Upper Tribunal for Scotland

[2022] UT05
Ref: UTS/AP/21/0038

DECISION OF

SHERIFF O'CARROLL

ON AN APPLICATION TO APPEAL
IN THE CASE OF

Mr Thomas Linden, 74A Culzean Road, Maybole, KA19 8AH
per Miss Janine Hogg, Mrs Anne Linden,
4 Barns Crescent, Ayr, KA7 2AY; 74A Culzean Road, Maybole, KA19 8AH

Appellant

- and -

Mr Alexander MacPherson, 15a Whattle Terrace, Plympton Park, Adelaide, SA5038, Australia

Respondent

FtT reference FTS/HPC/CV/21/0804

27 January 2022

Decision

The respondents shall pay the sum of £324.24 (THREE HUNDRED AND TWENTY FOUR POUNDS AND TWENTY FOUR PENCE STERLING) to the appellants within 14 days of today's date.

Introduction

1. This is an appeal against the decision of the First-tier Tribunal for Scotland ("the FTS") dated 3 September 2021 that the respondent was entitled to payment from the appellants of £383.34 being rent arrears.

2. The appellants sought leave to appeal on various grounds including the FTS assessment of the amount of abatement due in respect of disrepair, the length of time that abatement was due and the date to which rent was due.
3. The FTS, by way of Decision dated 7 October 2021, granted leave to appeal only as regards its determination of the date of the termination of the tenancy.
4. The Upper Tribunal ("the UT") on 17 November 2021 ordered as follows. Appeal would proceed only on the ground identified by the FTS and therefore the UT would determine whether the FTS erred in law as regards its decision concerning the end of the tenancy and if it did, the effect on the FTS determination of the sums due to or by either party. A case management discussion hearing was fixed for 14 January 2022. The parties were advised in that Order that the CMD would consider all matters relating to the appeal at that hearing and that at that hearing a final decision might be made on the appeal. Parties were ordained to lodge all and any relevant documents in advance of the CMD.
5. The CMD took place on that date by Webex. The appellants, Mr and Mrs Linden appeared personally. The respondent, Alexander MacPherson did not appear but was represented by his wife Mrs MacPherson, who was familiar with the circumstances. None of the parties had legal representation. In advance of the hearing, in compliance with the earlier order of the UT, the appellants lodged and intimated to the respondent a document containing copies of a large number of electronic messages that had passed between Anne Linden and the respondent between 13 July 2019 and 17 December 2020. No equivalent document was lodged by the respondent. No issue was taken at any time by either party as regards the accuracy of the contents of the document.

   Submissions
6. On behalf of the respondent, so far as the core issue of when the tenancy was lawfully brought to an end, it was submitted as follows. It was accepted that there had been a history of complaints by the appellants concerning disrepair in the flat, that there had been continuing informal communication between the Mrs Linden and the respondents towards the end of 2019 and during 2020 about this, that around October 2020, the respondent told the appellant that he was selling the flat, that he had found a buyer who wanted entry as soon as possible; that following this, there were discussions between the appellant and the respondent about the appellants moving out as well as continuing complaints of disrepair; that the tenancy was due to expire in May 2021; that

on 20 November 2020 in response to Anne Linden's question to the respondent as to whether, if the appellants found somewhere else to live before May, he would be 'happy for them to move "ASAP"' he gave unqualified agreement to that course of action and that it was in the interests of both parties that the flat be vacated sooner rather than later.

7. However, Mrs MacPherson submitted that that agreement was made before the appellants began withholding rent due to the disrepair problems. She submitted that the respondent's agreement to early termination would not have been given if he had known that rent would be subsequently withheld.
8. Furthermore, she submitted that at the earliest, the tenancy had been terminated by the appellants on 29 March 2021. Mrs MacPherson said that was the date reported to the respondent by his letting agent; that was the date that the respondent was told by the letting agent that the keys to the property had been handed to the letting agent by the appellants. Further, that date was consistent with the final payment made by the appellants for rent which was £271.50. She explained as follows. The full contractual rent was £850 per calendar month. The rental period began on the 15th of each month. The appellants had unilaterally reduced rental payment to £550 per calendar month on account of the alleged continuing disrepair. A back calculation shows that the final payment made represents payment for rent for 15 days at the reduced rate of £550 p.c.m. that was (wrongly) assessed by the appellants to be due up to 29 March 2021, which is consistent with what the respondent was told by his property agent was the final date of the tenancy.
9. In relation to that core issue, it was submitted by the appellants as follows. The document lodged by them, containing many pages of the message exchanges between Anne Linden and the respondent, clearly demonstrated that following frequent complaints of disrepair, the respondent had told the appellants on 17 October 2020 that he was going to sell the flat and soon after indicated that he had a buyer. The appellants decided they were going to move out but, as the correspondence shows, they had difficulties in finding somewhere suitable and there was continuing discussion with the respondent about that. The contractual term of the lease was 2 May 2020. The correspondence shows that there was ongoing discussion about whether appellants could move out before the end of the tenancy. On 28 November 2020, Anne Linden messaged the respondent saying "if we find somewhere before [end of April] are you happy for us to move ASAP. The date on the notice is 2 May". The reply from the respondent was a thumbs up emoji, indicating unqualified agreement. She returned to the same subject on 30 November 2020 with regard to a

