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/18/0449

Re: Property at 41D, Glebe Road, Kilmarnock, KA1 3DJ ("the Property")

Parties:

KEY-LETS, 12 Parkhouse Street, Ayr, KA7 2HH ("the Applicant")

Mr David Hunter, at one time resident at 41D Glebe Road, Kilmarnock, and then at 23 Dunure Drive, Kilmarnock ("the Respondent")

Tribunal Members:

Alastair Houston (Legal Member) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of £61.03 be made in favour of the Applicant.

1. Background

1.1 This was an application under Rule whereby the Applicant sought an order for payment of £1213.07. This sum had been amended since the initial lodging of the application. The sum comprised of £235.07 in respect of unpaid rent, £138.00 being the cost of replacement of a damaged smoke detector and £840.00 in costs incurred by the Applicant in connection with the bringing of and procedure associated with this application.

1.2 The application was accompanied by, amongst other things, copies of the written tenancy agreement between the parties, invoices, correspondence from SafeDeposits Scotland, photographs of the property and a significant volume of correspondence between the parties. A copy of a previous application to the Tribunal by the Respondent in respect of repairing issues within the Property was also included. The

Applicant's representatives had also lodged written submissions together with authorities in support of those submissions.

2. The Hearing

2.1 The Hearing took place on 22 February 2019. The Applicant was represented by Mr Tim Williamson. The Respondent was personally present.

2.2 Neither party had any additional witnesses. The Tribunal proceeded on the basis of the evidence and submissions of the parties and on the papers accompanying the application.

2.3 The Tribunal first confirmed, with Mr Williamson, the breakdown of the sums sought by the Applicant. He confirmed that the sum comprised of £235.07 in respect of unpaid rent, £138.00 being the cost of replacement of a damaged smoke detector and £840.00 in costs incurred by the Applicant in connection with the bringing of and procedure associated with this application.

2.4 The Tribunal firstly heard evidence from the parties regarding the damaged smoke detector. Mr Williamson advised that the Respondent had reported a fault with the smoke detector on 24 November 2017, being a Friday. The Respondent had advised that the alarm was constantly bleeping. The letting agents responsible for the management of the Property had a system to record and note any necessary repairs needed to one of their houses. Mr Williamson advised that a firm of electricians, being JMC Electrical, were instructed to attend the Property the day of the report. They could not gain access to the Property. JMC Electrical returned to the Property on 26 November 2017, being a Sunday. As it was a weekend, a replacement smoke detector could not be sourced. JMC Electrical required to return the following Wednesday to replace the smoke detector. Mr Williamson referred to an email from JMC Electrical dated 9 January 2018. That email confirmed that the smoke detector had been smashed and required to be replaced. JMC Electrical had been unable to establish whether there was a fault with the smoke detector. The smoke detector was hardwired. Another battery powered detector had also been removed as it was not working. Mr Williamson concluded by submitting that this was malicious damaged on the part of the Respondent and was not an attempt at maintenance.

2.5 The Respondent advised that he reported a fault with the smoke detector by telephone on 24 November 2017. No tradesman attended on that date prior to the Respondent requiring to go out. The smoke detector was "chirping" constantly. The Respondent admitted attempting to take the smoke detector off the wall to try and stop this. No instruction had been given to the Respondent as to how to do this. The Respondent submitted that this caused him inconvenience. He advised that he would have been available on 24 November 2017 to allow for access at the time the fault was reported. Nobody contacted him to arrange access and the first contact he had with JMC Electrical was when they turned up around

9am on 26 November 2017. In reply, Mr Williamson advised that the Respondent would have been contacted by telephone in advance by before JMC Electrical attended the property on 24 November 2017.

2.6 In respect of the unpaid rent, the parties were in agreement that the total amount rent outstanding following the payment of the tenancy deposit to the Applicant was £235.07. The parties further agreed that the decision of the Tribunal in respect of application reference FTS/HPC/RP/17/0400, being the application by the Respondent in terms of the repairing issues at the Property, was a true and accurate record in terms of both the findings in fact and determination with reference to the repairing standard. Accordingly, this was to form the evidential basis on which any abatement of rent was to be assessed.

