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/19/2598

Re: Property at 20 Blantyre Crescent, Fraserburgh, AB43 9TW ("the Property")

Parties:

Klondyke Fishing, Steamboat Quay, North Breakwater, Fraserburgh, AB43 9EE ("the Applicant")

Ms Katie Forbes, 13 Argyll Road, Fraserburgh, AB43 9RF ("the Respondent")

Tribunal Members:

Ewan Miller (Legal Member) and Mike Scott (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that The Decision of the Tribunal was to grant the Applicant a payment order against the Respondent for the sum of FIVE THOUSAND TWO HUNDRED POUNDS (£5,200) STERLING payable at the rate of £866.67 per month.

1. **Background**

The Applicant was the owner of the Property. The Applicant had let the property to the Respondent on or around 4 June 2018. There was no dispute between the parties as to the fact that the Respondent had not paid rent under the lease to the sum of £5,850. However, the Respondent had argued that due to numerous defects in the Property they were entitled to an abatement of rent equivalent to the amount of rent due. The Applicant disagreed. In order to resolve the matter the Applicant had applied to the Tribunal seeking a payment order against the Respondent for the full arrears of rental.

The Tribunal had before it the following documentation:-

- The Applicant's application to the Tribunal dated 12 August 2019;
- A copy of the Lease between the Applicant and the Respondent commencing 4 June 2018;
- A copy of the Applicant's Land Certificate to the Property (Title Number ABN105642);
- Inventories of Productions from the Applicant's solicitor numbering 101 items and largely comprising three types of document:-
    - Correspondence via letters and emails between the Parties;
    - Invoices in relation to works carried out at the Property by the Applicant; and
    - A Schedule of Condition of the Property taken prior to the commencement of the tenancy as well as photographs of the condition of the Property taken at termination.
- Written submissions from the Respondent setting out the issues she alleged she faced with the Property and incorporating previous written submissions of 30 May 2019.

2. **Hearing**

The Tribunal held a lengthy hearing on 12 December 2019 at Banff Sheriff Court, Low Street, Banff. The Applicant was not present but was represented by Mr Alan Duthill of Messrs Stewart & Watson Solicitors, Fraserburgh. It should be noted that as well as representing the Applicant, Messrs Stewart and Watson had been the letting agent for the Applicant and had let the Property to the Respondent and dealt with the various issues that had arisen during the tenancy. Mr Duthill called three witnesses from his firm's letting department, Mr Gary Duguid, Ms Elaine Donald and Ms Tracy Fraser.

The Respondent was present and represented herself. She had one witness, her partner, David James Forbes.

3. **Findings in Fact**

The Tribunal found the following facts to be established:-

- The Applicant was the owner of the Property;

- The Applicant and the Respondent had entered into a Lease of the Property at £650 per calendar month with effect from 4 June 2018;

- The Respondent had paid rent, albeit not necessarily on the specified dates in the Lease, from commencement until 5 November 2018;

- From 4 December 2018 until 4 August 2019 the Respondent had not paid any rental;

- There were arrears of rental outstanding of £5,850;

- Notwithstanding the terminology used in relation to "withholding", the Respondent had sought to apply a rent abatement due to defects within the Property;

- The Tribunal determined that there had been some defects within the Property. These were:-

    - General decoration, particularly in the hallway and stairs;

    - The floorboards within the kitchen;

    - The electrics in the garage;

- The Respondent had been entitled to an abatement of rent in respect of these defects but only to the sum of £650;

- The sum of £5200 remained due to the Applicant by the Respondent

4. Reasons for the Decision

4.1 The Tribunal based its decision primarily on the evidence obtained at the Hearing. As highlighted above, there was no dispute between the parties that, in terms of the tenancy agreement between them, rental had not been paid by the Respondent between 4 December 2018 and 4 August 2019. The Respondent confirmed at the hearing that she had not paid this. The Respondent was, however, of the view that she had been entitled to an abatement of rent due to the poor condition of the Property.

4.2 In the correspondence between the parties there were numerous references to the Respondent "withholding" rent. The Tribunal was conscious that there is a difference between a tenant withholding or retaining rent and a tenant carrying out a justified abatement of rent. A withholding of rent can be done where a tenant advises a landlord that

they are unhappy with the condition of the Property and is holding that rent back from the landlord until the matter complained of is resolved. When the matter in dispute is resolved the rent is then released by the tenant to the landlord. A withholding of rent acts to encourage a landlord to comply with their obligations. When they do so, the reward is the release of the withheld funds to them. The withheld funds should normally be held in a separate account or identified in some way.

