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/18/0826

Re: Property at 184 Merkland Lane, Aberdeen, AB24 5RX ("the Property")

Parties:

Mr Paul Cocozza, 12 Dundas Street, Bo'ness, EH51 0DG ("the Applicant")

Miss Kudzai Chiriseri formerly residing 184 Merkland Lane, Aberdeen, AB24 5RX ("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:-

A Payment Order in favour of the Applicant would be granted against the Respondent in the sum of £763.80.

Background

This case was conjoined alongside another case (FTS/HPC/CV/18/0825) against the joint tenant of the Respondent - Ms Sarah Zaman. The circumstances in both cases are identical.

The Respondent and Ms Zaman were tenants of the Applicant and held a lease of the Property. During the course of December 2017 and January 2018 the Respondent withheld her rent due to alleged failings on the part of the Applicant to maintain the Property to an appropriate standard. Although withholding the rent in December and January, the Applicant began paying rent again until the termination of the tenancy in August 2018. A portion of rent for August 2018 was also alleged to be outstanding at that point .The Applicant had regained possession of the Property in August 2018.

By way of an application to the Tribunal dated 9 April 2018. The Applicant sought a Payment Order against the Respondent for the outstanding rent due under the lease of the Property.

A case management discussion had been held between the parties on 18 July 2018. The Tribunal Member at that date determined that the matter should proceed to a full hearing on 13 September 2018. The Tribunal Member noted that the principal issue to be determined was whether the Respondent was entitled to withhold rent for the period December 2017 and January 2018 on the basis that the Property was uninhabitable at that time. At the case management discussion the Respondent had indicated that due to deficiencies within the heating system and a difficulty with an extractor fan, the Property was not capable of being adequately heated. This position was disputed by the Applicant.

The Hearing

The Tribunal held at Hearing at Ferryhill Community Centre, Aberdeen on 13 September 2018 before Mr E K Miller (Chairman and Legal Member) and Mr M Scott (Ordinary Member).

The Applicant was present and represented himself. He was accompanied by his wife. The Respondent was present alongside Ms Zaman. They represented themselves.

There were a number of preliminary matters that arose during the course of the Tribunal as follows:-

1. **Breach of tenancy deposit regulations** – the Respondent and Ms Zaman had now lodged an application with the Tribunal against the Applicant in respect of a failure to timeously lodge their tenancy deposit. The Tribunal indicated that it was outwith the scope of the hearing to determine that matter now. However the Tribunal did note that if the Respondents were to be successful in their application to the Tribunal in relation to the breach of the tenancy deposit regulations then there would be a material possibility that each party would end up with a payment order against the other for a similar value. In the circumstances the Tribunal suggested that an adjournment might be appropriate for the parties to see if they could reach agreement between themselves. Both parties were agreeable to this. The Applicant took some advice during the adjournment and did seek to make an offer to the Respondent and Ms Zaman to reach an overall settlement of all the issues in dispute between them. However although there was some movement from both parties, no overall agreement could be reached and accordingly the Tribunal determined that the hearing in relation to the payment order would require to proceed to determination.

2. **Amount in dispute** – the Applicant sought payment orders of £1,177.50. The Applicant also indicated at the hearing that they had incurred additional costs in relation to repairs/cleaning to the Property upon regaining possession. No evidence had been submitted in relation to the these additional costs prior to the Hearing. In any event, this did not appear to be appropriate for an action for payment of arrears. The Tribunal was of the view that this was a matter to

be determined through relevant deposit scheme and the adjudication service in relation to the deposits held by the deposit scheme. The Applicant accepted that this was the case.

The Tenancy Agreement also contained provision that the monthly rental was £387.50 but that this was reduced from £400. The lease specified that if the condition of the Property was not kept to an appropriate standard at termination, the Applicant would be entitled to revert to charging the full amount of £400. The Applicant stated that he was seeking to revert to charging the full amount of £400. £150 of the payment order sought was as a result of the Applicant removing the "discount" that had previously been applied. Again, the Tribunal was of the view that this fell outwith its remit for this hearing. The Tribunal had not had sight of any evidence as to the condition of the Property on termination. Again, it seemed appropriate to the Tribunal that this matter be resolved through the relevant deposit adjudication scheme.

