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 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/CV/17/0481

Re: Property at 1A Westbourne Gardens, Glasgow, G12 9XA ("the Property")

Parties:

Ms Virginia Braid, 4 Westbourne Gardens, Glasgow, G12 9XD ("the Applicant")

Mr Stuart Alexander McArthur, Mrs Carolyn McArthur, 1A Westbourne Gardens, Glasgow, G12 9XA ("the Respondents")

Tribunal Members:

Nairn Young (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision

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

- Background

This is an application for payment of unpaid rent allegedly due in relation to the Property. After various procedure, the matter called for a hearing of evidence on 25 May 2018. At that point, with the agreement of all parties, the Respondents were asked to lead. It was also agreed by the parties that the amount unpaid to the rent account was £12,365.06 and that the amount claimed should be amended to this sum. The Tribunal allowed this.

The Respondents' case was concluded on the morning of 25 May 2018. The Applicant was not able to conclude her case on that day. The matter therefore called again on 6 August 2018 and was heard to its conclusion on that date.

In the time between the two days of hearing evidence, the Respondents submitted a further document, which they stated gave evidence of monies owed to them by the Applicant. The Tribunal considered whether to receive this document before commencing further hearing of evidence on 6 August 2018. The Tribunal did not consider that to allow this evidence to be received would be in line with the overriding objective to deal with the proceedings justly. The evidence related to a line of argument that had not been put forward at any point in the proceedings to date and which had not been disclosed to the Applicant.

At the first day of the hearing, the Applicant was present in person and represented by Ms McQuarrie of TC Young Solicitors. On the second day, she was again present and was represented by Mr Welsh, advocate, instructed by Dentons solicitors. Both Respondents were present at the first day of the hearing; only the Second Respondent attended the second day.

The Tribunal heard evidence from the Respondents in support of their case; and Craig MacDougall, Joanne Morries, Karen Friel and the Applicant, in support of hers.

The Respondents claim that none of the £12,365.06 referred to is due, on the basis that they are entitled to an abatement of rent. They base that assertion on various issues they claim affected their enjoyment of the Property. On occasion, these issues overlapped in time. After some preliminary points, the Tribunal's findings in fact in relation to these will therefore be grouped by issue, as nearly as possible to chronologically:

- Findings in Fact

1. The Property was let to the Respondents by the Applicant under a Short Assured Tenancy agreement signed on 25 March 2016 ('the Lease').

2. The Lease was for a term of 24 months. This period was agreed following the Applicant's initial offer to Lease for 12 months. The Respondents suggested a longer term after viewing the Property. The rent due under the Lease was £1,750 per calendar month. The Lease does not make any particular provision as to the condition in which the Property should be made available to the Respondents.

3. The Respondents vacated the Property on 26 March 2018. At that point, the rent account showed £12,365.06 outstanding.

Water Damage

4. Prior to the Respondents taking entry to the Property in terms of the Lease, damage was caused to the lounge by water. The source of this water was a central heating pipe two floors above which leaked down the wall space. This pipe was repaired in January 2016. Work was done in terms of the pipe-owner's insurance to remove the damaged plaster in the lounge and attempt to dry the affected area out. After a little delay, it was ultimately thought that this had been successful and, by the time the Respondents were to take entry, the area had been re-plastered. Suitable wallpaper was agreed between the parties and put up at some point after the commencement of the Lease. The Respondents used the lounge, but only rarely and on special occasions, because, as a large room, it was hard to heat.

5. At some stage prior to 27 January 2017 it was discovered that the area had not fully dried and that further work would be involved. The Second Respondent, in an e-mail of 16 February 2017 mentioned the dampness of the lounge wall amongst a list of issues she described as, "not serious." In an e-mail of 17 April 2017, the Second Respondent described using the lounge daily and stated, "there is no damp visible and no other issue is detectable." In an e-mail later on the same date, she stated, "I am not sure how urgent the works are, it certainly doesn't affect us." The Respondents were concerned that if work were to go ahead it would affect their enjoyment of the Property. There was correspondence between the Applicant's agents and the

Respondents throughout 2017 attempting to arrange for remedial work to be done at a time and in such a way as to inconvenience the Respondents as little as possible. No work was carried out on the lounge during the period of Lease. The Respondents had full use and enjoyment of the lounge throughout their tenancy of the Property.

