



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 16 of the Housing (Scotland)
Act 2014**

Chamber Ref: FTS/HPC/CV/22/0109

**Re: Property at Dalmahoy Cottage, Dalmahoy, Kirknewton EH27 8EB (“the
Property”)**

Parties:

**Dalmahoy Farms, Dalmahoy Estate Office, Dalmahoy, Kirknewton EH27 8EB
 (“the Applicants”)**

**Mr John Steven, Dalmahoy Cottage, Dalmahoy, Kirknewton EH27 8EB and Mr
John Steven Snr, 23 Firrhill Drive, Edinburgh EH13 9ES (“the Respondents”)**

Tribunal Members:

George Clark (Legal Member) and Ann Moore (Ordinary Member)

Decision (in absence of the Respondents)

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that the application should be granted and made an Order
for Payment by the Respondents to the Applicants of the sum of £21,000.**

Background

1. By application, dated 13 January 2022, the Applicants sought an Order for Payment in respect of unpaid rent that had become lawfully due by the First-named Respondent to the Applicants. The sum sought was £7,700.
2. The application was accompanied by copies of a Private Residential Tenancy Agreement between the Applicants and the First-named Respondent, commencing on 4 March 2021 at a monthly rent of £750 and a Rent Statement showing arrears as at 4 December 2021 of £6,750. The only payment of rent that had been made was on 13 April 2021. By Clause 37 of the Tenancy Agreement, the Second-named Respondent guaranteed all payments of rent. The Tenancy Agreement bore to be signed by both Respondents on 4 March 2021.

Case Management Discussions

3. Case Management Discussions was held by means of telephone conference calls on 9 May and 20 October 2022 and 26 January 2023. After the first Case Management Discussion, the First-named Respondent submitted a series of photographs of the Property and the Applicants sought to increase the amount sought to £14,250 and provided a submission on further procedure and responses to the Respondents' claims relating to the condition of the Property. At the second Case Management Discussion, the Respondents did not object to the request to increase the amount sought and the Tribunal allowed the application to be amended accordingly. The Applicants, represented by their solicitors, refuted the Respondents' claim that the Property was not in a tenable condition. The Respondents explained that they both suffered a medical condition which made it very difficult for them to provide written information. The rent was being withheld as a result of the Applicants failing to resolve the First-named Respondent's complaints about the condition of the Property.
4. Both Parties were agreed that a Hearing would be required to resolve the factual dispute between them. The Tribunal set a Hearing and issued a Direction to the First-named Respondent to provide video evidence showing the alleged defects upon which he relied. The First-named Respondent did not comply with the Direction.
5. At the request of the Applicants, the Hearing was converted to a further Case Management Discussion in circumstances where the First-named Respondent had not complied with the Direction and the Tribunal would be unaware in advance of the evidence that the Respondents intended to lead.
6. At this third Case Management Discussion, the Applicants sought to amend the sum sought to £16,500. The Respondents did not object and the Tribunal allowed the application to be amended accordingly. The Applicants' solicitor invited the Tribunal to grant the Order sought on the basis that the Respondents had failed to produce any evidence to support their claims. As, however, the First-named Respondent had stated that he had been the victim of a serious assault and that, as a result, he had not been able to comply with the Tribunal's Direction, the Tribunal's view was that it would not be just to grant the Order without allowing the Respondents the opportunity to make their arguments with regards to the withholding of rent. The First-named Respondent told the Tribunal that if the application was again continued to a Hearing, he would be able to provide the material previously requested. He would also seek evidence from the Fire & Rescue Service regarding his assertion that the Property does not comply with fire regulations due to windows that do not open and inadequate internal doors. He also stated that he had not received a Gas Safety Certificate or an Electrical Installation Condition Report, but that repair work to the septic tank had been completed and smoke detectors installed, although he did not think they complied with current regulations. He stated that the gas fire in the Property was defective and asserted that the Applicants had only recently registered themselves on the Landlord Register. As such registration was required prior to leasing the Property to him, he considered that he had a claim

regarding liability to pay rent. He also referred to the fact that he has a number of legal claims against the Applicants and was in the process of instructing a solicitor to represent him. The Tribunal noted that this appeared sensible in circumstances where the Respondents' legal position was complex.