Lastly, there had been some confusion between the parties as to the date that possession had been required. The original lease had been due to terminate on 20 August 2018. There had been some discussion between the parties about possession being returned on 10 August 2018. The Respondent and Ms Zaman seemed to have a genuine belief that they had required to remove by 10 August as that was what the Applicant required. The Applicant had simply meant that he was happy for them to return the keys from that date. It seemed to the Tribunal that this was a genuine misunderstanding between the parties as to each other's intentions. In the circumstances, and as a way of being fair to both parties, the Tribunal suggested that an arbitrary date of 15 August 2018 was used for the calculation of rent. Both parties were agreeable to this. This reduced the sum sought by the sum of £63.70.

Taking all of the above into account, the parties agreed that the sum being sought by the Applicant under the Payment Order was £963.80.

3. **Audio/video recordings** – the Respondent had made a number of video and audio recordings and submitted these to the Tribunal. The audio recordings were with the Applicant's gas and electrical engineers when they had attended at the Property to look at the boiler and thermostat. The video recordings were of the operation of the boiler and thermostat. No individuals appeared in the video recordings.

   Due to a delay in the processing of the information within the administrative function of the Tribunal, these audio and video recordings had only been made available to the Applicant and the Tribunal the day before the hearing. Neither the Applicant nor the Tribunal had managed to download or review them in advance of the Hearing.

   The Applicant submitted that neither of his tradesmen had consented to the recording. The Applicant also objected on the basis that he had not had time to listen to the voice recordings or reviewed the video recordings. He also

questioned the weight that could be attached to these as it may not be possible to identify the parties voices in the audio recordings.

The Tribunal considered it was allowable, in general terms, for the Tribunal to hear video and audio recordings. It was not illegal for one individual to record another individual without their knowledge notwithstanding that some people may find this unpleasant thing to do or a breach of their privacy. Individuals collecting and processing personal data such as this for personal reasons are not caught by GDPR regulations or the like. By way of a similar comparison, if a party uses CCTV to record images on their property, then provided the CCTV only records their property (and not their neighbour's) then this is considered personal use even if it captures images of third parties on their property without the third party's knowledge.

The Respondent was of the view that the recordings substantiated her claims that the central heating was not working and that also the thermostat at the Property had not been working. The Tribunal considered that in terms of the overriding objective of fairness, it would be appropriate for the Tribunal to hear the recordings. The weight that would be placed on these recordings would require to be determined by the Tribunal, taking into account the circumstances in which they were made and that it may be difficult to substantiate who the parties in the audio recordings were.

The Tribunal was, however, conscious that the Applicant had not heard the recordings and may require time to consider the impact on his case.

The Tribunal determined that it would be appropriate to listen to/view the recordings. The Tribunal would then allow the Applicant to indicate whether he was happy to continue with the case or whether he wished to adjourn to a later date to consider the terms of those recordings or to take further advice.

The Respondent then played the recordings to the Tribunal and the Applicant. The Applicant, having heard these, confirmed that he was happy to proceed and did not require an adjournment. It was accepted by both the Applicant and the Tribunal that the audio recordings did indeed appear to be between the Respondent and the Applicant's workmen. There was no dispute that the video recordings were taken within the Property. On that basis the Tribunal was happy to accept the recordings as evidence and to give them an appropriate degree of weight.

The Parties Submissions

The Applicant led his evidence based on his written submissions that had been submitted to the Tribunal on 7 September 2018. The Applicant highlighted text messages between the parties where the Respondent accepted that the radiators were heating up to the point that they were too hot to place a hand on them for any length of time. The Applicant also highlighted a gas safety certificate which had been produced by his engineer on 8 January 2018 which confirmed that the boiler was in proper working order as at that date.

Whilst the Applicant accepted that there may have been an issue with the thermostat at the Property, his view was that this was caused by the Respondent and Miss Zaman constantly turning it on and off and that it had become broken because it had been turned past the furthest point it ought to be. The Applicant felt that he had been put through significant expense and that the Respondent and Ms Zaman had been trying to make issues up in order to avoid paying rent. He highlighted that the Respondent's solicitor had indicated that if he carried out certain works to the Property then the withheld rent would be paid to him. He took the view that he had done the works but he had still not received payment.

The Respondent's submission was that they were not disputing that the gas boiler itself did work and had been working through the terms of the tenancy. Their submission was, however, that the thermostat that regulated the temperature in the Property and that linked to the boiler was not in proper working order. In the Respondent's submission, this meant that the Property did not heat properly.