Missing Light Fitting and Smell of Cooking

6. On 29 March 2016, the Second Respondent contacted the Applicant's letting agent, Vanilla Square, by e-mail. Among other issues, the Second Respondent referred to, "1x kitchen led strip … not working," and, "a strange smell of cooking in the [snug]." The first of these issues concerned a missing light fitting. No fitting was installed during the period of the Lease. The second issue was with cooking smells coming from the neighbours. When they cooked, it was possible to smell this in the snug at the Property. No action was taken to address the smell of cooking during the period of the Lease. Neither of these matters was raised again by the Respondents.

External Windows

7. Also on 29 March 2016, and again on 5 May 2016 and 16 February 2017, the Second Respondent e-mailed Vanilla Square, referring to the condition of the external windows. The Respondents' issue with regard to the external windows was that they considered they required to be re-painted. No re-painting was instructed by the Applicant during the period of the Lease. There was not any issue with wind or water penetration of the external windows at any point during the period of the Lease.

Issues re: Bathrooms

8. On 3 June 2016, the Second Respondent intimated various issues to Vanilla Square by e-mail. She reported that the shower in the en suite to the small front bedroom was leaking due to problems with its doors; that the en suite to the main bedroom was smelling of damp; and that the extractor fans in the

main bedroom en suite and the main bathroom were not working. Vanilla Square contacted the Second Respondent by e-mail on 6 June 2016 to arrange access by a plumber. At some point in the fortnight following, Craig MacDougall, a plumber, attended the property on behalf of the Applicant.

9. The shower in the en suite to the small front bedroom was leaking. Mr MacDougall repaired this during a further visit on 1 July 2016.

10. Mr MacDougall did not find any source of a smell of dampness. On his visit in June 2016, he checked the saniflow, which is a part of the toilet fitting, and the shower traps. There was no issue with any of these at that time. On 1 August 2016, the Second Respondent e-mailed Vanilla Square and, among other things, stated that the en suite to the main bedroom continued to smell. She stated that both Respondents, "would be away for a week or so and will be in touch when we get back to Glasgow." Without having heard further from the Respondents, Vanilla Square e-mailed them on 17 August 2016 and asked whether plumbing investigations could proceed. In an e-mailed response of the same day, the Second Respondent requested that these proceed as soon as possible and offered to arrange for her own plumber to attend. Vanilla Square and the Second Respondent exchanged e-mails on 25 August 2016 in regard to arranging for a plumber to attend, but this was never arranged by either party. Nonetheless, the issue of the damp smell was not referred to again by the Respondents until the e-mail to Vanilla Square on 16 February 2017 (referred to in para.4, above). The Second Respondent referred to the problem has having existed since taking entry to the property. In the same e-mail, she described the problem as not being a serious issue. No further work was done to ascertain whether there was a smell of damp and (if so) what might have been causing it.

11. On his June 2016 visit to the property, Mr MacDougall also carried out smoke tests on the extractors in both of the en suite bathrooms and the main bathroom. He also tested the extractors by checking whether they held a piece of toilet paper, when placed against the intake. All of the extractors were

functioning correctly at that time. No further issue in regard to the extractors was raised by the Respondents.

Neighbour Dispute

12. In the e-mail of 3 June 2016, the Second Respondent also referred to an ongoing problem with neighbours interfering with enjoyment of a private access and private areas of garden. On 14 June 2016, the Second Respondent contacted Vanilla Square further by e-mail in regard to the disagreement with the neighbours. She described the situation as, "escalating," and, stated that the neighbours were, "deliberately causing a nuisance, ... completely encroaching on any enjoyment or use of the property garden ... contrary to what is contained in the lease which we signed." The Property benefits from exclusive use of an access gate and a private area of garden ground. The Respondents' upstairs neighbours did not recognise these exclusive rights and used the access and garden ground as though communal. After various e-mail correspondence between Vanilla Square and the neighbours, and discussion between the Respondents and the neighbours, this matter was resolved.

Lights and Electrics

13. In the e-mail referred to above at para.4, of 16 February 2017, the Second Respondent raised various other issues. She also described these as, "not serious". One of these concerned spotlights in the kitchen, hallway and small bedroom not working. The Applicant considered that this matter could be fixed by replacing the bulbs and that this was the Respondents' responsibility in terms of the Lease. On 25 April 2017, the Second Respondent e-mailed Vanilla Square and reported that more lights were not working, some lights were flashing on and off, and that there was a fault with a socket in the lounge. The issue was now described as urgent by the Respondent and requiring an electrician. The Applicant instructed an electrician, Mark Hinshelwood, to attend the Property. He visited at some point in May 2017 to assess the situation and again on 8 June 2017 to complete the work required.