2.7 The Respondent advised that the Property had been damp with evidence of mould growth since around October or November 2016. The windows were not watertight and had not been since around January or February 2017. He subsequently became aware that the windows had no provision for ventilation when the property was inspected by a surveyor in connection with his Tribunal application. He advised he raised the issue of abatement of the rent due to the repairing issues with the letting agents around 8 November 2017. He had taken advice from a solicitor and carried out research online as to his rights, from sources such as Citizens Advice Scotland. He had withheld payment of rent from the end of November until the end of the tenancy due to the condition of the property. He had attempted to negotiate an abatement of the rent due. He submitted that he did not agree that the Applicant had been entitled to payment of the tenancy deposit and that he should be entitled to an abatement of 50% of the total unpaid rent, being £585.07. This was based on the rear bedroom and bathroom of the Property being affected by the dampness and mould growth. The Respondent accepted that whole property had not been rendered uninhabitable by the apparent defects. He founded upon the Repairing Standard Enforcement Order that had been made by the Tribunal due to defects within the property.

2.8 Mr Williamson referred to his written submissions as to why the Respondent was not entitled to an abatement of rent. He adopted these submissions as a whole. The Tribunal indicated that they had read his submissions and would take them fully into account however, he could take the Tribunal through the full document if he wished or summarise and supplement them. Essentially, he had three separate arguments as to why this was the case. His first argument was that the statutory provisions contained within the Housing (Scotland) Act 2006 ("the 2006 Act"), in terms of a tenant's right to make an application to the Tribunal when aggrieved by an apparent breach of a repairing standard, precluded a tenant from retaining or seeking an abatement of rent. Mr Williamson referred to the case of *Stobbs & Sons v Hislop* 1948 S.C. 216 in support of this proposition. He submitted that the statutory rights available to a tenant were analogous to those considered by the Court in *Stobbs & Sons*. Further, he submitted that the condition of the property did not

justify the retention or abatement of rent by the Respondent. A property must be physically uninhabitable before an abatement could be considered. In the present case, no one part of the Property was affected to that extent and that the Respondent remained within the Property should be taken into account.

2.9 The second argument advanced by Mr Williamson was that the Respondent was contractually barred from retaining or seeking an abatement of rent in terms of Paragraph 50 of the written tenancy agreement between the parties. Mr Williamson also highlighted the paragraphs of the agreement that included the repairing standard and the requirement of the Respondent to give notice of any defects which may render the property below the standard. He accepted that there was a possibility that such a clause may fall foul of the Unfair Terms in Consumer Contracts Regulations 1999. He submitted that the clause would not be unfair as the mechanism available to the Respondent within the 2006 Act was not restricted in any way.

2.10 The third argument advanced by Mr Williamson was that the Respondent required to advance a claim for damages rather than seeking an abatement of unpaid rent. He relied on a decision made by the Tribunal in the matter of *Cacioppo v Stewart* (FTS/HPC/CV/18/0305) in which a tenant had initially defended an application for an order for possession due to rent arrears on the basis that rent had not been due for a period due to a breach of the landlord's repairing duty. The Tribunal highlighted the case of *Stobbs & Sons* during the hearing and the tenant elected to withdraw her defence to the action, in which an abatement of rent had been sought, to pursue a separate application for damages. Mr Williamson submitted that this was authority that an abatement was not possible due to the remedies available to a tenant under the 2006 Act and linked to his first line of argument. Mr Williamson advised that the principle of retention or abatement of rent was an important point which the Tribunal required to consider. In reply, the Respondent highlighted that he had sought to negotiate with the Applicant's agents and that he had had solicitors write a letter to which they had not received a response.

2.11 Finally, the issue of the costs incurred by the Applicant in connection with the present application was covered. Mr Williamson submitted that Paragraph 12(b) of the written tenancy agreement, which imposed an obligation upon the Respondent to make payment to the Applicant of "*reasonable costs of and in connection with…Any breach by the Tenant of any covenant of whatever nature set out herein*". Mr Williamson advised that the breach in the present case was the failure to pay rent. This breach could not be justified. Mr Williamson advised that the fees charged were reasonable. He referred to the invoice to the Applicant which detailed his charges incurred in relation to the application, amounting to £840.00. He submitted that there was no hourly charge made, rather a set fee for the work related to the application was incurred by the Applicant. If an hourly fee was charged it would exceed the

invoiced amount. Mr Williamson referred to the Tribunal decision in the matter of *Cuckow v Hamill* (FTS/HPC/18/1061) that the expenses of bringing an application could be recovered by virtue of a contractual obligation. The Respondent advised that the adjournment of the previous hearing was necessitated by documents submitted to the Tribunal not being forwarded and, accordingly, he shouldn't be responsible for the additional fee for attendance and preparation for this hearing. He submitted that the employment of Mr Williamson to represent the Applicant was their decision and therefore they should bear the cost. He accepted it was a matter for the Tribunal to decide.