The Respondent played an audio recording taken with the Applicant's gas engineer from Aberdeen Heating Services. In that conversation the engineer indicated that the thermostat "was faulty but was working now". The Respondent indicated that in order to get the thermostat working at that particular visit the engineer had removed the cover and manually set the trigger point for the thermostat to a set level. The Respondent confirmed that she accepted that the radiators did heat up but that they would get to a certain temperature and then cool down again quite quickly.

The Respondent played a second audio recording with an electrical engineer of the Applicant taken on 15 March 2018. This confirmed that a new thermostat was being installed at the Property.

The Respondent also played two video tapes from February 2018. She submitted that this showed that the link between the thermostat and the boiler was not working in that no matter how high the thermostat was turned up there was no corresponding "click" from the thermostat as it reached the point where the room temperature was lower than the thermostat was being set at. Videos showed the boiler not engaging when the thermostat was turned up from low to high.

An audio recording from 4 April 2018 was also played which related to a discussion regarding the extractor fan at the Property.

The Respondent accepted that they had indicated that they would pay the withheld rent when certain works had been carried out. However the Respondent submitted that she and Ms Zaman had then suffered loss as a result of the Applicant's failure to have the thermostat repaired timeously and they had incurred costs that they wished to counterclaim from the Applicant. The Respondent produced evidence that she had moved to a flat owned by her parents in Edinburgh in December and January and had to pay additional rental of £400 per month and incurred costs in commuting back to Aberdeen.

In response to this the Applicant highlighted that if there had been a problem in the Property the Respondent could simply have bought a couple of electrical radiators and sought reimbursement of the cost of these together with any additional electricity

used. He viewed relocating to Edinburgh for two months as excessive. Upon being questioned by the Tribunal, the Respondent indicated she had moved to Edinburgh as she did not know many other people in Aberdeen with whom she could stay whilst the flat was cold.

The Tribunal was of the view that, in essence, the question before it for determination was whether the Applicant had maintained the Property to an appropriate standard throughout the Lease. There was no material dispute between the parties as to the amount of rental that was outstanding. Rather, however, the Respondent's position was that there had been a justified withholding of rent and that they had suffered loss as a result of the Applicant's failure to maintain the Property. In essence they were counterclaiming for their losses arising from the Applicant's failure

Findings in Fact

- The Applicant and the Respondent had entered into a lease of the Property from 21 August 2017 until 20 August 2018. The parties had agreed to treat the termination date of the lease as 15 September 2018 during the course of the Hearing.

- The monthly rental under the lease was £387.50 per month.

- The Respondent had withheld rent in December 2017 and January 2018 to the sum of £387.50 in each month. There was outstanding rental paid from 1 August 2018 to 15 August 2018 in the sum of £188.80. The outstanding sum due under the lease as at the date of the Hearing was £963.80.

- That the thermostat within the Property had been faulty from the period from date of entry under the lease of the Property until it was replaced on or around 15 March 2018.

- That it had been unreasonable for the Respondent to live in the Property without the heating system working effectively in Aberdeen during the months of December 2017 and January 2018.

- The Respondent had a duty to minimise any loss and to take reasonable steps to mitigate the effect of the thermostat being broken.

- That relocating to Edinburgh for two months was not a reasonable step.

- That an appropriate assessment of the loss to the Respondent, had she taken reasonable steps, would have been £100 per calendar month.

- That taking account of the Respondent's counterclaim, that the appropriate reduction meant there was an outstanding payment due to the Applicant of £763.80 and that a Payment Order to that effect would be made against the Respondent.

Reasons for Decision

This was a difficult case for the Tribunal to determine. After discussion, it was apparent that there was no particular dispute between the parties as to amount of rent that was outstanding. This was agreed between the parties at £963.80 as at the date of the Hearing. The dispute between the parties was whether the Respondent had been entitled to withhold rent due to the condition of the Property and thereafter to offset against the rental arrears the costs she had incurred. A subsidiary question was whether these costs were reasonable in the circumstances.

The Tribunal accepted that, taking into account the overriding objective of fairness, that it was appropriate to treat the Respondent's claims for losses incurred as a counterclaim to be set off against the payment for arrears sought by the Respondent. There was nothing in the lease terms that prohibited such a set off occurring and so it was available as a contractual remedy.