7. The Applicants' solicitor confirmed that he had just been provided with a Gas Safety Certificate and that the Electrical Installation Condition Report was in the course of being undertaken. He had not previously been made aware of the issue with the gas fire.
8. Both Parties submitted further productions and representations in advance of the Hearing.

The Hearing

9. A Hearing was held on 2 May 2023 at George House, 126 George Street, Edinburgh. The Applicants were represented by Ms Eagers and by Mr Forrester Smith, solicitor. The Applicants were both present.
10. The Applicants' solicitor told the Tribunal that remedial work was scheduled to be carried out on 5 May 2023. Amongst other things, it involved electrical work required for electrical safety reasons and the installation of vents for gas safety reasons. The Parties were agreed that the Hearing should be continued to allow these works to be completed.
11. On 31 July 2023, the Applicants' representatives provided the Tribunal with a number of documents. They supplied an updated Rent Statement showing arrears as at 4 July 2023 of £21,000, an Invoice from Done N Dusted Property Maintenance of 13 May 2023 for the annual service to the back boiler, and a further Invoice of 25 May 2023 from the same company for changing single electrical sockets to doubles in Bedrooms 1 and 2 and the hallway and additional work to upgrade sockets and wiring in the living room, kitchen and utility room, with new lights being fitted in the utility room and outside the Property. They also produced a Gas Service Record from Stark Heating & Gas Ltd, West Calder, dated 6 June 2023, which confirmed that the Baxi appliance is operating correctly, but does not conform to current safety standards. The back boiler test and flue and spillage tests were all in order. There was a recommendation for a "new boiler for future due to age and efficiency." An Electrical Installation Condition Report ("EICR") from A.B. Electrical, dated 6 March 2023 was also produced. It gave an overall "Unsatisfactory" rating and contained two C2 items of disrepair. There was a handwritten note on the EICR stating "All observations have now been rectified as per email 28/7/23" and the Applicants' representatives supplied a copy of that email from A.B. Electrical, confirming that all observations in the EICR had been attended to.
12. The continued Hearing was held at George House, 126 George Street, Edinburgh on 3 August 2023. The Applicants were represented by Mr Ruari Peoples of Turcan Connell, solicitors, Edinburgh. The Respondents were both present.

13. The Applicant's solicitor told the Tribunal that he was seeking to increase the amount sought to £21,000. The Respondents confirmed that this was the amount of rent that was unpaid, and the Tribunal allowed the application to be amended accordingly.
14. Mr Peoples then stated that there had been two outstanding matters at the date of the Hearing on 2 May 2023, namely the production of a Gas Safety Certificate and an Electrical Installation Condition Report. He referred the Tribunal to the Gas Service Record dated 6 June 2023. The First-named Respondent challenged the assertion of Mr Peoples that the fact that it did not comply with current safety standards did not mean that it was not safe, but that it reflected the fact that it is an old model and not of a standard that would be fitted now. Mr Steven also pointed out that the vents had only recently been fitted, and that the sub-floor ventilation was compromised by debris underneath the floors of the Property. The Tribunal noted that the Record stated in terms that the gas appliance is safe.
15. Mr Peoples also referred to the EIRC and the Invoice from Done N Dusted dated 25 May 2023. The First-named Respondent confirmed that he was content with the smoke alarms that had been fitted, but referred to the fact that there was a sizeable hole in the wall plaster around the socket in the hall.
16. Mr Peoples called as a witness Mr Craig Stewart, the Director of Done N Dusted Property Maintenance. Mr Stewart told the Tribunal that the engineer who had carried out the gas safety check had indicated where airflow vents should be installed and had returned after the work was completed. He had not expressed any concern about the safety of the gas appliance, but had said that he would recommend a new boiler for future efficiency. Mr Stewart confirmed that the Invoice of 25 May 2023 from his company was for work done by A.B.Electrical. Each room has a small number of power sockets, so they had put in double sockets, to prevent possible overloads through use of extension cables. He accepted from photographs provided by the First-named Respondent that there now appeared to be a big hole around the socket in the hall. He said it was not there when he visited the Property after the electrical contractors had completed their work and it had not been reported to him. He told the Tribunal that it is an old cottage, and it was understandable that doors might not shut properly. For cosmetic reasons, however, the doors were to be replaced. He refuted the suggestion that repairs were not being attended to and pointed out that his company are on the estate all the time, so would have no reason not to attend to repairs reported by tenants.
17. Mr Peoples expressed the view that it was necessary for the First-named Respondent to specify the basis on which he was withholding rent. He understood that it was the question of the vents, the safety the boiler and the electrics. The First-named Respondent told the Tribunal that his reasons for withholding rent were as set out in the paperwork. The First-named Respondent referred to a leaking drainpipe at the front door, an issue with the septic tank, issues with external doors and windows, internal doors, the hole in the wall in the hallway, panels in the bathroom which need to be resealed, the bathroom radiator, which is hanging off the wall, rotten timbers under the bath and his