4.4 An abatement of rent, on the other hand, is effectively a Tenant holding back the rent for themselves and there is to be no subsequent payment to the Landlord. As with a withholding of rent, a retention of rent would normally serve to encourage a landlord to comply but is more penal in nature because the funds are never released back to the landlord. The Tribunal noted the commentary on the case of Taghi –v- Reville 2003 Hous.L.R. 110 where it is highlighted that "the appropriate remedy, in less serious disrepair cases is to seek a modest abatement of rent, in other words argue that because the Landlord is in breach of contract, a reasonable proportion of rent should be deducted."

4.5 The Tribunal noted that in the written submissions and in correspondence with the Applicant, the Respondent had referred to the withholding of rent. If this was correct then the withheld rent ought to have been paid to the Applicant as the various repairs complained of were carried out (the repairs were, over the period of the tenancy, completed at one point or another). However, notwithstanding that the phrase "withholding of rent" had been used by the parties it was clear that what was envisaged by the Respondent, and indeed appeared to be accepted by the Applicant, was that the Respondent had sought an abatement of rent. The parties had exchanged emails in relation to the lack of a gas safety certificate at one point. The emails between them talked about a withholding of rent for 76 days (being the period until a gas safety certificate was produced). However, it was clear from the context of the correspondence that this was simply to be a permanent deduction against the rent rather than withholding.

4.6. The Tribunal was cognisant of the overriding objective of fairness contained within the Tribunal's procedural rules. Notwithstanding that the phrase "withholding of rent" had been used the Tribunal was satisfied that the Respondent had meant an abatement of rent and that the Applicant had also taken it in that context. Accordingly the Tribunal was satisfied that it was appropriate to treat the Respondent's submission as one seeking confirmation that they had made a valid abatement of rent notwithstanding that the incorrect terminology had been used.

The Tribunal noted that there was nothing in the lease between the parties which contractually prohibited the exercise of a right of abatement. It was common under the old Short Assured Tenancy regime to see prohibitions against any form of set-off or retention. However, the model Private Residential Tenancy produced under the new legislation did not have any such prohibition. Accordingly it appeared to the Tribunal that the remedy of abatement of rent was available to the Respondent

4.7 The Tribunal was, however, conscious that there were no provisions for counter-claim within the Tribunal rules. The Tribunal considered whether a justifiable exercise of a claim for abatement would amount to a counter claim and should be the subject of a separate action by the Respondent. The Respondent was not seeking separate damages as a counterclaim for any loss she had suffered after the fact. Rather she was looking to abatement as an explanation or defence as to why rent had not been paid. She was simply stating that the sum sought did not take account of the fact that there had been breaches of the obligation by the Applicant to maintain the Property to the repairing standard as required by the Housing (Scotland) Act 2006. She had therefore already carried out the abatement. The Tribunal was prepared to accept this argument, albeit with a degree of reluctance. The Tribunal was conscious that more and more cases before it had elements where tenants cited a lack of repair as a justification for non-payment of rent. From a practical standpoint it made sense for the Tribunal to deal with both the claim for rent and possible abatements as one matter. Both related to obligations on the parties stemming from the same lease. However, the Tribunal was of the view that it would be helpful to have guidance from the Upper Tribunal in due course as to whether this is appropriate or whether it is a separate matter that should be the subject of a separate claim by a tenant.

4.8 The Tribunal was conscious that it would not have the benefit of seeing the Property, as it would in a repairing standard case under the Housing (Scotland) Act 2006, for example. The Respondent was no longer in situ and she could produce limited evidence as to the condition of the Property other than her own testimony and that of her partner. The Tribunal was being asked to form a view of the condition of a property after the fact. As a result the Tribunal was of the view that it should take a cautious approach and only apply a deduction where it was clear, on the balance of probabilities, from the evidence before it that the condition of the Property justified it.

Much of the evidence and the Tribunal's deliberations related to evidence from both sides on the condition of the Property during the lease term. The items complained of were too innumerable to explore all in detail and so the following items that are narrated are the ones that, in the view of the Tribunal, were either significant to one or other of the Parties or merited an explanation from the Tribunal. Any others were deemed to be minor in nature and did not merit the imposition of an abatement.

