



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

Chamber Ref: FTS/HPC/CV/19/0212

Re: Property at 28 Balmoral Drive, Bearsden, G61 1DJ (“the Property”)

Parties:

Mr Stephen McCammon, 136 Athelstane Road, Knightswood, Glasgow, G13 3QY (“the Applicant”)

Mr Robert Kennedy, Mrs Jackie Kennedy, 98 Speirs Road, Bearsden, Glasgow, G61 2LA; 98 Speirs Road, Bearsden, G61 2LA (“the Respondents”)

Tribunal Members:

Neil Kinnear (Legal Member) and Gordon Laurie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that

Background

This is an application for a payment order dated 17th January 2019 and brought in terms of Rule 111 (Application for civil proceedings in relation to a private residential tenancy) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant seeks payment of £396.00 in his application form from the Respondents, who were his landlords in respect of his tenancy of the Property.

The Private Residential Tenancy Agreement had been correctly and validly prepared in terms of the provisions of the *Private Housing (Tenancies) (Scotland) Act 2016*, and the procedures set out in that Act appeared to have been correctly followed and applied.

A Case Management Discussion was held on 14th March 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Applicant and the Respondents appeared, and neither were represented.

The Tribunal identified a number of factual disputes between the Parties and set a Hearing for today.

The Hearing

A hearing was held on 8th April 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Applicant and the Respondents again appeared, and again neither were represented.

At the hearing, the Tribunal heard evidence from the Applicant and from the Second Respondent, Mrs Jackie Kennedy, the latter giving evidence on behalf of both herself and her husband the First Respondent.

After hearing all the evidence led by both parties, the Tribunal found in fact:

- 1) That the Respondents purchased the Property from the previous owners on or about 15th August 2018, and thereafter let the Property to those former owners pending them acquiring a new address to reside in. The previous owners moved out of the Property on Friday 12th October 2018.
- 2) That the Respondents conducted viewings with potential replacement tenants in the second half of September 2018, and subsequently agreed to let the Property to the Applicant.
- 3) That the parties signed a lease on 30th September 2018, with a start date of Sunday 14th October 2018. The Applicant was anxious to obtain early entry to the Property in part so that he could enrol his daughter at the local primary school after returning to Scotland from Australia with his family (as indicated in his e-mail to the Second Respondent of 10th October 2018).
- 4) That the Applicant was aware that the previous owners, now renting the Property, were not leaving until 12th October 2018.
- 5) That on attending the Property on 13th October 2018 in order to clean and prepare it for the Applicant moving in the following day, the Respondents noticed that the previous owners had removed the Property's white goods, which they had understood were being left.
- 6) That the Respondents immediately ordered replacement white goods, and advised the Applicant of these circumstances. The replacements were delivered on 15th and 16th October 2018.
- 7) That on Monday 15th October 2018, the heating system failed, and the Respondents arranged for its repair, which was completed on Wednesday 17th October 2018.
- 8) That the Applicant was aware of the short time-scale from the previous owner leaving until his taking entry, and was content for matters to proceed in that way in order to allow him as early entry as possible.
- 9) That the Applicant gave notice to leave on 4th December 2018, with an end date for the tenancy of 31st December 2018.

- 10) That the heating system again failed on 24th December 2018, which the Applicant reported immediately to the Respondents.
- 11) That the First Respondent attended the Property that same day with wood for burning in the fireplace, and three portable heaters to run off the electricity supply in order to heat the Property until a repair could be completed. The Applicant made no comment expressing any dissatisfaction with this arrangement at that time.
- 12) That the Property had an electric shower, which provided hot water for bathing. This was unaffected by the fault in the heating system.
- 13) That the Respondents contacted two different plumbers in an attempt to arrange for someone to come and repair the heating system on 24th December 2018. They obtained no response due to the commencement of the Christmas public holidays. The Applicant indicated that he would also make attempts to identify a plumber who could attend over the Christmas period, and it was agreed that the Respondents would meet the cost of repair if he succeeded in obtaining a plumber to carry out the repair.
- 14) That the Applicant, his wife and their young children moved out of the Property into his parents' house over the Christmas period, and advised the Respondents of doing so by text message on 27th December 2018. In that text message he also advised that he had been unable to get a plumber during the Christmas break, and enquired when the Respondents' plumber would restart work.
- 15) That the Respondents had (wrongly) assumed after not hearing further from the Applicant over the Christmas period that he had managed to find an available plumber and resolved the heating problem.
- 16) That the Respondents made further efforts to obtain a plumber for an urgent repair on 27th December 2018, but desisted their efforts after the Applicant advised by further text message that day that that he was quitting the Property and moving out completely with his family and possessions. He indicated in that text that he would be completely removed from the Property by the following day, and asked if the Respondents would bring the tenancy end date forwards, which they refused to do.
- 17) That the Respondents obtained the services of a plumber who repaired the fault on 3rd January 2019. The plumber noted that the system was not working due to a supply valve to the boiler having been turned off, and rectified the problem by simply turning the valve back on.