dissatisfaction with the gas and electrical safety tests. He also stated that he could not use the kitchen, as pots and pans would fall off the cooker, which was not big enough. He accepted that it was a new cooker, that he had no qualifications in gas safety. He said that he had no evidence to offer from the Fire & Rescue Service in relation to fire safety of doors and windows. With regard to the hole in the wall in the hallway, he asserted that it is presently in the same condition as it was when A.B. Electrical completed their work.

18. In relation to the bathroom, The First-named Respondent told the Tribunal that the leak to the external waste pipe had not been fixed and that Mr Stewart would be mistaken if he claimed that he was waiting to hear from the First-named Respondent with an appropriate time for gaining access to the Property to carry out work. When asked by the Applicants' solicitor if the £21,000 unpaid rent was set aside, he stated in terms that he was not going to back-pay the rent.

19. Mr Peoples then recalled Mr Stewart to give further evidence. Mr Stewart repeated his earlier statement that the hole beside the socket in the hallway had not been large, the leaking drainpipe from the bathroom had been repaired about 6 months ago and that several of the issues raised are cosmetic and can be dealt with when Mr Steven tells him he is ready for workmen to go in. He said that the Estate do not chase tenants on such cosmetic matters. His ability to use the shower and bathroom were not affected by the issues he had raised. The new hob is a standard size. Mr Stewart stated again that the boiler had not been condemned by the Gas Safe engineer. It was simply not as efficient as a modern boiler would be. The only concern had been the vents, and this had been remedied. He had instructed a joiner to replace the doors and was hopeful that this would be done in the course of the next week, but he stressed that this too was cosmetic work. The windows were also to be replaced in the bathroom and bedroom, but Done N Dusted had said they could not get access to the bedroom window as there was too much stuff in the room. The First-named Respondent said that it had been measured and that he had been waiting for the Applicants to come back to him about the doors. The Applicants could have access to the Property at any time. He accepted that the work on the central heating vents had been done, but said that they need to be rectified.

20. Mr Peoples then called as a witness Ms Mary Eagers, the Applicants' Estate Administrator. She was referred to an Invoice from Alclean Drainage dated 7 February 2023 and confirmed it was for drainage works and had been signed off. The First-named Applicant had not reported any further issues with the septic tank. She stated that she had seen Mr Barnes, who had prepared the EICR, write and sign the highlighted portion on the EICR confirming that all observations had been rectified as at 28 July 2023. Mr Steven had not provided her with any evidence from the Fire & Rescue Service that the doors and windows are not fire safe and he had not reported a leaking pipe to her.

21. In relation to the Lease and in particular Clause 37, which relates to the Guarantor Ms Eagers said that she had witnessed Mr Steven senior signing and dating it at Dalmahoy Estate Office on 4 March 2021. He had been a Guarantor for a previous lease to his son and his attendance would not

otherwise have been necessary. She recalled that they had also reminisced about the Estate at that meeting.