These were the earliest dates he could arrange that suited the Respondents. There was no electrical fault at the Property at the time of either visit. Mr Hinshelwood replaced various lightbulbs on 8 June 2017. The lights at the Property were working when he left.

14. The Second Respondent raised three further issues in October 2017. These were that the lights dimmed when appliances were being used, that a switch in the lounge did not work correctly and that certain lights were causing the electrics to fuse. Vanilla Square attempted to arrange a suitable time for an electrician to attend the property to investigate these issues, but the Respondents could not provide one before the tenancy came to an end.

Miscellaneous Other Issues

15. The remaining issues raised in the e-mail referred to above at para.4, of 16 February 2017, and described by the Respondent as, "not serious," concerned the paintwork in the main bathroom, the towel rail in the smaller en suite bathroom and the alarm.

16. At no point during the period of the Lease was the Property or any part of it uninhabitable.

- Relevant Law and Reasons for Decision

17. Mr Welsh, on behalf of his client, directed the Tribunal to three judgements, two of which (*Muir* v. *McIntyres* (1887) 14 R. 470 and *Fingland & Mitchell* v. *Howie* 1926 S.C. 319), he submitted, represented the law on the question of abatement of rent in Scotland, as relevant to this case. In essence, this was that entitlement to an abatement of rent was founded on the property being uninhabitable, at least in part, and for at least part of the period of the lease.

18. While he did not contend that the third case, *Renfrew District Council* v. *Gray* 1987 S.L.T. (Sh. Ct.) 70, was wrongly decided, Mr Welsh submitted that it

could be distinguished from the extant case, insofar as it concerned a situation where a house was agreed by parties to be uninhabitable, notwithstanding that the tenants had in fact been living in it for the period they alleged this to be the case. Absent that agreed position, he contended, tenants would in fact have to have been deprived of all use of the property concerned, in order for it to be considered 'uninhabitable'.

19. The *Renfrew* case provides a useful overview of various authorities in this area (including the other two referred to by Counsel for the Applicant) and it is helpful to quote from the judgement of Sheriff Principal Caplan QC at some length, beginning at the end of page 71 of the report:

> "In my view it is long established law that a tenant is entitled to an equitable abatement of rent for at least certain degrees of partial non-performance of the lease by the landlord. This general rule of law is discussed in Gloag on Contract (2nd ed.), pp.628–629. The authorities do not appear to have been reviewed in any recent decision but there is no reason why the principles set out in the earlier authorities should not remain applicable. ... In principle I can see no justification for the view apparently taken by the sheriff that the fact that the tenants remained in the subjects deprives them of their right to resist payment of rent. Thus, in *Kilmarnock Gas-Light Co.* v. *Smith* (1872) 11 M. 58, the pursuers attempted to sequestrate for rent and the defenders resisted this on the ground that they had not been afforded certain facilities due to them under the lease. Lord Justice-Clerk Moncrieff observed at p.61: "The continuance of the tenant in possession may prevent him from rescinding the contract, but it will not deprive him of his defence to the landlord's demand." Lord Cowan notes in the same case at p.61 that the tenant's defence is not to be regarded as a claim for damages. The defence in fact failed but only because the defenders had failed to prove that the landlords had withheld the said facilities (p.60). In *Critchley* v. *Campbell* (1884) 11 R. 475 the tenant claimed damages on the ground that he had not received full possession of the subjects let. The defenders pleaded that the pursuers should have rescinded the contract and could not continue in possession and at the same time claim damages.

The court rejected this contention and it may be significant that Lord President Inglis observes at p.479 that, although the action was presented as a claim for damages, the action was equivalent to a demand for abatement of rent. Thus, in my view, it would not do in a demand for abatement of rent to contend that this is not available unless the tenant has quitted the subjects.

