised valve in the central heating system at the Property.

(vi) The problem with the boiler continued thereafter.

(vii) On 29th November and 1st December 2019, the Respondent again contacted the gas engineer, who attended the Property on 3rd December 2019 and could not find any further problem.

(viii) The boiler problem continued thereafter.

(ix) The Applicants provided meter readings for gas and electricity to their energy provider, Bulb, every three months as requested. In the interim, usage billed to the Applicants was based on estimated readings.

(x) Mr Bailo received a bill from Bulb dated 17th December 2019, covering the period from 17th November to 16th December 2019. The electricity consumption for the period amounted to £81.14. The gas consumption for the period amounted to £1444.45.

(xi) Prior to the receipt of the bill dated 17th December 2019, Mr Bailo had been paying £65.65 per month by direct debit to Bulb.

(xii) Prior to the receipt of the bill dated 17th December 2019, Mr Bailo's account with Bulb was in credit of £237.32.

(xiii) Following receipt of the bill dated 17th December 2019, Mr Bailo's account with Bulb was in debit of £1222.62.

(xiv) Discussion between Mr Bailo and the gas engineer took place on WhatsApp on 18th December 2019, ending with the gas engineer stating that he would speak to the Respondent about changing the time click [sic].

(xv) The problem with the boiler continued thereafter.

(xvi) The Applicants began to operate the boiler by turning it on and off when required.

(xvii) An energy bill from Bulb dated 17th February 2020 showed electricity consumption amounting to £25.23, and gas consumption amounting to £63.47, for the period from 17th January to 16th February 2020

(xviii) Mr Bailo and the Respondent corresponded by email on 17th February 2020 about the problem with the boiler.

(xix) No further work was carried out to the boiler or central heating system before the termination of the tenancy on 19th July 2020.

Preliminary Issues

8. There were initial technical issues concerning the ability of the Applicants to participate by video conference. An alternative mobile telephone was sourced and they were able to participate.

9. The Respondent requested confirmation of the status of Ms Fernandez during the hearing. It was confirmed that Ms Fernandez is an Applicant.

Evidence from the Applicants

10. Evidence was given by the Applicants that, from early November 2019, the new boiler would run continuously and the temperature in the Property was excessive. A part of the central heating system was replaced in November 2019 but the problem continued. Mr Bailo sent a video showing the boiler running continuously to the gas engineer and corresponded with him by WhatsApp messages in December 2019. The Respondent had initially told the Applicants not to turn the boiler off, as reflected in the tenancy agreement, but eventually, when the bill dated 17th December 2019 was brought to his attention, the Respondent told them to do that in order to regulate the heating. Mr Bailo said he thought the Respondent did not believe him that there was a problem, and that the Respondent never accepted responsibility for the problem. Mr Bailo said that the Respondent told the gas engineer he believed Mr Bailo had not been paying enough by direct debit per month, and had run up a large bill.

11. Mr Bailo said that, prior to the bill of 17th December 2019, their bills for the winter were around £100 per month for gas and electricity. Their direct debit was around £62 per month. They would not have used the amount of gas used from November to December 2019 in a year, in normal circumstances. Mr Bailo was working night shift during the tenancy. He was in bed during the day. Ms Fernandez was working during the day. They tended not to have the heating on during the day.

12. Mr Bailo referred to an energy bill lodged from his previous tenancy that showed a sum of £108.02 for gas and electricity over a period of 5 weeks in October/November 2018. He referred to an energy bill lodged from the Applicants' current tenancy, where there are three tenants, that showed a monthly energy cost of £56.29 for the period from 7th November to 6th December 2020. He pointed out that the annual gas projection for the property in which he currently lives is £348 compared to £1877 on the bill dated 17th December 2019. Responding to questions from the Tribunal as to why they had not lodged any other energy bills in respect of the Property, the Applicants said they had not been asked to do so.

13. Responding to questions from the Tribunal, the Applicants said they provided three-monthly meter readings to Bulb, upon request. Otherwise, the bills were based on estimates. Their direct debit would be adjusted from time to time. Their direct debit increased after the 17th December 2019 bill. They paid an extra £100 per month. Mr Bailo said he is still paying towards the bill.

14. Responding to questions from the Tribunal, Mr Bailo said he contacted Bulb regarding the large bill. They asked him to send them a photo of the meter. They responded saying there was no problem with the meter. Mr Bailo had been a customer of Bulb for two and a half years. The Applicants said they had not thought to ask the Respondent to contribute to the excessive bill until they spoke to a solicitor after the tenancy ended. They said they had trusted

the Respondent and they were disappointed when he told the gas engineer that he did not believe them about the problem with the boiler.