4.9.1 Cleanliness of the Property

The Respondent complained very strongly about the cleanliness of the Property. Whilst she acknowledged that she had viewed the Property prior to taking entry and had signed a Schedule of Condition that indicated the general cleanliness of the Property was good, she disputed that this was, in fact, the case. She advised that on a closer inspection after she had obtained the keys that there was a high level of uncleanliness. She complained that, in particular, when moving the sofas the floor underneath was covered in dust and there was mail from previous tenants. She complained about the condition of the oven as well. The Tribunal was of the view that there was no particular merit in the Respondent's submission in this case. The Respondent had signed the Schedule of Condition upon entry. This had stated that the cleanliness of the Property was good. Mr Duguid of the Applicant's solicitors, who was a property manager, confirmed that he had carried out the ingoing inspection and he was satisfied that the Property was in reasonable condition.

The Tribunal accepted that when viewing a property for the first time a tenant's focus may be primarily on the overall size, location, area, available rooms, outlook etc. A tenant may not notice cleanliness in any great detail. However, it was apparent from the photos in the Schedule of Condition that the Property was generally tidy. Whilst it may have benefitted from a better clean this was, to an extent, a matter of individual preferences for individual tenants. A lack of general cleanliness was not something that fell within the repairing standard under the 2006 Act either. There was no suggestion that the Property was at a level below being fit for human habitation. The fact that the Respondent had accepted the comment that the general cleanliness was good in the Schedule of Condition also persuaded the Tribunal that there was no significant issue here.

4.9.2 Gas Safety Certificate

The Respondent had a particular complaint that a gas safety certificate had not been provided to them. It took a period of 76 days for this to be provided to them after they had asked for it.

Ms Elaine Donald, a letting manager for the Applicant, confirmed that whilst they had been advised that a gas safety certificate was in place they had not had sight of it from the Applicant before commencement of the tenancy. She accepted that they relied upon the Applicant's assurance that he did have one, despite not having seen it themselves. The Tribunal was of the view that the letting agents should not have let the Property without having satisfied themselves that a valid gas safety certificate was in place. They should not have taken their client's word for this. However, in due course a Gas Safety Certificate was produced that pre-dated the commencement of the tenancy and was still valid. Whilst the Respondent was justifiably concerned to not have had sight of this upon taking entry, the fact of the matter was that there had been a valid gas safety certificate in place at all times during the period of the tenancy. The Property had been compliant and there had been no risk to her or her family. No loss had been suffered by her.

The correspondence between the parties highlighted that the Respondent had indicated to the Applicant's letting agents that she was intending to deduct rent as a result of the lack of exhibition of the Gas Safety Certificate for an equivalent period to 76 days. The Applicant's solicitors had rejected this although they had ceased to chase her for a period of 76 days for further rent. The fact that they had ceased to chase her for that period did not, however, mean that Applicant and his agents had accepted that there was to be no payment. It appeared to the Tribunal that they were simply waiting to see whether payment would start again at the end of the 76 days, in which case they may have taken a commercial view of the matter. However payment did not restart and, in any event, they had stated they were not accepting the abatement of 76 days. On the evidence before it the Tribunal did not accept that it had been agreed that an abatement would apply.

4.9.3 Decoration of the Property

The Respondent was of the view that the Property was in very poor condition decoratively. In particular she complained about the hallway where there was loose and ripped wallpaper at various points. The Tribunal did note that the Property inventory highlighted that there was

wallpaper on the stairs that was damaged. The Tribunal also noted the evidence of the Applicant's own letting agent, Tracy Fraser, who admitted that upon viewing the Property for the first time herself she felt that the décor was not to a good enough standard and that it should have been redecorated prior to the let of the Property. On balance, the Tribunal was of the view that the Respondent's complaint here had been justified and therefore some element of retention was justifiable. However, the matter was not one of safety or significant inconvenience and so any abatement that was justified was minimal.

4.9.4 Sofas

The Respondent claimed that there were sofas in the Property that were in very poor condition and they felt they could not use them. The Tribunal was of the view that there was insufficient evidence to allow it to make a determination on this point. The Applicant's letting agents were unable to give a view on the matter. In any event the Respondent had purchased her own sofas shortly after moving in that they had the benefit and ownership of. Accordingly the Tribunal was of the view that it was not appropriate to accept any element of abatement on this particular point.

4.9.5 Grass, Decking & Windows

Prior to taking entry it had been agreed that in the garden the grass would require to be cut and that some windows that had been replaced would be removed from the Property. The decking at the Property had been noted as being in poor condition and the Respondent had indicated to the Applicant that she wished it to be removed. This had been agreed but had not been done by the Applicant. The Tribunal noted that the Respondent's partner had done these works in the end. Whilst it appeared that the Applicant had not carried out the works that they said they would, nonetheless the Tribunal did not view that any abatement was allowable here. The Respondent's partner had invoiced the Applicant £190 for removing the various items and cutting the grass. He had been paid for doing these works by the Applicant. On that basis it appeared that the Respondent and her partner had already been adequately remunerated in respect of this particular matter.