2.12 Given the time of conclusion of the hearing, the issues raised by the parties and the volume of documents submitted by them, the Tribunal indicated that a decision would be delivered in writing at a later date.

3. Findings In Fact

3.1 The parties entered into a tenancy agreement in respect of the property which commenced on 29 May 2013 and continued until 15 January 2018.

3.2 In terms of Paragraph 1 of the written tenancy agreement, the Respondent was required to make rental payments of £350.00 per calendar month, which had increased to £375.00 per month from 29 May 2015.

3.3 In terms of Paragraph 49 of the written tenancy agreement, the Respondent was liable to pay the Applicant the cost "for any work carried out or item not replaced or repaired to the Landlord's satisfaction".

3.4 Between 24 and 26 November 2017, the Respondent damaged a smoke detector within the Property necessitating its replacement.

3.5 The Property was affected by condensation and/or penetrating dampness.

3.6 As of the 12 January 2018, the Applicant was in breach of his repairing obligations due to the bathroom and rear bedroom of the Property being affected by condensation and/or penetrating dampness.

3.7 Following the end of the tenancy agreement £585.07 in rent had not been paid by the Respondent.

3.8 A tenancy deposit of £350.00 paid by the Respondent had been released to the Applicant by SafeDeposits Scotland, resulting in £235.07 remaining unpaid.

3.9 The sum of rent sought by the Applicant is not lawfully due.

4. Reasons For Decision

4.1 Turning firstly to the issue of the smoke detector, Paragraph 49 of the written tenancy agreement states:-

"*The Tenant will refund any costs incurred by the Landlord or Agent, including arrangement and administration fees, for any work carried out or any item not repaired or replaced to the Landlord's satisfaction.*"

The Respondent accepts attempting to stop the smoke detector from "chirping" without having the necessary skill or knowledge to do so. He damaged the smoke detector to the extent that it required to be replaced. The Tribunal is of the opinion that this constitutes "work carried out". It is clear that it was not carried out to the Applicant's satisfaction. The Tribunal accepts the assessment of JMC Electrical as contained in their emails, that this was the only course of action. Mr Williamson stated that the Applicant would have been content to pay for the cost of the repair had it not been necessary as a result of the Respondent damaging the smoke detector. It was not possible to determine the presence or cause of any fault due to the damage caused by the Respondent. The Tribunal has therefore found the Respondent liable for the charge of £138.00 as detailed in the invoices from JMC Electrical..

4.2 The issue of an abatement of rent is more complex. The case of *Renfrew District Council v Gray* 1987 S.L.T. (Sh. Ct.) 70 is, on face value, authority for the proposition that a tenant should not be required to pay the contractual rent for a property that does not meet the repairing standard. Mr Williamson advanced three arguments as to why the Respondent was not entitled to retain or have abated a sum of rent. The Tribunal considered everything that was said at the hearing as well as the written materials lodged by both parties.

4.3 The first argument was based on the decision of the Court in *Stobbs & Sons*. This case centred around the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 ("the 1920 Act"), particularly Section 2, the relevant provisions of which state:

(c) In addition to any such amounts as aforesaid, an amount not exceeding fifteen per centum of the net rent:

Provided that, except in the case of a dwelling- house to which this Act applies but the enactments repealed by this Act did not apply, the amount of such addition shall not, during a period of one year after the passing of this Act, exceed five per cent.:

(d) In further addition to any such amounts as aforesaid

where the landlord is responsible for the whole of the repairs, an amount not exceeding twenty-five per cent, of the net rent; or

where the landlord is responsible for part and not the whole of the repairs, such lesser amount as may be agreed, or as may, on the application of the landlord or the tenant, be determined by the county court to be fair and reasonable having regard to such liability:

(2) At any time or times, not being less than three months after the date of any increase permitted by paragraph (d) of the foregoing subsection, the tenant or the sanitary authority may apply to the county court for an order suspending such increase, and also any increase under paragraph (c) of that subsection, on the ground that the house is not in all respects reasonably fit for human habitation, or is otherwise not in a reasonable state of repair.

The court on being satisfied by the production of a certificate of the sanitary authority or otherwise that any such ground as aforesaid is established, and on being further satisfied that the condition of the house is not due to the tenant's neglect or default or breach of express agreement, shall order that the increase be suspended until the court is satisfied, on the report of the sanitary authority or otherwise, that the necessary repairs (other than the repairs, if any, for which the tenant is liable) have been executed, and on the making of such order the increase shall cease to have effect until the court is so satisfied.