15. Responding to questions from the Tribunal about statements made to the effect that the Respondent had done nothing to fix the problem, Mr Bailo accepted that the Respondent had sent a gas engineer. Ms Fernandez said she felt the Respondent should have sent another engineer to provide a second opinion, and that it was later discovered that the gas engineer was a friend of the Respondent.

16. Mr Bailo said that he sent a video by WhatsApp to the gas engineer, who said there was no problem with the thermostat for the boiler. Before this problem commenced, the Applicants had used the timer to set the boiler and it had worked initially.

Evidence from the Respondent

17. The Respondent said there was no correspondence between the parties from 18th December 2019 to February 2020. He had relied on his Corgi registered gas engineer, who said that there was no problem. In February 2020, he asked Mr Bailo if there was a problem and Mr Bailo said it was all right and he had increased his payments to the energy provider. He had asked Mr Bailo for copies of previous energy bills but they were not provided. The gas meter was changed at the same time as the boiler. This was arranged by the Applicants. It may have been the case that the wrong figures were transposed during the changeover from one meter to another. He was uncertain as to whether bills were based on estimates or actual readings. The February 2020 bill indicated there was no problem, as the gas was £65. The Respondent said he has now sold the Property and he did not hear anything from the new owners regarding a problem with the boiler within the period allowed by the missives for the reporting of such issues.

18. The Tribunal pointed out that Corgi was no longer the standard for gas engineers and had not been since April 2009 and that this role had been taken on by the Gas Safe Register. The Respondent said he has not checked the gas engineer's certification but he is a qualified working gas engineer, working for the local authority.

19. Asked by the Tribunal whether the Respondent had a view as to why the electricity costs had not risen in the same way as the gas costs had risen between November and December 2019, in view of his suggestion that the issue may have been caused by the Applicants paying too low a sum in the past, and being, effectively, caught out when actual readings were taken, the Respondent said he had no understanding of the matter and would not answer a hypothetical question.

Questioning of the Applicants

20. The Respondent requested permission to question the Applicants on matters that they had raised in documentation and submissions. He felt the evidence would be relevant to the credibility of the Applicants. The questioning was allowed, on the basis that it remain relevant.

21. The Respondent asked the Applicants if he had ever made racist comments towards them. Ms Fernandez said that he had. The comments had been made face to face and there was no written record. Ms Fernandez said he made comments at the end of the tenancy, for instance, saying they should be grateful and did not belong.

22. The Respondent asked the Applicants if it was true that he had refused to provide them with a landlord reference. Ms Fernandez said that he had refused, unless the Applicants complied with his requirements. She said she believed he was an obsessive person and had engaged in a personal war against the Applicants after discussions and disagreement on the value of the Property. She said that the problems started when the Applicants said that they did not want to buy his property. Ms Fernandez said, when challenged by the Respondent, that he had delayed in providing a reference for a property that the Applicants did not take in the end, but had eventually provided a reference. The Respondent said that he did provide them with a reference and he could prove it. Ms Fernandez said that the Respondent had refused to provide a reference as he said that they had caused damage to the property. She also said that the Respondent's behaviour had affected them and they felt that they had to move away from the property. She said that they had left the property in perfect condition and that he had replied to the reference request with negative comments.

23. The Respondent asked Mr Bailo why he had claimed that all communication between the parties was by email. Mr Bailo said that was the case, unless the Respondent turned up at the Property when they would discuss matters face to face.

24. The Respondent asked the Applicants if they knew how much the Property had sold for. They did not know. He asked how they could claim that he had asked for an inflated price during earlier discussions regarding the possibility of the Applicants purchasing the Property. Ms Fernandez said they had checked similar properties online.

25. The Respondent said he wished to ask questions about the lease agreement between the parties. This was not allowed by the Tribunal as it did not appear to be relevant to the matter before the Tribunal. Furthermore, this matter had been dealt with at the preliminary hearing, where a decision was made.

26. The Respondent then said he had 'a couple' more questions but he expected they would not be allowed, so he would not ask them. Offered an opportunity

to ask the questions by the Tribunal, so that relevance could be determined, the Respondent declined the opportunity.

27. Asked by the Tribunal how many other properties the Respondent let out, he refused to answer as he considered it not relevant. Asked about his arrangements for dealing with gas issues in other properties, he said he did not have a contract with a particular gas engineer and had used different engineers for different issues in different properties. Asked whether or not the boiler installed in the Property was new, the Respondent said that it was. He did not have a warranty for it and believed the warranty would have been left with the Applicants by the gas engineer. He was unable to provide details of the make of the boiler.