flat that they might be able to move to, again seeking assurances that the respondent would be happy for them to move out earlier than 2 May as the appellants could not afford rent for two houses. The reply by the respondent on the same date was positive and unconditional. On 3 December 2020, the respondent asked the appellant if she could provide more news on her new house stating that the "buyer for Meadow Park [the subjects of the tenancy] also wants to move quickly". Anne Linden could not confirm that. On 9 December 2020, Anne Linden sent a lengthy email to the respondent stating that their plans were no longer going through and they will be looking for alternative property and would keep the respondent updated. She reiterated that they intended to move out as soon as they could but that until they moved out there were a large number of disrepair issues which require to be resolved and that until they were, she proposed that the rent be reduced to £550 a calendar month. The response from the respondent that day was not satisfactory so far as she was concerned. In that response, the respondent said "if you find a new home soon that may be the best remedy for problems at the house".

10. The appellants therefore contended that there was an agreement between the parties that they could move out soon as they had alternative accommodation and that they would not be held to the contractual notice. They eventually found accommodation. Anne Linden explained that the flat was emptied of all possessions on Sunday 21 March 2021 and that the keys were returned to Eddie who was the property agent instructed by the respondents and that was done at the flat on Monday 22 March 2021. The physical handover of the keys was done between her mother on that date and Eddie. That meeting had been arranged the previous Thursday by her directly with Eddie by means of text (which she was able to confirm during the course of the hearing). That chronology she said was consistent with the relevant dates so far as the new property was concerned. She received the keys for their new flat on 15 March, a removal van was booked for 17 March which removed most of the property with the exception of some items which require to be moved by Mr Linden personally. He did that on Sunday 21 March. They moved into the new flat in the week commencing 22 March. Therefore, the appellants contends that the termination date of the tenancy was 22 March and not 29 March.
11. As regards the contention by the respondents that the termination date was 29 March 2021 and that a back calculation on the final sum paid by her is consistent with that date, she submitted simply that she knew a further payment of rent was required for the remaining part of March from 15 March 2021 and she told Mr Linden to send a final payment of £271.50 to the respondents.

However she said, she simply made an error in calculating the final sum due. Since she had given notice to the landlords agent in the week before the 22 March that they had new accommodation and since she had arranged with the agent that the keys would be handed over that day, that was the last date of occupation and it had been agreed between the parties that contractual notice would not apply so nothing was due after that day.

Decision and reason on the date of termination of the tenancy

12. It is amply clear in my opinion from the submissions of the parties, which are supported to some extent by the documentation lodged by the appellants that while the ish, the contractual end of the tenancy over the subjects, was on or around 2 May 2021, long before that date, the respondent had decided to sell the subjects and had found a buyer who was apparently willing to take occupation soon as the subjects were vacated and wanted to do so sooner rather than later. It is also amply clear that the appellants were willing to leave early as the disrepair was not being remedied. It is also very clear in my view that the respondent agreed that the appellant would not be held to the contractual period of notice. In this case, according to the decision of the FTS, clause 24 of the tenancy agreement provided for 28 days' notice on the part of the tenant. I conclude from the submissions and material made available to me that there was a clear agreement, varying the contractual terms of the lease, between the parties, as of 28 November 2020, that as soon as the appellants found alternative accommodation, they would be entitled to move as soon as possible and that without the requirement to give contractual notice. That agreement between the parties was unequivocal and unqualified and consistent with the reasons why each party wanted the tenancy to terminate. Further, I conclude on the material available to me that there was no agreement made between the parties as to any alternative period of notice to quit. The parties could have agreed an alternative period of notice shorter than 28 days. They did not. No minimum period of notice required to be given. The intention of the parties was clearly that the contractual relationship between the parties be terminated as soon as was practically possible on the appellants ending possession of the subjects. It therefore follows that both parties had agreed that clause 24 of the tenancy agreement would not have effect.
13. In so finding, I reject the contention by the respondent that this agreement between the parties was capable of being rescinded by him on grounds that the appellant later unilaterally withheld a proportion of the rent in response to continuing disrepair, said to be in breach of the landlords repairing obligations. That is because the agreement having been made without conditions, one