The statute provided for restrictions in respect of a landlord's entitlement to increase the rent charged for a house It also allowed the tenant the right to apply to the Court to suspend the increase, on the grounds that the house was not reasonably fit for human habitation or otherwise in a reasonable state of repair. In *Stobbs & Sons*, the Court held that the statutory right of a tenant to have the rent increases suspended superseded the common law right of retention that had existed prior to the statute. Mr Williamson sought to argue that the provisions under the 2006 Act, entitling a tenant to make an application to the Tribunal, who could then make a Repairing Standard Enforcement Order and, subsequently, a Rent Relief Order, were analogous. Rent Relief Orders reduced the rent payable by up to 90%, when a Repairing Standard Enforcement Order had not been complied with. Mr Williamson argued that Parliament had limited the circumstances in which rent may be found not to be due in respect of the property and, therefore, the Respondent could not insist on an abatement of rent of up to 100% of the sum payable.

4.4 The tenancy agreement to which the present application relates is obviously not subject to the same statutory provisions that applied in the case of *Stobbs & Sons*. The Tribunal does not agree that an analogy can be drawn between the provisions in the 1920 Act and the 2006 Act and that the case of *Stobbs & Sons* can be distinguished. The power of the

Tribunal to make a Rent Relief Order is contained within Section 27 of the 2006 Act, the relevant provisions of which state:-

(1) A rent relief order is an order by [the First-tier Tribunal] [1] which reduces any rent payable under the tenancy in question by such amount (not exceeding 90% of the rent which would, but for the order, be payable) as may be specified in the order.

(2) [The First-tier Tribunal] [2] may make a rent relief order only where [it has] [3] decided that a landlord has failed to comply with a repairing standard enforcement order which has effect in relation to the house concerned.

In the opinion of the Tribunal, there are critical differences between the provisions in the 1920 Act and the 2006 Act. The 1920 Act conferred a right on a tenant relating to payment of rent. If a tenant obtained the necessary certification relating to the condition of a property and applied to the Court, subject to the qualification relating to the cause of the condition of the property, the Court was required to make an order suspending the increase in rent. The word "shall" in Section 2(2) allowed no discretion on the part of the Court. This can be contrasted with the circumstances in which a Rent Relief Order can be made. Whilst the application to the Tribunal may be at the instigation of the tenant, and Section 24(2) of the 2006 Act requires the Tribunal to make a Repairing Standard Enforcement Order if a landlord has not complied with their repairing duty, the making of a Rent Relief Order should be considered a sanction imposed in response to a failure to comply with a Repairing Standard Enforcement Order. The word "may" in Section 27(2) implies a discretion as to whether a Rent Relief Order is made. The submissions on behalf of the Applicant discuss the intention of Parliament and refer, amongst other things, to the explanatory notes accompanying the 2006 Act. The intention of Parliament only requires to be considered in exercises relating to interpretation. There is no such difficulty in the present case. The 2006 Act simply provides a mechanism by which a tenant can seek a determination as to whether a landlord has complied with his repairing duties, not to obtain suspension of payment of a portion of the rent, albeit this could be the result. Another difference between the provisions is the element of the rent to which the orders apply. The 1920 Act restricted the right of a tenant to not pay rent in the event of disrepair to the suspension of increases above the "base" rent payable. The Rent Relief Orders apply to the whole rent payable. If a Rent Relief Order were made, and a tenant claimed a further abatement of rent for the same period the order was in force, account could no doubt be taken by the Tribunal of the order when determining if an abatement should be allowed. The two do not appear to be incompatible to the Tribunal. For these reasons, the Tribunal considers that the *Renfrew District Council* case remains authority for the proposition that a tenant should not be expected to pay rent for what they did not get, namely a house that met the legal repairing standard.

4.5 The Applicant's representative also referred to the level of disrepair in the present case as being insufficient to entitle the Respondent to an abatement of rent. Reliance was placed on the description of the property in the *Renfrew District Council* case as being "uninhabitable". The suggestion was that a property required to be physically uninhabitable before a tenant could claim an abatement of rent. It was submitted that, as the Respondent remained in occupation, the Property was not uninhabitable. The Tribunal considers this to be incorrect. In the judgement in *Renfrew District Council*, Sheriff Principal Caplan observes (at page 73) that "the defenders remained in occupation of the house despite the fact it was uninhabitable in the sense of not being fit for habitation". Further, the Sheriff Principal had already stated (at page 71) "In my view it is long established law that a tenant is entitled to an equitable abatement of rent for at least certain degrees of partial non-performance". It would therefore appear to the Tribunal that the continued occupation of a tenant is not fatal to an argument that a portion of rent should be abated and that, in deciding the measure of an abatement, reference should be had to how far a property falls short of the required standard.