28. Responding to questions from the Tribunal as to whether the Respondent considered the motorised valve could have caused the high gas usage, he said he did not have any knowledge in this regard. He accepted that he could not rule it out. The Respondent agreed that there may have been another underlying fault that caused the high gas usage, but the Applicants may also have been underpaying towards their energy costs

29. The Tribunal asked why the Respondent had not provided any evidence from the gas engineer, despite stating in an earlier email to the HPC that he could get a statement from his gas engineer. The Respondent said he did not do this as it was not required of him by the Tribunal.

30. The Respondent said he believed he had discharged his common law duty to keep the Property in repair throughout the duration of the lease. He could not say there was no problem with the boiler or system between December 2019 and February 2020, pointing out that he had relied upon the word of the gas engineer that there was nothing wrong with the boiler or system. When asked if he may have been told of a problem during that period, he said he did not believe so, but he was going from memory.

Questioning of the Respondent

31. Ms Fernandez asked why the Respondent had not provided an EICR and Gas Safe Report to the Applicants, and why there were no alarms in the Property. The Respondent said there were alarms and the EICR and Gas Safe Report had been provided.

32. Asked by Ms Fernandez why he had not obtained a second opinion on the boiler problem, the Respondent said he had not been asked to do so. He had every confidence in the gas engineer.

33. Asked by Ms Fernandez why he had not responded when the gas engineer told him of the problem, the Respondent said he always responded immediately when called. The gas engineer had told him there was no problem. Mr Bailo had told him everything was all right and that his payments for energy had increased. The Respondent said he was not aware of the

WhatsApp conversation between Mr Bailo and the gas engineer until the transcript was lodged with the Tribunal. He said he had not been told there was any problem by the gas engineer.

34. Asked by Mr Bailo whether he could prove that the boiler was a new boiler, the Respondent said he would have to speak to the engineer and check his records.

Further submissions by the Applicants

35. The Applicants said it was clear there was a problem with the boiler. The Respondent and the gas engineer communicated about this. The Respondent had never trusted that there was a problem and he didn't ask for a second opinion. There was clear evidence he was rude and intimidatory. If it was not for his behaviour, the Applicants would not be in this position.

36. The Applicants accepted that the Respondent should not be responsible for their electricity costs for the month from 17th November to 16th December 2019. They suggested that a sum of £100 be deducted from their claim in respect of gas costs for that month, as well as the electricity cost of £81.14.

Further submissions by the Respondent

37. The Respondent said he always carried out repairs timeously and effectively. He wished to refute the ridiculous allegations made against him by the Applicants. He did not overinflate the price of the Property. He had asked for a fair price. He had never made a racist comment to anyone. He did not refuse to provide a reference. There had not been a problem with noise from a previous boiler. He had not illegally evicted the Applicants. They could have stayed as long as they wished, and he told them so, even after they had given notice. He was never rude or intimidatory. It was his belief that the Applicants lied with ease.

38. The Respondent asked if a recording of the hearing would be retained by the HPC. The hearing clerk confirmed that the hearing had not been recorded. The Respondent asked if the Ordinary Member's notes would contain all the issues raised and could he have a copy of these. The Respondent was told that members' notes were for the private use of members and would not be made available to him.

Reasons for Decision

39. The Tribunal had regard to the evidence heard and the written submissions made by parties in coming to its decision.

40. The Tribunal allowed a degree of latitude to the Respondent in asking questions of the Applicants, as the Respondent was not legally represented. Most of the questions asked were not relevant. It appeared that the Respondent was aggrieved by comments made in the application and written

representations by the Applicants regarding his behaviour throughout the tenancy, believing that this was an attempt to denigrate his character. It was his position that such comments suggested a lack of credibility on the part of the Applicants. Other than questioning the Applicants and denying their comments, the Respondent did not provide any compelling evidence of a lack of credibility on the part of the Applicants. The Tribunal did not find that the Applicants lacked credibility. The Tribunal found all parties to be credible in their evidence.

The cause of the excessive gas bill

41. The Tribunal considered the Respondent's suggestion that there may have been an issue with the meter that led to the high gas usage. The Tribunal accepted the evidence of the Applicants that this was looked into by the energy company and no fault was discovered. The Tribunal took the view, therefore, that it was unlikely that a fault with the meter caused the problem, particularly given the evidence of the Applicants, which was accepted by the Tribunal, that the boiler was running continuously.