The Tribunal was invited by the Applicant to grant an order for payment of the sum of £396.00, which was his calculation *pro-rata* of twelve days rent in terms of the lease agreement. He submitted that he was entitled to this sum as "a refund" of the rent he paid for those days, which comprised the four days at the start of the tenancy and the eight days at the end of the tenancy when he alleged that he was unable to occupy the Property due to the various faults he had identified.

The Applicant confirmed that he based his claim for this refund of rent upon a breach of the repairing standard imposed upon the Respondents as landlords by the *Housing (Scotland) Act 2006*, and drew the Tribunal's attention to page 41 of the *Easy Read Notes for the Scottish Government Model Private Residential Tenancy Agreement*, which gives an explanation of what the repairing standard means.

In answer to a question from the Tribunal, the Applicant confirmed that he had sought basic legal advice on his position from Shelter, who had told him that he had a potential claim against his landlords after he left the Property in terms of the repairing standards provisions. Shelter had not advised him further, nor upon the appropriate form of procedure to make such a claim.

The Respondents invited the Tribunal to reject the application. Their position was that they had promptly taken all reasonable steps that they could upon defects coming to light to rectify those, and had done so within a reasonable timescale.

Statement of Reasons

The jurisdiction of the Tribunal in relation to Private Residential Tenancies, such as that which applied to the Property, is set by statute. Section 71(1) of the *Private Housing (Tenancies) (Scotland) Act 2016* provides:

“First-tier Tribunal's jurisdiction

(1) In relation to civil proceedings arising from a private residential tenancy—

(a) the First-tier Tribunal has whatever competence and jurisdiction a sheriff would have but for paragraph (b),

(b) a sheriff does not have competence or jurisdiction.

(2) For the purposes of subsection (1), civil proceedings are any proceedings other than—

(a) the prosecution of a criminal offence,

(b) any proceedings related to such a prosecution.”

The Tribunal accordingly has jurisdiction to hear civil proceedings arising from a private residential tenancy such as between the parties in this application.

The Tribunal found on all the relevant and material facts that the two witnesses were credible and reliable witnesses. They differed and disagreed on a number of peripheral issues which were not relevant to this application, but there was little factual dispute between them about the facts of relevance to the Applicant's claim. The real dispute between them was upon the interpretation the Tribunal should put upon the factual circumstances, and the potential remedy available to the Applicant.

The Applicant seeks a refund of rent paid upon the basis that the Respondents are in breach of the repairing standard imposed on them by the terms of the *Housing (Scotland) Act 2006*.

The Tribunal noted that pages 40 to 42 of the *Easy Read Notes for the Scottish Government Model Private Residential Tenancy Agreement* referred to by the Applicant explain that the tenant can apply to the Tribunal to tell the landlord to do what is needed in the event of their breaching the repairing standard (page 39).

It further explains that if the tenant thinks the landlord has failed to make sure the property meets the repairing standard, then the tenant after first contacting the landlord can apply to the Tribunal, which might reject the application, agree with the tenant and order the landlord to carry out repairs, or suggest mediation. If the

landlord is ordered to carry out repairs, the order will give them reasonable time to do so, and if they fail to do so, the Tribunal can issue a rent relief order reducing the rent the tenant has to pay by an amount not exceeding 90%. The tenant should not withhold rent without a rent relief order being issued by the Tribunal (Page 41).

Thus, the *Easy Read Notes for the Scottish Government Model Private Residential Tenancy Agreement* explain the potential remedies available and which the Tribunal might order in respect of a breach of the repairing standard, which do not include a refund of rent.

Indeed, any application upon the basis of the breach of the repairing standard ought to be brought to the Tribunal in terms of Rule 48 (Application for determination of whether the landlord has failed to comply with the repairing standard) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, and not under Rule 111 as this application has been.

Section 14 of the *Housing (Scotland) Act 2006* provides:

“14 Landlord's duty to repair and maintain

(1) 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.