4.6 The second argument advanced on behalf of the Applicant is that the Respondent was prevented, in terms of the written tenancy agreement, from insisting on an abatement of rent. The relevant contractual provision which the Tribunal was directed to was Paragraph 50 of the tenancy agreement. This provision states:-

The Landlord and his Agents shall not be liable to the Tenant for any loss, injury or damage of whatsoever kind which the Tenant may sustain from any defect or deficiency in the dwellinghouse; by execution hereof the Tenant acknowledges being satisfied with the dwellinghouse and contents and renounces any claims against the Landlord in respect thereof.

The Tribunal does not agree with this proposition. The provision seeks to exclude liability for "any loss, injury or damage" that the Respondent sustained. Notwithstanding that such a provision would appear to the Tribunal to be contrary to Sections 2 and 3 of the Occupiers' Liability (Scotland) Act 1960, the provision would only appear to operate in the circumstances where the Respondent sought compensation or damages in respect of a loss suffered. The Respondent is not doing that in the present application, rather he is asserting a right to abatement of the rent due. Referring again to *Renfrew District Council* case, guidance can be found from the Sheriff Principal's judgement, where he states (at page 72) "Rights to abatement of rent and damages for loss due to breach of the lease may in many cases be equivalent in practical terms but they are different concepts". The Respondent is seeking to assert the equitable right discussed in that case as opposed to a quantified claim based on loss suffered due to breach of contract. Indeed, the submissions submitted on behalf of the Applicant state that "The clause expressly

denies Mr Hunter by his agreement to make a claim" which is not what the Respondent is doing.

4.7 Reference was also made by the Applicant's representatives to the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations"). The 1999 Regulations applied to tenancies entered into prior to 1 October 2015. It was submitted the provision was not unfair. The written submissions state that the Respondent and his father both read and initialled the document. An unfair term is defined by Regulation 5(1) and (2) of the 1999 Regulations, which state:-

(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

Schedule 2 of the 1999 Regulations contains a non-exhaustive list of provisions which may be considered unfair. Paragraph 1 of Schedule 2 includes the following:-

Terms which have the object or effect of–
(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

Given the content of the submissions, the Tribunal is therefore proceeding on the basis that the provision in question was not individually negotiated. The Tribunal is of the opinion that the provision does result in a significant imbalance in the parties rights and obligations arising under the contract given its scope. Furthermore, its effect would appear to encapsulate both Paragraphs 1(a) and (b) of Schedule 2. The Tribunal would therefore regard the provision as unfair and not binding. For all of these reasons, the provision can not be relied upon to defeat the Respondent's argument for abatement of rent.

4.8 The third argument advanced on behalf of the Applicant is that abatement of rent is incompetent and that the Respondent was required to pursue a separate application seeking damages or compensation. The case of *Pacitti v Manganiello* 1995 S.C.L.R. 557 and the Tribunal decision in *Cacioppo v Stewart* (FTS/HPC/CV/18/0305) were cited as authority for this proposition. It was submitted on behalf of the Applicant that the case

of *Pacitti* confirmed that rent could not be retained beyond the end of a tenancy agreement but could only be offset against a claim or counterclaim for damages arising out of a contractual breach by the landlord. On first glance, this may appear to conflict with *Renfrew District Council*, however, the Tribunal is of the opinion that the two are not irreconcilable. In *Pacitti*, the tenant claimed a right to retain the rent beyond the end of a tenancy. The Sheriff Principal considered that such a right was based on the mutuality of the contract – as the contract had ended, the tenant no longer had such a right. The concept of an abatement was not claimed by the tenant nor discussed. Referring back to *Renfrew District Council*, the Sheriff Principal was clear that abatement of rent was a distinct remedy open to tenants. Rather than being based on mutuality, it was an equitable right. When examining the decision in *Cacioppo*, although the issue of competency of abatement was discussed, no decision was made or conclusion drawn. The Respondent in that case chose not to defend the application, instead pursuing a separate claim for damages, as was their right in terms of *Renfrew District Council.* Considering *Pacitti and Renfrew District Council* together, it would appear to the Tribunal that abatement is a remedy open to the Respondent, provided it has been positively asserted. In the present case, it has. The submissions on behalf of the Applicant also made reference to the Respondent being required to have acted in good faith when withholding the rent. The Tribunal does not consider this to be a material consideration in relation to abatement, albeit it may be in relation to the right of retention of rent by a tenant when attempting to force a landlord's hand to carry out repairs. Whilst the Respondent, in his communications with the Applicant's representatives, at times, appears to have conflated retention of rent with an abatement, he has always been clear that it is an abatement he is seeking.

