Upper Tribunal for Scotland

2022UT25
Ref: UTS/AP/21/0045

DECISION OF

SHERIFF GEORGE JAMIESON

ON AN APPEAL TO THE UPPER TRIBUNAL FOR SCOTLAND

AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER

IN THE CASE OF

Ms Katherine Chen Zhao, 10 Murdochs Wynd, Elgin, IV30 1TW

Appellant

- and -

Mr Edward Dunbar, The Old Manse, Duffins, Elgin, IV30 5QD

Respondent

FtT case reference FTS/HPC/PR/20/2505

Paisley 8 July 2022

Decision

1. Allows the appeal against the Decision of the First-tier Tribunal Housing and Property Chamber dated 6 September 2021 in respect of an error of law in relation to head of claim 4(b) only.
2. Quashes that Decision; Remakes the Decision; Orders the Respondent to pay the sum of £1,100 to the Appellant.

Introduction

Legal References

[1] The following statutory provisions are referred to in this Decision:

- Tribunals (Scotland) Act 2014 (asp 10).
- The Upper Tribunal for Scotland Rules of Procedure 2016. These rules are out in the schedule to the Upper Tribunal for Scotland (Rules of Procedure) 2016 (SSI 2016 No. 232).
- First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017. These rules are set out in schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017 No. 328)

Background

[2] The Appellant sought an order for payment in the sum of £4,000 against the Respondent, representing losses occasioned by the Respondent's breach of the parties' tenancy agreement. On 14 July 2020 she reported fungal mould within the property to the Respondent. An inspection on 28 July 2020 established this to be dry rot. The Respondent arranged for works to be carried out to the tenanted property and the larger property of which the leased subjects formed part. As of consequence of these works being carried out, the Appellant and her daughter were unable to use a large bedroom and a staircase within the tenanted property between August and October 2020. The Appellant left the property on 30 October 2020. Before securing alternative property, she had to pay £300 for emergency property and taxi costs of £95.

[3] The First-tier Tribunal found in favour of the Appellant on the question of liability.

[4] They found the tenancy conditions in relation to habitability had been breached as the Appellant had been unable to enjoy full use of the property. They assessed the Appellant's losses in the sum of £770. The Appellant was aggrieved by this decision and sought permission to appeal against the decision of the First-tier Tribunal.

[5] The First-tier Tribunal refused permission to appeal.

[6] The Upper Tribunal initially refused permission to appeal, but upon reconsideration granted permission to appeal limited to the question whether the First-tier Tribunal adequately considered the Appellant's head of claim 4 set out at paragraph 7(c) of her Claim Form (Form G).

The Appellant's Losses and the Decision of the First-tier Tribunal

[7] The Appellant's claim for compensation was set out at paragraph 7(c) of her Claim Form. This was set out under five heads of claim:

1. A full refund of rent for August, September and October: £500 per month x 3 = £1,500.
2. Compensation for not terminating the tenancy earlier as a result of not informing her of the property's unfitness on time in July: £500 per month x 3 = £1,500.
3. Emergency accommodation: £300.
4. Loss to be determined by the First-tier Tribunal for: (a) impact to physical and mental health (eczema, coughing, fear, stress); (b) impact on safety and security (flat open several nights, electric wires, holes, plastic sheets, etc.); and (c) impact on the time the Appellant had to spend to deal with her claim.
5. Taxi cost: £95.

[8] The Appellant subsequently reframed her heads of claim 1 and 2.

[9] She described her head of claim 1 as compensation for the property no longer being "liveable". She submitted the tenancy should have been terminated immediately by the Respondent and she sought a three months' rent rebate in compensation for this three months' notice period.

[10] She referred to her head of claim 2 as being for full refund of rent for August, September and October as the building and flat were not liveable in terms of safety and security.

[11] The First Tier-tribunal awarded the Appellant an abatement of rent for the room and the staircase the Appellant was unable to use for three months at £125 x 3 = £375. They did not find it reasonable to award her a full refund of rent nor an additional compensation for a three month notice period. They awarded the Appellant the losses under heads of claim 3 and 5.

[12] These three sums of £375 + £300 + £95 amounted to a total award of £770.

[13] The First-tier Tribunal explained these findings at paragraph 37 of their Decision as follows:

> "The Tribunal carefully considered the issue of the level of compensation to be awarded to the Applicant for her loss and inconvenience, and determined that it was fair and proportionate to make an order for the Respondent's payment to her of the sum of £770. The Tribunal found that this sum will reasonably compensate the Applicant for not being able to enjoy all of the Property's accommodation, as the bedroom and staircase were not habitable during the said months August, September and October 2020. The sum ordered will also reasonably compensate the Applicant for her emergency accommodation and travel costs. The tribunal found it was not reasonable to award the Applicant compensation for a notice period, nor for full rent paid in August, September and October 2020, as she did have use of the majority of areas of the Property during those months."