42. The Tribunal considered the Respondent's suggestion that the problem arose because Mr Bailo had not been paying a sufficient amount each month by direct debit, and that the meter was not read during the bulk of the tenancy. The Tribunal had regard to the email exchange between the parties in February 2020 lodged by the Respondent. The exchange began on 17th February 2020 where the Applicant asked that the problem be fixed, and that he wished to pay his rent in two instalments, because he could not afford to pay it all at once, due to the excessive energy bill. The Respondent goes on to suggest to Mr Bailo that the energy provider may not have been taking sufficient by way of monthly payments. In a written representation sent to the HPC by email dated 2nd December 2020, the Respondent suggested that Mr Bailo's response of 18th February 2020 whereby he wrote: *Yes I know that during some times was the pays* indicated that he was admitting that he had not been paying enough in his standing order. The Tribunal did not agree that the message suggested any such admission by Mr Bailo. Mr Bailo was not questioned on this matter by the Respondent.

43. The Tribunal decided that, had there been any merit in the Respondent's suggestion that Mr Bailo had not been paying sufficient towards his energy costs over a long period, it is likely there would have been a similar issue with the electricity by the time an actual reading was provided, which was not the case. Furthermore, the Tribunal accepted the evidence of the Applicants regarding the provision of three-monthly readings as requested by their energy provider, which would provide a safeguard against building up a bill of this magnitude.

44. The Tribunal did not give any weight to the energy bills lodged by the Applicants from other properties as there was no evidence provided regarding the size and type of the properties that would allow a comparison with energy usage for this Property.

45. In all the circumstances, and on the balance of probabilities, the Tribunal found that the excessive gas bill was caused by a faulty central heating system.

The responsibility of the Respondent in terms of repairs

46. The Tribunal noted that the tenancy agreement was silent on the matter of landlord's responsibilities generally, and made no mention of any obligations in respect of repairs. The repairing standard, as set out in section 13 of the Housing (Scotland) Act 2006 is an implied term of the tenancy agreement. The landlord is not in breach of the obligation until they have been given notice of the defect and have failed to remedy it within a reasonable period. The Tribunal considered that, although there may have been a breach of the repairing standard, the 2006 Act provides a distinct remedy for such breach, and no application had been made in respect of the repairing standard in this case. The Tribunal considered that the 2006 Act did not, however, displace the contractual repairing obligations implied at common law.

47. The Respondent acted promptly in reporting the issue to the gas engineer in early November 2019, as soon as it was reported to him, and again on 29th November 2019, chasing up the engineer on 1st December 2019. The Tribunal found, however, that, thereafter, the Respondent did not ensure that the problem was fixed, despite the continued complaints of the Applicants.

48. The Tribunal was not persuaded that a second opinion was required, although it may have been prudent. It was incumbent upon the Respondent as landlord to ensure that the central heating system was in good repair throughout the tenancy, and this did not happen. The Tribunal noted that the Respondent did not take advantage of any warranty that should have been provided with the new boiler. It appeared to the Tribunal that, following his initial early action, the Respondent reached a decision that the problem lay with the Applicants and was nothing to do with the boiler or the central heating system. This was borne out by the Respondent's email to the gas engineer of 18th February 2020 wherein he stated *Juan was not being totally honest with me. He had a debit of £1250 before he got his February bill. … He did not, as he claimed, run up a £1300 bill in 3 months. He has not been paying an appropriate amount each month and has probably built up that debt since he moved in in November 2018.*

49. In all the circumstances and on the balance of probabilities, the Tribunal found that the Respondent breached the contractual repairing obligations implied at common law.

50. The breach led to a situation where the boiler was running constantly for a period, resulting in a gas bill of £1444.45 for a period of one month from 17th November to 16th December 2019, for which Mr Bailo was held responsible.

Damages for loss

51. The Applicants are claiming for the cost of gas usage for a period from 17th November to 17th December 2019. Their evidence was that the boiler was switched off thereafter to avoid the problem continuing, and no claim has been made for further sums incurred thereafter. They are claiming damages in the sum of £1344.45, which is calculated by deducting the sum of £100 to cover their estimated monthly gas cost from the sum of £1444.45 as reflected in the 17th December energy bill.

52. The Tribunal considered that the Applicants have suffered loss of £1344.45 as a result of the Respondent's breach and they are entitled to be compensated for their loss.

Decision

53. The Tribunal finds that the Respondent breached the contractual repairing obligations implied at common law.

54. An order for payment is granted in favour of the Applicants in the sum of £1344.45.

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.

Helen Forbes _____ **23rd March 2021**
Legal Member/Chair **Date**