4.9.6 Floorboards in Kitchen

The Respondent had highlighted during an inspection of the Property before taking entry that there was a lot of flex in an area of floorboards in the kitchen. This was acknowledged and highlighted in the ingoing inventory. The Respondent stated that she had complained about this several times to the Applicant's letting agents. She was of the view that it was likely to give way and that she was concerned about it. The letting agent's employees did confirm that this had been highlighted to them and also that they had raised it with the Applicant. The Applicant's response to his letting agents had been that this was common in such properties and seemed to suggest that it was in some way positive that there was significant flex in a wooden floorboard. Some time later the floorboard did indeed give way and a large hole through the linoleum was created where the Respondent's partner's foot had gone through on 20th August 2018. The Applicant's letting agents had responded swiftly that day and arranged for a temporary fix of some plywood to be placed over the gap. A proper repair was effected around 10 days later. The Respondent complained about the fact that a temporary repair was done with plywood which itself had some flex in it.

The Tribunal had some sympathy with the Respondent's position here in relation to the fact that the position with the floorboard had not been investigated or remedied properly sooner. There appeared to be a somewhat laissez-faire attitude on the part of the Applicant and his letting agents. From the evidence before it the Tribunal was satisfied that, on the balance of probabilities, the floorboard was showing a sufficiently high degree of flex at entry that it merited further investigation. It was fortunate that no injury had occurred. The Tribunal was of the view that some element of abatement was allowable here. The Tribunal was, however, satisfied with the works subsequently carried out by the letting agents. Upon being informed of the collapse of the floorboard a temporary repair was effected almost immediately. Whilst this was only with plywood, which may not have sufficed in the longer term, it was sufficient in the short term and prevented any further mishap. The period of around 10 days until the full repair was effected was not unreasonable in the circumstances.

4.9.7 Relationship with the Letting Agents

It was apparent that the Respondent and the Applicant's letting agents had a very poor relationship. At one point it had been agreed that the

management of the Property was being transferred from Elaine Donald in Fraserburgh to Tracy Fraser in Peterhead. One of the Partners at the Applicant's solicitor had agreed to this. Notwithstanding this agreement it would appear that to a greater or lesser extent the Fraserburgh office still had some dealings with the Property. The Tribunal noted the position but was not of the view that this was a matter relevant to it in assessing whether a justifiable abatement of rent had occurred. At best it was a matter in relation to the letting agent code of conduct rather than being a question where rent may be abated.

4.9.8 Ongoing Repairs

The Tribunal noted that other matters had arisen in relation to the tenancy, beyond those identified at or around the commencement of the tenancy. The Tribunal noted that there was an issue in relation to the freezer and also a shower which needed to be replaced. The Respondent acknowledged that these had been dealt with timeously. The Tribunal highlight this particular issue not because of any direct relevance to the question of abatement of rent but rather that it did provide an indication that the Applicant and his letting agents were, in general, actively managing the property and carrying out repairs timeously. It was indicative of good practice overall and supported the view of the Tribunal that the Property was generally being looked after and in reasonable order.

4.9.9 Grassed/Stoned Area

There had been an area outside the Property which had initially been grassed. The grass had been removed and small stone chips laid down instead. The Respondent and her partner complained that this area was heavily waterlogged. There was no substantive evidence that the Tribunal had before it in this regard. The Respondent's partner indicated during the hearing that the area was often under water by several inches above the level of the stones. The Tribunal did not view this as a credible claim. Notwithstanding Fraserburgh's often inclement weather, a water level of that amount would have meant rains of biblical proportions. There was insufficient credible evidence to support an abatement

4.9.10 Electrical Installation at the Property

The Tribunal noted that work had been carried out in September 2018 in relation to an extractor fan. The Respondent's partner was of the view that the workmen who had carried this out had little or no

knowledge and had inspected their work himself. He was of the view that it was of a very poor standard and that the electrics in the garage were also in a dangerous condition. After complaining vociferously about this to the Applicant's letting agent a further electrician was sent to investigate. Notwithstanding that the Applicant had a current Electrical Installation Condition Report (EICR) that indicated the electrics in the Property were in order, it transpired that there were errors in this certificate and further works were required by another tradesman – Nigel Bacon – to ensure the Property was compliant. Around £1,400 of work was required. It did appear to the Tribunal that some workmanship had been carried out and that there had been a small element of risk to the Respondent and her family for a period. The Tribunal was of the view that a small element of abatement of rent was allowable here. A poor level of workmanship had been carried out. The abatement needed to be limited as the issues had largely been outwith the knowledge of the Applicant as they did have what appeared to be a valid EICR in place at the commencement of the Lease.