Permission to Appeal

[14] Permission to appeal was granted by the Upper Tribunal only in relation to a re-examination of all three parts of the Appellant's head of claim 4, as the foregoing reasons of the First-tier Tribunal appear to make no specific reference to any part of that head of claim.

[15] Permission to appeal was refused in relation to heads of claim 1 and 2 as it was open to the First-tier Tribunal only to abate the rent for three months rather than award a full refund of rent in circumstances where they found the property was partly but not fully habitable, and to refuse an additional award based on a notice period.

Head of Claim 4

[16] In her email to the Upper Tribunal dated 16 December 2021, the Appellant referred to the First-tier Tribunal not having considered her losses in relation to "all other practical factors such as construction dust, fungi spores, dead flies, electric wires, leaking of roof, opening of the flat, etc."

[17] She also referred in that email to her inability to produce a formal medical report in relation to her eczema and mental health sufferings which "were taken as nothing".

[18] The Respondent accepted at the hearing before the Upper Tribunal on reconsideration of permission to appeal that the Appellant had brought these matters to the attention of the First-tier Tribunal during the hearing of her claim.

[19] At paragraph 15 of their separate Decision dated 15 November 2021 refusing the Appellant permission to appeal, the First-tier Tribunal noted in relation to head of claim 4(a) that the "Applicant did not provide evidence to support claims for compensation for injury to mental or physical health, arising from stress or mould".

[20] There is no indication, however, in either Decision that the First-tier Tribunal had also considered the Appellant's head of claim 4(b) in relation to the impact on the Appellant's safety and security which extended to and included such factors as construction dust, fungi spores, dead flies, electric wires, leaking of roof and the opening of the flat, as a separate head of claim. After making enquiries of the First-tier Tribunal on this point, the Upper Tribunal was not satisfied the First-Tier Tribunal had adequately considered (if at all) head of claim 4(b) in assessing the Appellant's award of compensation.

Role of the Upper Tribunal for Scotland

[21] The Upper Tribunal hears and decides appeals from the First-tier Tribunal in terms of rule 24 of the Upper Tribunal for Scotland Rules of Procedure 2016. Appeal is restricted to a point of law (2014 Act, section 46 (2) (b)). On allowing an appeal, the Upper Tribunal may re-make the decision of the First-tier Tribunal, remit the case to the First-tier Tribunal, or make such other order as the Upper Tribunal considers appropriate (2014 Act, section 47(2)).

Consideration of the Appellant's Appeal

[22] The Upper Tribunal offered the Appellant the opportunity of having an oral hearing in relation to her appeal. She ultimately declined that offer, but requested that her appeal be determined by the Upper Tribunal on the basis of the various written submissions and responses the parties had made to the Upper Tribunal. The Respondent was content for the Upper Tribunal to determine the appeal without a hearing. The Upper Tribunal accordingly decided to determine the appeal without a hearing in terms of rule 24 of the Upper Tribunal for Scotland Rules of Procedure 2016.

Appellants' Submissions in Respect of the Appeal

[23] The Appellant seeks to re-open her appeal in relation to heads of claim 1 and 2. She believes she has not had an adequate explanation why her case based on the "livability" of the property was not addressed by either the First-tier Tribunal or the Upper Tribunal. She believes "heads of claim 1 and 2 were repeatedly dismissed with no clear reasons".

[24] The reason for this is her "livability" concept is not *per se* part of the law of Scotland.

[25] Instead, the Respondent firstly had an implied contractual obligation under the parties' tenancy agreement to put the Appellant in possession of the whole of the rented property during the currency of the tenancy agreement.

[26] Because that obligation was breached, the Appellant was entitled to an abatement of rent. The First-tier Tribunal considered that issue in their Decision dated 6 September 2021 and awarded the Appellant compensation based on the fact one room and the staircase were not available for use by her for a three month period. Their decision to abate rent in part and not in full for that period, and not to award her any other compensation for this breach, was a matter for determination by the First-tier Tribunal. Their approach to that question does not disclose any error of law on their part. The Upper Tribunal cannot allow an appeal where there was no error of law on the part of the First-tier Tribunal.

[27] The Respondent secondly had an implied contractual obligation to put the tenancy subjects in "tenantable and habitable" condition at entry and during the currency of the lease. This may sound like the Appellant's "livability" concept, but the First-tier Tribunal were required to apply their mind to the common law obligation expressed as habitability.

[28] They did this as they plainly refer in paragraph 37 of their Decision dated 6 September 2021 to the bedroom and staircase not being habitable during August, September and October 2020.

[29] The Appellant contends these areas were not usable since the inception of her tenancy. However, the First-tier Tribunal found otherwise, referring at finding in fact 21 of their Decision to the large bedroom not being used during August, September and October 2020. The Upper Tribunal cannot interfere with this finding in fact as it considers appeals only on a point of law.