... Abatement of rent as illustrated by the authorities is an equitable right and is essentially based on partial failure of consideration. That is to say, if the tenant does not get what he bargained to pay rent for it is inequitable that he should be contractually bound to pay such rent. This position results even if the failure to enjoy the subjects is through accident rather than breach of contract and the abatement really is based on the fact that the tenant should not pay for rights he never enjoyed rather than loss suffered although in certain cases loss sustained may be a suitable measure of the abatement due. The foregoing views are, I think, supported by *Muir* v. *McIntyres* (1887) 14 R. 470. In that case the difference between abatement of rent and compensation by way of damages was clearly recognised. Moreover, while it was acknowledged that a claim for compensation would require to be constituted by separate action, a claim for abatement could be advanced by way of a defence to an action for the rent for it is in essence a claim that the rent is not due. The law was summed up by the Lord President at p.472 when he observed: "it is quite settled in law that an abatement is to be allowed if a tenant loses the beneficial enjoyment of any part of the subject let to him either through the fault of the landlord or through some unforeseen calamity". In Muir's case the tenant had been deprived of possession of the whole subjects when part of them had been destroyed by fire. However it seems to me as I have indicated that the principle must be that the tenant should not be expected to pay for benefits of occupancy which were assumed by the contract and which he did not enjoy. The rental is fixed in the expectancy that full possession of the subjects of let will be enjoyed and it can readily be supposed that the tenant would not have contracted to pay the full rent for less than full enjoyment of the subjects hence the entitlement to abatement of rent. *Fingland & Mitchell*

was a damages case but the tenant's counterclaim was based on the fact that her enjoyment of the rented property had been adversely affected by a burst pipe. Lord Ormidale observed at 1926 S.L.T. p.285: "But it appears to me that ... there is enough ... to infer that the landlord is in breach of his contract to give her, in the fullest sense, full possession of the house — that is to say, a house fully susceptible of possession by her under the circumstances I have referred to". Thus his Lordship appears to recognise that the landlord's failure to give possession of the subjects in the state contracted for is equivalent to a failure to give full possession of the subjects. From the tenant's point of view it matters little that the subjects are not fully enjoyable through some accidental partial destruction such as would be caused by a fire or because they are in an equivalent uninhabitable state through some failure on the part of the landlords. In my view it is not destructive of the right to an abatement of rent that the tenant has notional occupancy of the subjects. In *Munro* v. *McGeoghs* (1888) 16 R. 92, where a claim for abatement of rent was held to be a relevant defence, the factual position appears to have been not that the defender was denied occupancy of the farm buildings complained of but that they had not been put in tenantable condition. In *Sivright* v. *Lightbourne* (1890) 17 R. 917 it is plain that the tenant enjoyed possession of the subjects but the tenant resisted an action for the rent on the ground that part of the subjects were not in tenantable state. ... Lord Shand stated at p.919: "But it is stated here that it was made a condition of any rent being paid that the houses should be put into a tenantable condition. Why the landlord should in such a case get the rent, and the tenant be left to raise another action to recover damages for breach of the stipulated condition, I do not see." In the present case it seems to me that the tenants' undertaking to pay rent must have been reciprocally dependent on the landlord's fundamental obligation to keep the house habitable. It is difficult to conceive of an agreement to pay rental for a house which is uninhabitable. The law in the matter is perhaps expressed most succinctly by Lord Shand in *Stewart* v. *Campbell* (1889) 16 R. 346. At p.349 his Lordship states: "Now, if either a portion of the subjects of a lease is withheld, or the buildings are not put into the condition stipulated, so that the tenant in effect really does not get the full

use of the subjects let, the tenant may retain a portion of the rent, and claim for abatement." His Lordship then goes on to indicate that damage caused to the tenant may be the measure of a claim for abatement. Lord Shand was particularly well placed to summarise this area of the law, having himself appeared in a number of the critical cases I have been discussing. In *Stewart* the defence was rejected but on the ground that during the actual period of disrepair the tenant had paid rent without objection. If it is established that rent ought to be abated for partial use of the subjects then there is no reason in principle why the abatement should not cover the whole rent payable over part of the period of the lease if, during that part period, the tenant was deprived of all fruitful enjoyment of the subjects. The basis of the matter seems to be that it was no part of the contract that the tenant should pay for what he failed to get.

...

[In this case the] sheriff sets out few findings in fact but what he has held established is critical. He has held that, over the relevant period, the said property was "completely uninhabitable". I think it is not an unreasonable inference that a house which is "completely uninhabitable" has no lettable value at all while it remains in that condition. It cannot be supposed that the defenders would have contracted to pay rent for an uninhabitable house. The fact that the defenders remained for a while in occupation of the house is not destructive of that conclusion. They may not have had anywhere else to go. It may even have been to the advantage of the pursuers that the defenders remained in occupation of the house despite the fact it was uninhabitable in the sense of not being fit for habitation. If the defenders had sought temporary accommodation elsewhere they may have had a claim for damages against the pursuers. In deciding abatement (which appears to be an equitable remedy) it may be that if it could be shown that tenants gained positive benefit from the property this could be taken into account in arriving at the abatement. However in the present case the pursuers have not pled or established any such specific benefit. What has been established is that the defenders were forced to occupy a completely

uninhabitable house and that is not a situation in respect of which a householder can be assumed to be willing to pay rent. A similar view was taken by Sheriff Substitute Smith in *Euman Trs.* v. *Smith* (1930) 46 Sh. Ct. Rep. 165. I agree with the observation of the sheriff substitute at p. 168, namely:

"While the house is not reasonably fit for human habitation the tenant is not getting his quid pro quo for the rent"."