(2) The duty imposed by subsection (1) includes a duty to make good any damage caused by carrying out any work for the purposes of complying with the duty in that subsection.

(3) 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.

(4) The landlord complies with the duty imposed by subsection (1)(b) only if any work which requires to be carried out for the purposes of complying with that duty is completed within a reasonable time of the landlord being notified by the tenant, or otherwise becoming aware, that the work is required.”

This section imposes the repairing standard upon the landlord, and provides that compliance with the standard is achieved if any work which is required is completed within a reasonable time.

Section 22 of the *Housing (Scotland) Act 2006* provides that a tenant may apply to the Tribunal for determination of whether the landlord has failed to comply with the duty imposed by section 14, and section 24 directs that the Tribunal must decide whether the landlord has complied with the duty imposed under section 14.

If the Tribunal concludes that the landlord has not complied, it must issue a repairing standard enforcement order requiring the landlord to carry out remedial work to comply with the repairing standard obligation with a time limit to complete the work of not less than 21 days.

If the landlord fails to comply with the order, in terms of section 27, the Tribunal has power to make a rent relief order of an amount not exceeding 90% of the rent which would, but for the order, be payable.

The remedies available to the applicant in terms of the legislation applying to the repairing standard, and the Tribunal's powers in relation thereto, are set out in the above sections, and do not include a power for the Tribunal to award a refund of rent as is sought in this application.

In any event, even if the Tribunal considered that the statutory repairing standard provisions could be utilised by the Applicant in this application (which it does not), then the legislation provides that a landlord be given a minimum of 21 days to carry out repairs, a period far in excess of the time taken by the Respondents here.

It appears to the Tribunal that any potential remedy which the Applicant seeks in the circumstances of this case must be one for damages in respect of an alleged breach of contract by the Respondents. However, that is not the basis upon which this application is brought.

The Tribunal would however note, that the landlord's contractual obligations in terms of the lease are to be found at paragraph 17, which provides that the landlord is responsible for ensuring that the Property meets the repairing standard.

That clause goes on to provide that the landlord will keep in repair and proper working order the installations in the Property for the supply of heating and water heating. The tenant is obliged to notify the landlord "as soon as is reasonably practicable of the need for any repair or emergency", and the landlord is responsible for "carrying out necessary repairs as soon as is reasonably practicable after having been notified of the need to do so".

The Tribunal considers that the Respondents were not in breach of their contractual obligation to carry out the necessary repairs to the heating system as soon as was reasonably practicable. They attempted to obtain the services of two plumbers on the day they were informed by the Applicant of the fault, and were in the process on the first working day after the Christmas public holidays of making further efforts to obtain a plumber when the Applicant advised them that he was in the process of moving out of the premises that day and would be fully removed by the following day.

It appears to the Tribunal that the Respondents took all reasonable steps which they could in the circumstances to carry out the repairs as soon as was reasonably practicable after being notified of the need to do so, and accordingly were not in breach of contract.

If the Tribunal is wrong in that view, and the Respondents were in breach of contract, that breach would entitle the Applicant to damages for any loss he sustained in consequence of the breach (see, for example, *Stair Memorial Encyclopedia, Landlord and Tenant (Reissue)* at paragraph 196).

The general legal principle in assessing damages for breach of contract is that of restoration of the innocent party to the same position as he would have been in had the wrong never occurred (see, for example, *Stair Memorial Encyclopedia, Volume 15, Obligations* at paragraph 910).

In the Tribunal's opinion, the true loss sustained in such a situation as this might be the cost of purchasing or hiring electric heaters, the cost of additional electricity used, or if the property was not suitable for occupation then the cost of alternative accommodation. It would not, in the Tribunal's view, entitle the Applicant to repayment of the rent for the period in question.

The Tribunal would observe that it has considerable sympathy for the Applicant's predicament in circumstances where the heating failed on Christmas Eve, which was undoubtedly most inconvenient, but it does not consider that the failure in the heating system rendered the Property unfit for occupation in circumstances where alternative heating might be provided by the use of electrically-powered heaters, and where an electric shower continued to allow the Applicant and his family to have washing facilities.

Finally, the Tribunal would note that the Applicant accepted the Property at the start date of the lease in the knowledge of the various faults which were being rectified before he moved in, and in those circumstances we consider that any potential claim for damages in that regard is excluded (see, again, *Stair Memorial Encyclopedia, Landlord and Tenant (Reissue)* at paragraph 196).

Decision

For the above reasons, the Tribunal refused the application.

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.

N Kinnear

Legal Member/Chair

11/04/19

Date