4.9 Having established that abatement of rent is a valid right open to the Respondent, the next issue for the Tribunal to consider is whether an abatement should be applied in the present case. Turning to *Renfrew District Council* again, as has already been stated, partial non-performance of obligations can result in an equitable abatement of rent. The parties accepted that the factual basis upon which the Tribunal was to proceed in relation to the issue of disrepair was contained within the decision issued in response to the previous repairing standard application. During that application, it was accepted that a letter dated 30 October 2017 had been sent to the Applicant's representatives, from the East Ayrshire Council's Environmental Health department advising of the presence of penetrating dampness within the Property. A subsequent survey by Rowallan stated that "condensation would appear to be aggravated by a build up of debris behind wall linings allowing moisture to bridge from external masonry onto external surfaces". An inspection of the Property was carried out by the Tribunal on 12 January 2018. The presence of dampness was confirmed in the bathroom and rear bedroom, to differing extents. The Tribunal noted, in paragraph 26 of the decision, that the precise nature and extent of any dampness problem dating back to February 2016 was in dispute. As of the 12 January 2018, the

Applicant was found to be in breach of his repairing obligations in terms of Section 13 of the 2006 Act, due to the defects within the Property. Proceeding on the basis of the previous decision in the repairing standard application, the Tribunal considers that there is sufficient evidence of the extent of the defects within the Property from 23 October 2017, being the date of the emailed notification of the issues by the Respondent to the Applicant's representatives. The Tribunal considers this notification to be sufficiently close in time to the report from East Ayrshire Council that an inference can be drawn that the defects detailed in that report existed to the same extent as of 23 October 2017. No further independent evidence was elicited regarding the extent of any dampness prior to this date, which, as already stated, was in dispute. The Tribunal therefore considers any abatement could only apply from 23 October 2017.

4.10 The rent payable under the tenancy agreement was £375.00 per calendar month. The tenancy agreement continued until 15 January 2018. Rent fell due, in advance, on the 29th day of each month. The total rent due for the period 23 October 2017 until 15 January 2018, with the portion of the month of October being calculated on a pro-rata basis, is £1040.32. The Tribunal considers the breach of repairing obligations by the Applicant to equate to partial non-performance. The Property consisted of an entrance hall, bathroom, kitchen, living room and two bedrooms. Only two of the six rooms were affected by dampness and mould growth, with the rear bedroom affected more severely than the bathroom given the moisture readings obtained by the Tribunal at the inspection on 12 January 2018. The Tribunal considers an abatement of 30% of the rent due under the tenancy agreement for the period 23 October 2017 until 15 January 2018 to be fair and equitable, amounting to £312.04.

4.11 The remaining part of the Applicant's claim related to the costs incurred to their representatives in connection with the application. The costs amounted to £840.00. It was submitted on behalf of the Applicant that Paragraph 12(b) of the written tenancy agreement provided for the recovery of such costs. Whilst the Tribunal agrees that, in principle, a party could be contractually obliged to meet the other party's expense in bringing an application, the costs incurred in the present application can not be considered "reasonable" within the meaning of Paragraph 12(b) of the written tenancy agreement. The bulk of the application and submissions of behalf of the Applicant dealt with the issue of abatement of rent. The Applicant has been unsuccessful in respect of the claim for unpaid rent. The successful part of the claim related to the broken smoke detector. This was a straightforward issue, necessitating minimal preparation and was only raised in the latter stages of the application. The Tribunal is therefore not prepared to find the Respondent liable for the Applicant's costs.

4.12 The Respondent has therefore been found liable to pay the Applicant £138.00. Separately, the Respondent has been found to be entitled to an abatement of rent amounting to £312.04. Whilst £235.07 of this is

accounted for in relation to the claim by the Applicant for unpaid rent, the Tribunal considers that the remainder, being £76.97, can be offset against the sum due in respect of the damaged smoke detector. The Tribunal therefore makes an order for payment of £61.03 in favour of the Applicant.

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.

Alastair Houston

18 March 2019

Legal Member/Chair **Date**