22. Mr Steven senior, the Second-named Respondent, categorically denied signing the Lease and contended that his signature on it had been forged. He had only signed two sheets of paper as a witness to the handing over of keys. In response to a question from Mr Peoples, he said that his signature must have been photocopied from something else that he had signed on a previous occasion. Mr Steven junior, the First-named Respondent also put it to the witness that his signature on the Lease had been forged. Both allegations were denied by Ms Eagers.
23. The First-named Respondent asked Ms Eagers whether she recalled telling him when he viewed the Property that the doors would be replaced within one month. Ms Eagers replied that she would never have said that. He also asked why it had taken so long to obtain a Gas Safety Certificate and EICR. Ms Eagers said it was due to the time pressures on the contractors. She also rejected the suggestion that the Applicants were not registered landlords when the Lease commenced.
24. No further witnesses were called by the Parties and the Tribunal invited both parties to make their closing remarks.
25. For the Applicants, Mr Peoples said that all remaining works which could have justified withholding rent had been completed and that any outstanding issues were not such as to justify withholding rent. He invited the Tribunal to prefer the evidence of the Applicants' witnesses over that of the Respondents where there were any contradictions. The First-named Respondent had accused the Applicants' witnesses of lying about every proposition that did not favour his position. He had sought to exaggerate alleged issues in relation to the Property. The Second-named Respondent would not concede that the signature on the Lease was his, even when Ms Eagers had said that she had seen him sign it. The allegations that their signatures had been forged had only been made by the Respondents towards the end of the evidential Hearing. It had not been mentioned earlier. The First-named Respondent had alleged that at the previous Hearing, the Tribunal had prejudged the outcome by saying that an Order would be made no matter what. That was clearly a lie. The evidence of the Applicants' intentions was supported by contemporaneous documentation.
26. Mr Peoples said that, prior to today's Hearing, he had understood that the First-named Respondent's position was about retention of rent, but he had said in terms that he has no intention of paying back rent. The issue for the Tribunal, though, was whether any outstanding issues justified ongoing retention of rent. The purpose of the remedy is to compel performance of the other party's obligations under a contract and retention is only valid while the other party is in breach. Once performance is rendered by that party, retention can no longer be justified, and the retained rent must be paid in full. He referred the Tribunal to the Inner House Decision in the case of *Macari v Celtic Football and Athletic Co Ltd* ((1999) Session Cases 628), where the Lord President had stated (at

p.640, paragraph H) “the party not in breach is entitled to withhold performance only for so long as the other party is in breach”. In this case, any issues, such as those raised in the Gas Safety Record and EICR, that might have justified retention of rent had now been remedied. The Applicants’ position was, in any event, that a breach of contract has to be sufficiently material to justify retention and that none of the alleged breaches would justify complete non-performance by the First-named Applicant. There were no breaches outstanding, but even if the Tribunal is of the view that there are, they are not sufficiently material to justify the continuing withholding of £21,000 in rent. Some of the issues, such as the ill-fitting doors, raised by the First-named Respondent are merely cosmetic. He had not led any evidence to support his contention that they are unsafe from a fire perspective. The First-named Respondent also has available to him the remedy of applying to the Tribunal for a Repairing Standard Enforcement Order if he believes the Property does not comply with that standard. In relation to the hole around the socket in the hallway, Mr Stewart had told the Tribunal that he had not seen it when he visited the Property after the electrical upgrading work was completed. Finally, issues raised for the first time at this Hearing did not constitute breaches of contract, as the Applicants had not been notified of them and been given an opportunity to remedy them.

27. Mr Peoples stated that the Applicants are registered on the Landlord Register and provided the registration number, which corresponded to the registration number specified in the Lease.
28. In relation to the case against the Second-named Respondent, Mr Peoples told the Tribunal that the documentary evidence shows his signature immediately beneath Clause 37 setting out the obligations of the Guarantor. Ms Eagers had seen him sign it and Mr Peoples invited the Tribunal to prefer her evidence, given that it is supported by the documentary evidence. The terms of what he signed are clear and he is a Guarantor for all payments of rent due by the First-named Respondent under the Lease.
29. The First-named Respondent said that 90% of the evidence had been provided by the Applicants. It showed that they were not registered as landlords and the Property was not gas safe or electrically safe. They knew they had rented an unsafe home. He was more than happy to commence paying rent when all the items of disrepair have been rectified, but he was not prepared to pay any arrears. He regarded them as compensation for the Applicants having put his family at risk.
30. The Second-named Respondent said that he would like to see the original paperwork that he allegedly signed. He declined to acknowledge that he had agreed anything as a Guarantor.
31. Mr Peoples, responding to the closing remarks of the First-named Respondent, pointed out that abatement is a completely different remedy from retention and that Mr Steven had enjoyed full possession of the Property and at no point had he been deprived of the Property.

32. The Parties then left the Hearing, and the Tribunal Members considered all the evidence, written and oral, that had been presented to them.