[30] The Upper Tribunal appreciates the Appellant disagrees with these assessments of fact and abatement by the First-tier Tribunal, but such matters were for the determination of the First-tier Tribunal and her disagreement therewith does not constitute a valid ground of appeal against the Decision of the First-tier Tribunal dated 6 September 2021.

[31] The Appellant's submissions in relation to heads to claim 4(a), 4(b) and 4(c) are summarised under the headings in this Decision which consider each of those heads of claim.

Respondent's Submissions in Respect of the Appeal

[32] The Respondent does not oppose the appeal. He has made some comments in relation to head of claim 4(a) which are considered below in the discussion of that head of claim.

Consideration of Head of Claim 4(a)

[33] Although the First-tier Tribunal did not refer separately to head of claim 4(a) at paragraph 37 of their Decision dated 6 September 2021, they make plain in paragraph 15 of their separate Decision dated 15 November 2021 refusing the Appellant permission to appeal, that the "Applicant did not provide evidence to support claims for compensation for injury to mental or physical health, arising from stress or mould".

[34] Contrary to the Appellant's submissions in this appeal, the Upper Tribunal did not, on granting permission to the Appellant to appeal in respect of head of claim 4, "disapprove compensation on this claim" owing to her lack of medical evidence to support her claim for compensation for injury to her physical and mental health (eczema, coughing, fear, stress) arising from the dry rot. No such decision was made by the Upper Tribunal at the time of granting permission to appeal in respect of head of claim 4, including head of claim 4(a).

[35] The Upper Tribunal now considers whether the Appellant's appeal should be allowed in respect of head of claim 4(a).

[36] The Appellant's position is that non-Covid physical health checks were not normally granted during the lockdown. She requested an appointment from her GP but could not obtain an appointment with her.

[37] The Respondent comments that the First-tier Tribunal requested medical evidence from the Appellant to demonstrate the health issues were caused by the works, but this was not forthcoming from the Appellant. He was advised by the dry rot specialists that the dry rot fungal spores were not a health risk. This information was relayed to the Appellant.

[38] The Appellant responded to these comments by requesting that the Respondent "provide professional proofs that a livability (fitness) assessment of a big property only considers spores issues".

[39] The Upper Tribunal must consider whether the First-tier Tribunal erred in law in denying the Appellant compensation for head of claim 4(a).

[40] In this connection, an error of law includes "a fundamental error in [the First-tier Tribunal's] approach to the case" (*Advocate General for Scotland v Murray Group Holdings Ltd* 2016 S.C. 201 at paragraph [43]). Applying that test to the facts of this case, the Upper Tribunal holds that the First-tier Tribunal did not err in rejecting head of claim 4(a) for lack of supporting medical evidence as to causation of injury. The Upper Tribunal is not satisfied that, even during Covid lockdown, the Appellant would have been unable to instruct an expert medical report to support this head of claim. A GP report might have confirmed injury but is unlikely to have sufficed for the purposes of proving causation.

[41] The onus was on the Appellant to prove injury caused by any aspect of the dry rot or works associated therewith. The Respondent is not obliged to comply with the Appellant's request to provide evidence to the contrary. The approach of the First-tier Tribunal to this head of claim was therefore a reasonable one. There was no error of law on the part of the First-tier Tribunal in respect of their decision on head of claim 4(a). The decision of the First-tier Tribunal in respect of that head of claim is therefore upheld by the Upper Tribunal.

Consideration of Head of Claim 4(b) - Error of Law on the Part of the First-tier Tribunal

[42] The Appellant has not focused in her submissions to the Upper Tribunal on explaining this head of claim in more detail. She insists on the Respondent "providing proofs" of various matters and she accuses him of adopting a self-contradictory approach as to the timing of the treatment of the dry rot. This misunderstands the role of the Upper Tribunal, which is to consider an appeal on a point of law.

[43] The Upper Tribunal considers however that the First-tier Tribunal erred in law in its approach to head of claim 4(b). The First-tier Tribunal made no reference to this separate head of claim either in their Decision dated 6 September 2021 or their separate Decision dated 15 November 2021 refusing the Appellant permission to appeal. The Appellant was entitled to claim additionally for inconvenience arising from the issues she reported under this head of claim. She did not need medical or expert evidence to establish the inconvenience caused to her as a result of "practical factors such as construction dust, fungi spores, dead flies, electric wires, leaking of roof, opening of the flat, etc."

[44] The Respondent does not oppose the appeal on this ground. He accepted during the reconsideration hearing on permission to appeal that the Appellant gave evidence on this matter before the First-tier Tribunal. Yet the First-tier Tribunal did not consider awarding the Appellant any compensation for this head of claim. This failure amounts to a "fundamental error of approach" on the part of the First-tier Tribunal and was therefore an error of law on their part.