4.9.11 Other Miscellaneous Matters

There were complaints from the Respondent over various other matters such as the external fascia boards at the Property, a garage door and a kitchen cupboard. The Tribunal did not view these as of any significance or having any material impact on the manner in which the Tenant could live in the Property. Accordingly the Tribunal was of the view that there was no reason for there to be an abatement of rent in this regard. Taking the fascia boards as an example, whilst it appeared they may have been a little scruffy they did not particularly cause any inconvenience to the Respondent. Their purpose was to assist in maintaining the exterior of the Property and to keep it wind and watertight. There was no evidence before the Tribunal that this was not the case.

5 Summary

The Tribunal was of the view that the majority of the complaints were not of material significance. There was no evidence that the Property was not wind or watertight or that it was damp. The supply of utilities and the heating and water systems within the Property all appeared to have been in working order throughout the tenancy. There were no rooms or areas of the Property that were alleged to be uninhabitable. Statutory compliance had occurred, although the lack of exhibition of a Gas Safety Certificate had been unfortunate. The Respondent had signed a Schedule of Condition that stated the Property was in good repair.

The Tribunal could not ignore the fact that the Respondent had signed and accepted this and gave weight to it as evidence that the Property was generally to an acceptable standard.

It appeared to the Tribunal that by late September/early October 2018 the Applicant had put the Property into an almost perfect condition. The Applicant had spent several thousand pounds addressing the vast majority of matters complained of by the Respondent – including several which were outwith the ambit of the repairing standard. The Tribunal also noted from the numerous invoices paid by the Applicant that the point the Property was brought up to a very high standard was also the point that the Respondent ceased to pay rent completely. Accordingly, whilst the Tribunal did feel that there were some elements where a minor abatement of rent could be allowed, these were very limited. The Respondent lost much of her justification to abate rent when the Property had been raised to a higher standard

The Tribunal noted the Applicant's solicitors' submission that they did not take the view that abatement was merited. That said, the Applicant's solicitor indicated at the hearing that he would have no particular objection if the Tribunal wished to impose an abatement equivalent to the 76 days that had previously been discussed. The Tribunal considered this but was of the view that this would be overly generous to the Respondent when compared to the actual inconvenience suffered by the Respondent.

There were only three elements where the Tribunal was of the view that retention would be acceptable, being the floorboards in the kitchen, the decoration in the hallway and the issue around the EICR.

When asked what retention they felt was reasonable the Respondent and her partner indicated that a 100% abatement of rent outstanding should be accepted as reasonable. They went further and were of the view that the Applicant should be paying them the rent they had previously paid back as well.

The Tribunal was of the view that this was a wholly unrealistic expectation on the part of the Respondent. In assessing what was a reasonable abatement the Tribunal was of the view that one had to take into account the overall inconvenience and hardship which the Respondent had had to suffer. Generally the Property appeared to be in good condition. The Respondent had signed the ingoing inventory which set this out. This went a long way to satisfying the Tribunal that the Property was in an acceptable condition. As stated above there was no suggestion that the Respondent had been unable to use any of the rooms or that the Property was not wind and watertight. It had provided proper shelter with all the usual facilities that one might expect. There had been no financial loss and only relatively minor inconvenience. Accordingly any abatement as a result of

the condition of the Property would be minor. The Tribunal found that £650, being the equivalent of one months rental, was sufficient in this regard.

6 Time to Pay

Due to the length of the hearing and the requirement to consider the various points made, the Tribunal did not hear from the parties on the day on the question of a time to pay arrangement. The Tribunal therefore intimated the extent of the payment order to be granted and sought submissions from the parties on the question of payment arrangements. The Applicant submitted that the Respondent appeared to have some means and had recently been on holiday to the Canaries and could therefore afford instalments at £1300 per month. The Respondent disputed that she had means or that the Applicant's solicitor would know where she had or had not been on holiday. She advised that she viewed £1300 as excessive.

Whilst intimating that £1300 was excessive, the Respondent, somewhat unhelpfully, did not give any indication as to what she thought she could afford or would be reasonable in the circumstances.

The Tribunal considered the point. £1300 was a large sum of money for the average person to meet. However, the Respondent had had the benefit of the Property without paying any rent for a considerable period and so should be able to use those sums to pay over a relatively short period. The Tribunal therefore determined that payment should be made at the rate of £866.67 per month in order that full payment occurred within 6 months

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.

E Miller

Legal Member/Chair

10/2/2020

Date