Reasons for Decision

33. The Tribunal noted the Landlord Registration Number specified in the Lease and from its own enquiries confirmed from the Landlord Register that the Applicants are registered as landlords under that number. As the number appeared in the Lease, the Tribunal did not uphold the First-named Respondent's contention that they had not been registered when the Lease was granted. Accordingly, the obligation to pay rent arose on 4 March 2021 and the First-named Respondent had no justification for withholding it based on landlord registration.

34. The Tribunal did not uphold the contention of both Respondents that their signatures on the Lease had been forged. The Tribunal found Ms Eagers to be a credible and reliable witness who expressed herself in measured tones throughout. She had stated in evidence that she was there when the Respondents signed the Lease. The Respondents had accepted that they were both at the meeting, and Ms Eagers had stated that there would have been no need for a witness to the handing over of keys. The Tribunal found, on the balance of probabilities, that both Respondents signed the Lease on 4 March 2021. The Tribunal noted that the signature of the Second-named Respondent is at the end of Clause 37 of the Lease, which clearly states the obligations of a Guarantor, and provides his name and address. Accordingly, the Tribunal decided, on the balance of probabilities, that the Second-named Respondent signed as a Guarantor for the obligations of the First-named Respondent.

35. The Tribunal then addressed the question of the entitlement of a party to a contract to withhold performance where the other party is in breach of contract. The Tribunal does not have to consider whether the First-named Respondent would have been entitled to withhold rent in the light of the issues he identified in relation to the Property. The Tribunal has to decide whether any remaining issues of disrepair, if established, would justify ongoing retention of rent, as the First-named Respondent would only be able to retain rent for so long as the Applicants were in breach of contract. In the absence of such an ongoing breach, the First-named Respondent is obliged to make over the full amount of the rent he has retained. This is emphasised by the Lord President in the *Macari* case.

36. The Tribunal accepted the evidence of Mr Stewart that the replacement of doors and windows was a cosmetic item. The First-named Respondent did not provide any evidence in support of his view regarding fire safety. The Tribunal also accepted the evidence of Mr Stewart that the leaking drainpipe had been repaired and that of Ms Eagers that the septic tank issue had been resolved. The Tribunal made no finding as to whether the delay in carrying out the works within the bathroom were attributable to the First-named Respondent not having confirmed a date for access, but it appeared that he had had continuous use of the shower and bathroom, so the Tribunal's view was that the absence of repairs did not justify withholding of rent. The Tribunal also accepted the

evidence of Mr Stewart that the hob was of a standard size and that it would, therefore accommodate standard sized pots and pans. The Tribunal made no finding in relation to the hole in the wall around the socket in the hallway, but noted that the electrical work within the Property had been completed by 25 May 2023 and that the contractor who issued the EIRC had not commented on it in his handwritten note of 28 July 2023, when he confirmed that all his observations had now been rectified. The Tribunal accepted the evidence of Ms Eagers that she had seen the electrical contractor write and sign the endorsement on the EIRC on that date.

37. The Tribunal noted that the First-named Respondent had also queried the Gas Service Record and the EICR. The Gas Service Record is dated 6 June 2023 and it confirms that the appliance is operating correctly, but that it does not conform to current safety standards. It contains some advisory comments and recommends a new boiler in the future, due to its age and efficiency, but also states that it is safe. Accordingly, the Tribunal did not uphold the contention of the First-named Respondent that he is entitled to withhold rent on the basis that the boiler is not safe to use. The Tribunal accepted that there appeared to have been a long delay in arranging the inspection of the boiler and obtaining the Gas Service Record, but that is not relevant to the issue of withholding rent, as the matter has in fact been resolved.

38. The conclusion of the Tribunal was that any repair items that remain outstanding are minor in nature and would not justify the withholding of any rent. Accordingly, there is no longer any right of retention, and the First-named Applicant is legally obliged to make over to the Applicants the full sum retained, namely £21,000. He is not entitled to keep any part of it by way of compensation, as his defence to the application is based entirely on retention and at no point prior to his closing remarks at the Hearing did he indicate that he was looking for an abatement of rent.

39. The Tribunal was satisfied that the sum sought, as amended to £21,000, had become lawfully due to the Applicants by the First-named Respondent as principal and the Second-named Respondent as his Guarantor.

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.

G Clark

Legal Member/Chair

23 August 2023
Date