The difficulty for the Tribunal was that it was being asked to determine whether a repair had been required, some 9 months after the breach complained of but without the benefit of having seen the Property. The Tribunal would require to be satisfied that there was sufficient evidence before it to allow it to make a determination.

The Tribunal found both parties to be credible and reasonable individuals. The Tribunal was of the view that it was unfortunate that matters had come before it as it seemed to the Tribunal that this was simply a case where better communication between the parties could have resolved the issues without difficulty.

It appeared to the Tribunal that the Respondent was not trying to be difficult with the Applicant. Once the colder months had passed, rent had begun to be paid again. It was apparent that the Respondent had held a genuine belief that the Property had been too cold to live in during the months of December and January. Similarly the Tribunal was satisfied that the Applicant was not, in any way, a "bad landlord" or deliberately failing to meet his responsibilities. The Applicant also had a genuine belief that the heating system at the Property had been working and that the Property had been inhabitable.

On the balance of probabilities, however, and by a fine margin the Tribunal was, on the basis of the evidence heard, satisfied that the Property had not been in an appropriate standard at the relevant period.

In the view of the Tribunal it was likely, on the balance of probabilities, that the thermostat at the Property had been faulty from the time of entry under the lease until repaired in March 2018. The Tribunal noted the voice recording of 8 January 2018 in which the engineer confirmed that the thermostat "was faulty but was working now". However the manner of the fix described by the Respondent suggested to the Tribunal that the fix effected by the engineer had been temporary and ineffective. The Tribunal found the two video recordings from February 2018 to be particularly telling. They clearly showed that whilst the boiler was in working order there was no connection between the boiler and the thermostat. Adjusting the thermostat did not cause the boiler to engage when a higher temperature was selected on the thermostat.

The Tribunal accepted the evidence of the Respondent that whilst they had confirmed that the radiators did get hot that they also cooled down quickly. This evidence was consistent with the thermostat being faulty.

The Tribunal also accepted that the extractor fan at the Property had not been in proper working order and had been taped up ineffectively. The Tribunal accepted the response of the Respondent and Ms Zaman that they had not deliberately tampered with the thermostat or the extractor fan. The Tribunal viewed the Respondent and Ms Zaman as honest and credible witnesses. There did not appear to be any ulterior motive on their part.

Accordingly, on the balance of probabilities, the Tribunal accepted that the Applicant had not maintained the Property in line with his obligations under the lease. The Tribunal is, however, at pains to point out that they did not view this as a deliberate breach by the Applicant and accepted that the Applicant had a genuine belief that he had fixed the system and that everything was in working order.

The Tribunal was satisfied that, albeit by a very narrow margin, the evidence favoured that of the Respondent. The Applicant had breached, albeit inadvertently, his contractual obligation in terms of Clause 9.1 of the lease of the Property.

The Tribunal then required to consider the loss suffered by the Respondent and the appropriate amount which could be offset against the outstanding rental.

The Tribunal was satisfied that an appropriate method of dealing with the situation here would not have been to relocate to Edinburgh. The Respondent requires to mitigate her loss and to take reasonable steps to ensure that she was able to continue to live in the Property. The Respondent and Ms Zaman could easily have purchased 2 or 3 small electric or fan heaters to tide them over. The increase in electricity use could have been monitored and reclaimed from the Applicant.

In the circumstances the Tribunal was of the view that the rental costs incurred by the Respondent in Edinburgh were not reasonable. The Tribunal was of the view that a reasonable adjustment to the rental for the months of December and January would have been £100 per month taking account . In reaching its decision the Tribunal noted the terms of Davis –v- Edinburgh District Council (1991 1S.H.L.R.26) and also the terms of the case of Taghi –v- Reville 2003House.L.R110. As noted in the commentary on the latter case "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".

In summary, the Tribunal was satisfied that the climate in Aberdeen in the depths of winter was such that the fault in the thermostat meant it was unreasonable to expect the Respondent to accept the position. However, the costs incurred by the Respondent were unreasonable and a more modest abatement of rent should be offset to the sum of £200 in total. According a Payment Order in favour of the Applicant against the Respondent would be granted for the reduced amount of £763.80.

Decision
The Tribunal granted a Payment Order in favour of the Applicant against the Respondent for the sum of £763.80.

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.

Ewan Miller

	20/9/18
Chair	**Date**