party is not thereafter entitled to vary that agreement unilaterally. Furthermore, it cannot be said that the appellants were in breach of their obligations under the tenancy by withholding rent. The withholding of rent by the appellants is a standard common law remedy open to tenants in the face of alleged breach of repairing obligations. That is merely a protective remedy and is not a substantive remedy in the sense that the tenant acquires a right to payment of the withheld rent. Rather, the withheld rent may not only encourage a landlord who has failed in its repairing duties to comply, but it also provides a form of security as regards other remedies open to a tenant faced with a breach of landlord obligations. Those substantive remedies include damages and/or abatement of rent.

14. Abatement of rent is a standard common-law remedy which may be available to a tenant who is unable to use part of the subjects let as a result of disrepair (whether or not resulting from a breach of the landlord obligations) whereby a court or tribunal may hold that the contractual rent be reduced by a proportion to take account of that effect of the disrepair. The FTS held that as a result of the continuing disrepair the appellants were entitled to an abatement of rent. The fact that the assessment of the appropriate amount of abatement was less than that contended for by the appellants and less than they had withheld in rent is unimportant. What is important is that the FTS Decision demonstrates that the appellants acted in good faith and had cause to withhold rent. They were not were not in breach of the tenancy agreement thereby. Therefore, the decision by the appellants in withholding rent did not entitle the respondent to renege on the agreement that the notice period set out in clause 24 be set aside.
15. What is also important is that the FTS having determined that the measure of the abatement was £100 per month, and not £300, the appellants are obliged to account to the respondents for the balance, being £200 per calendar month.
16. The next issue is to determine when the tenancy actually terminated standing that no notice was required. There are two candidates for that date. The first is that claimed by the appellants being 22 March 2021. The second is that claimed by the respondent being 29 March 2021. I prefer the contention of the appellants to that of the respondent for the following reasons. First, I heard directly from both Mr and Mrs Linden as regards the dates and notice issue. They spoke and in my view credibly and reliably concerning their flit, the arrangements for that, the date when Ms Lyndon contacted the property agent to make arrangements as regards the handover of the keys, the handover of the keys and the commencement of their new tenancy. So some notice was given

the respondent's agent of the move even though none was required. It was the responsibility of the respondent's agent to intimate that to his principal: the respondent. The contention of the respondents that the parties agreed that rent was due by agreement between the parties rests on an inference to be drawn from the amount of the final payment and also what Mrs MacPherson says she was told by the agent. I prefer the appellants' position as regards the calculation of the final payment made being an error and not being referable to some other agreement, having heard directly from them and that account being consistent with the other circumstances. The date contended for by the respondent is inconsistent with the other circumstances and the expressed intention of the parties. There was nothing placed before this tribunal from the agent or Mr MacPherson concerned supporting Mrs MacPherson's submission. I prefer the contention of the appellants.

17. Therefore, I find that the tenancy was brought to a lawful end on 22 March 2021 and no rent is lawfully due by the appellants to the respondents after that date in respect of the subjects of the tenancy.

    What is the effect of the finding concerning the date of termination of the tenancy on the sums due to or by both parties?

18. I advised the parties of my finding at paragraph 17 once I had considered all the parties' submissions. I then invited the parties to make submissions as to the methodology for calculating the final sums due to or by the parties in the light of that finding and adjourned the hearing for a short time for that purpose.
19. On resuming the hearing, the parties were both agreed that the effect of my finding at paragraph 17 above is as follows (it being understood that the respondent's representative maintained her disagreement as to my finding in that respect).
20. The abated rent due was £750 p.c.m. rather than the contractual rent of £850 p.c.m. Although the FTS determined that abated rent was due from "December 2020", rent was payable on the fifteenth of each month, the first date on which the appellants withheld rent was December 15th and therefore the abated rent was due by the appellants from that date (and not 1 December 2020) until the end of the tenancy.
21. The abated rent lawfully due from 15 December 2020 to 22 March 2021 (all dates inclusive) was £2447.25. The total sums actually paid by the appellants to the respondents for that period was

£1921.50. Therefore the appellants owe the respondents £525.76 by way of unpaid rent for that period.

22. However, the respondent holds a deposit of £850 and that there is no other claim that could or would be made on that deposit. Parties were agreed therefore that, on the basis that the tenancy was terminated on 22 March 2021, after deduction of the rent arrears from the deposit, the sum of £324.24 is now due by the respondent to the appellants.
23. I will make an order in those terms, that sum to be paid within 14 days of today's date. There was no motion for expenses and I find no expenses due to or by.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*