20. Although different expressions may be used, all of the authorities mentioned in this judgement consider subjects that were to some extent 'uninhabitable' (as does the judgement itself); but it is clear from the ratio of these cases that there is no conceptual requirement for subjects to be uninhabitable before abatement is justified. Abatement of rent is an equitable right, based on partial failure of consideration. It follows that, if the contract of lease stipulates that subjects will be provided to the tenant in a particular condition, a failure to make them so available could found a right to an abatement. A lease could conceivably place a higher requirement on a landlord than merely to maintain the property in an inhabitable state. In most residential leases, however, no particular condition is stipulated other than that the subjects will be inhabitable; and, where there is no other evidence on the matter, it is sensible to infer that this was the intention of the parties. While the Respondents in this case contend that, as it concerned a, "premium property," the Lease did require more of the Applicant than merely to provide an inhabitable flat, the Tribunal was not presented with any evidence of the Applicant having given an undertaking to that effect, expressly or impliedly. If the rent agreed between the parties included any premium, it was neither referred to, nor linked to a particular responsibility on the landlord, in the Lease. The Respondents are therefore only entitled to an abatement of rent to the extent that the Property was not inhabitable for any period, in whole or in part.

21. While 'inhabitable', in this sense, means more than simply capable of bare occupation (as is implied in *Renfrew*), it cannot be taken to mean completely

without the sort of minor problems that householders in ordinary circumstances encounter. The Tribunal is of the opinion that all of the issues raised by the Respondents in relation to the condition of the Property itself fall within that description. None of these issues had a significant impact on the Respondents' enjoyment of the Property. Most of them were described by the Second Respondent herself as, "not serious issues." Even without that statement, the Tribunal did not consider that they could be objectively classified, whether alone or cumulatively, as constituting a failure of consideration on the part of the Applicant. It would therefore not be equitable for an abatement of rent to be granted on this basis.

22. The Tribunal did not consider that the existence of a dispute with neighbours over the extent of the Property and rights pertaining to it rendered the garden area uninhabitable. The dispute was of a kind very common between neighbours. The Applicant cannot be assumed to have undertaken to provide the Property free of any such difficulty. The dispute did not prevent the respondents from taking possession of the subjects of the Lease. There is therefore no failure of consideration and it would not be equitable for an abatement of rent to be granted on this basis.

23. In relation to the lounge and the work that required to be done to deal with the results of the water damage that affected the Property prior to the Lease, the Respondents' case is based more on the inconvenience caused to them in anticipation of the work, than by any effect that such work had on their enjoyment of the Property, or the condition of the lounge pending the work being completed. No work in fact ever took place during the period of the Lease. The Respondents had full use and enjoyment of the lounge throughout the period of the Lease. Nonetheless, there was considerable correspondence between the Applicant's agents and the Respondents throughout 2017 attempting to arrange work. The Respondents did not want the work to go ahead while they were occupying the Property and, on that basis, the anticipation that it might proceed was no doubt concerning for them. That notwithstanding, the Applicant was entitled, once it was discovered that work was necessary, to take steps to arrange for it to be carried out. The

approach taken to doing so was to seek to take access to the property by consent of the Respondents, by discussing the prospect with them. That discussion cannot be taken in itself as interfering with their enjoyment of the Property sufficiently to render it equitable to abate the rent.

24. It was agreed between the parties that, should the argument that an abatement should be granted fail, the sum of £12,365.06 is due. Given the above conclusions, the Tribunal therefore made an order for payment of that sum.

- Decision

Order for payment of the sum of £12,365.06 (TWELVE THOUSAND THREE HUNDRED AND SIXTY-FIVE POUNDS AND SIX PENCE STERLING) granted to the Applicant.

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.

Nairn Young

Legal Member/Chair 18 SEPTEMBER 2018 **Date**