Consideration of Head of Claim 4(b) - Assessment by the Upper Tribunal

[45] The Upper Tribunal has decided to re-make the Decision of the First-tier Tribunal by assessing a figure for compensation in respect of the Appellant's head of claim 4(b). The sum involved is relatively small. Remitting to the First-tier Tribunal would unnecessarily prolong these proceedings, and open up the possibility of a further appeal, neither of which is in the interests of either party to this appeal, nor an efficient use of judicial resources relative to the amount involved.

[46] The Appellant's complaints under this head of claim establish a breach by the Respondent of his implied contractual obligation to provide the Appellant with tenancy subjects in "tenantable and habitable condition" (*cf Kippen v Oppenheim* (1847) 10D 242).

[47] The Upper Tribunal does not think the description so severe that the subjects were rendered completely uninhabitable by the Appellant, but this breach of contract does entitle the Appellant to an award of compensation for inconvenience (*Mack v Glasgow City Council* 2006 SLT 556).

[48] A comparator case which may assist in assessing such an award of compensation is *McArdle v Glasgow District Council* 1989 SCLR 19, in which the tenant suffered inconvenience for living in damp conditions for a period of approximately five years. She was awarded compensation for inconvenience in the sum of £750 by the sheriff in her action for damages in Glasgow Sheriff Court. The date of this award was 4 July 1988.

[49] In the present case, the Appellant reported fungal mould within the property to the Respondent on 14 July 2020. She left the property on 30 October 2020. Taking the figure of £750 in *McArdle*, before inflation, as a starting point, the sum due to the Appellant in the present case would be calculated as 3.5/60 x £750 = £43.75. The inflation table in *McEwan and Paton on Damages for Personal Injuries in Scotland* provides a multiplier of 3.08 for a damages award in 1988 to obtain the value in January 2022. Accordingly, this suggests a sum of £134.75 might be a useful starting point for the Appellant's award of compensation in this case.

[50] Further examples are set out in paragraph 7.69 of Robson and Combe, *Residential Tenancies* (4th ed. 2019). These awards were made in a date range from 1982 to 2007 and average, before inflation, between £30 and £70 a month for the more severe cases of inconvenience.

[51] This survey suggests that awards of compensation for inconvenience in housing cases have tended historically to be quite low. Amongst the most generous awards noted in *Robson and Combe* is that in the case of *Christian v Aberdeen City Council* 2005 Hou. L. R. 26, another dampness case, in which the pursuer was awarded £2,750 on 12 August 2005 for inconvenience lasting for nearly four years. That represents no more than £60 a month, or approximately £100 a month adjusted for inflation at a multiplier of 1.68.

[52] Awarding compensation for inconvenience in housing cases is not an exact science and each case must turn on its own facts and circumstances. In the present case, taking a broad and generous approach, a sum of £330, roughly £100 a month, appears to the Upper Tribunal to be the appropriate sum for compensation in respect of head of claim 4(b).

Consideration of Head of Claim 4(c)

[53] The Appellant refers to the amount of time spent by her to vindicate her rights through the First-tier and Upper Tribunals, and notes that the First-Tier Tribunal did not even mention this head of claim in its Decision dated 6 September 2021.

[54] While that omission was unfortunate, neither the First-tier Tribunal nor the Upper Tribunal may ordinarily make an award for these costs (known in the law of Scotland as "expenses") against the Respondent.

[55] Rule 40(1) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 provides that the First-tier Tribunal may award expenses against a party *only* where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.

[56] Rule 12(1) of the Upper Tribunal for Scotland Rules of Procedure 2016 applies that rule in proceedings in the Upper Tribunal on appeal from the First-tier Tribunal.

[57] There is nothing in the proceedings before the First-tier Tribunal or the Upper Tribunal to suggest the Respondent put the Appellant to unnecessary or unreasonable expense through unreasonable behaviour on his part in the conduct of the case or appeal. The First-tier Tribunal therefore did not err in law in rejecting an award under this head of claim.

[58] The Upper Tribunal therefore upholds the decision of the First-tier Tribunal not to award the Appellant expenses against the Respondent in the proceedings before the First Tier Tribunal. In addition, the Upper Tribunal, for the foregoing reasons, makes no award of expenses to the Appellant in respect of the proceedings before the Upper Tribunal.

Conclusion

[59] The appeal is allowed only in respect of head of claim 4(b).

[60] The Upper Tribunal awards the Appellant £330 in respect of that head of claim.

[61] The Upper Tribunal therefore remakes the Decision of the First-tier Tribunal and awards the Appellant compensation in the total sum of £1,100.

George Jamieson
Sheriff of North Strathclyde
Member of the Upper Tribunal for Scotland

NOTICE TO PARTIES

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.*