Decision after a Hearing 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/19/0649

Re: Property at 41 Sorn Road, Auchinleck, Cumnock, KA18 2LY ("the Property")

Parties:

Mr Barry James Parker, Mrs Agnes Donis Parker, Westdoura Farm, Craigie, Kilmarnock, KA1 5NL ("the Applicant")

Mr Iain Stephen Treherne, Mrs Ann Christine Treherne, 7 Swanston Avenue, Edinburgh, EH10 7BU; 7 Swanston Avenue, Edinburgh, EH10 7BU ("the Respondent")

Tribunal Members:

Jan Todd (Legal Member) and Elaine Munroe (Ordinary Member)

Background

1. This was a hearing to consider the application by the Applicant for damages for breach of contract and breach of statutory repairing duty under Rule 70 of the Tribunal's rules.
2. At the hearing the Applicant attended in person with her representative Ms Nichola McAtier, solicitor.
3. The Respondent also attended with their representative Ms Rachel Hill solicitor.
4. The parties had lodged a record of the pleadings and a joint minute of admissions on 26th June 2019.
5. At the first calling of the hearing on 2nd July the Applicant's solicitor had lodged a written submission clarifying their claim for damages and confirming that they proposed to lead evidence to claim that a notional abatement should be used as a comparator to assist in guiding the Tribunal to make an award of damages as well as claiming for inconvenience and loss of amenity. The

written submission was in response to a direction sent on 25th June by the Tribunal asking for specification of how the sum claimed is made up and also referred to a large list of authorities including a number of text books and cases that the Applicant wished to refer to.

6. The Written submission indicated that the Applicant was now seeking to claim the larger sum of £ 13,120 as Ms McAtier explained that although this represented the sum of £10,120 which was 80% of the rent paid during the time of the lease, if this was successful then Housing Benefit would have to be repaid so her client was seeking to recover both the sums paid in rent by them and the sums paid via housing benefit. The Respondent did not object to this amendment of the claim to remove one crave, and the Tribunal having considered the submission agreed that if the Applicant was successful in her claim in whole or in part, whether she had to repay housing benefit was an issue for them and the Council issuing the benefit, and not a matter for the Tribunal.
7. The Tribunal clarified with the Applicant's solicitor that any reference to a claim for unlawful eviction which had had been in the original application is not being relied on and has been withdrawn.
8. After the Applicant produced a substantial list and copy of authorities that she was seeking to rely on the Hearing was then adjourned to allow the Respondent's solicitor to consider these new productions and to take her client's instructions to the late lodging. On returning Ms Hill confirmed she wished a postponement of the hearing to have time to consider the new submissions and authorities and to allow all the evidence to be taken on the same day as it was apparent that as this was now mid -afternoon it would not be likely all the evidence taking would be completed today. Ms McAtier for that applicant agreed with the postponement. Mrs Treherne, however, objected herself to the new submission being allowed at all in view of the late notice. The Tribunal adjourned to consider these further motions and on return agreed that it would be in the interests of all parties and in compliance with the overriding objective, which is to deal with the proceedings justly, to postpone the Hearing to a date where the whole day would be set aside to hear the evidence from the Applicant, Mrs Parker and Mr Watt for the Respondent. Noted that the Applicant was now unlikely to lead other witnesses but did want to lodge affidavit evidence from 3 other witnesses.
9. The Tribunal considered that the written submission should not be accepted on that date in light of the late notice but as the hearing was being continued to another date ordered the Applicant to submit a written submission which should include reference to all the authorities and documents that she wishes to rely on.
10. The Respondent's solicitor then invited the Tribunal to make an award of expenses for today's hearing against the applicant and in their favour, as she submitted the further delay is being caused by the introduction of the written

submission and long list of authorities today. The Applicant's solicitor acknowledged the submission was made out of time in terms of the Tribunal's rules which calls for any documents that the parties wish to rely on being lodged on at least 7 days before the Hearing, and confirmed that she had no valid excuse other than she was prompted to do this in response to the Tribunal's direction, but submitted that expenses can only be awarded if the party against whom they are to be awarded has through unreasonable behaviour in the conduct of the case has put the other party to unnecessary or unreasonable expense. Ms McAtier's submission was that making this submission was not in the realm of unreasonable behaviour. She also submitted that she did require to rely on all the authorities. At this point the fire alarm sounded and all parties, witnesses, observers and the Tribunal Members had to evacuate the building for approximately an hour.

11. The hearing was then adjourned to 13th September 2019 at Glasgow Tribunal Centre and recommenced at 10am on that date, where the parties were all present along with their solicitors. Both the Applicant and Respondent had lodged prior to the adjourned hearing further written submissions and in the Applicant's case a list of authorities.
12. The Applicant had also lodged an affidavit from her sister Ms Susan Clinton dated 28th June 2019 and letters from Environmental Health at East Ayrshire Council.
13. The Tribunal had the following papers before it:-

- The Application
- Written submissions from the Applicant
- Written submissions from the Respondent
- Record
- Joint Minute of admissions
- Inventory of Productions from Applicant
- Inventory of Productions from Respondent
- List of Witnesses for Applicant
- List of Witnesses for the Respondent
- Affidavit from Susan Clinton
- Letters from Leigh Richardson of Environmental Health East Ayrshire Council dated 7th September 2019 addressed to the Housing and Property Tribunal.
- List of Authorities the Applicant is relying on.

The Claim

14 The Applicant claim is for damages for breach of contract and breach of the Respondent's statutory obligation relating to the uninhabitable condition of the property. The Applicant submit that it is a long established principal of common law that breach of contract can open an aggrieved party to pursue a claim of damages in

respect of any loss incurred as a result of said breach on taking possession of the Property. It is submitted that the Property was not fit for purpose. The tenancy agreement is a mutual contract. The Applicant had effectively paid to reside in a property which was not fit for purpose; the Respondent had failed to fulfil their obligations under the contract. On the basis that restitution is no longer possible the Applicant seek to recover their losses by way of a claim for damages for breach of contract and breach of the respondent's statutory obligations.
The Applicant then mention Sheriff Jamieson's judgement in Perker Inkersall Investments limited 2018 SCDUM66 as authority for the position that the Tribunal has jurisdiction to grant damages for breach of contract arising out of a lease or tenancy.
Finally the Applicant claim to "seek to exercise their right to pursue a claim for damages for breach of contract and breach of statutory repair obligation. Their claim arises from the Short Assured Tenancy contract between the Applicant and the Respondent.

15 Quantum

The Applicant aver that the Property fell below the repairing standard for the whole duration of the tenancy. This being the case they aver that the Respondent is in breach of their contractual obligations under the Tenancy Agreement as well as S13 and 14 of the Housing Scotland Act 2006. The Applicant claim for damages is brought under two main heads:-

1. Damages in the form of what amounts to a partial refund of rent paid and
2. Inconvenience/ loss of amenity

They go on to elaborate that the Applicant have referred to a notional abatement of rent as a comparator to assist in guiding the Tribunal on what would be an appropriate level of damages. It is the Applicant's position is that they did not have full use of the property due to the continuing repairing issues. If this were a matter of abatement the Applicant submits that they would have been entitled a reduction of 80 % of the rent. The Applicant therefore submits that they are entitled to look to recover 80% of the rent paid by them which amounts to £10,120.
16 For their additional claim of loss and inconvenience the Applicant submits that "while the courts have cautioned that such awards should be modest the Applicant in the present case have suffered greater loss of amenity and inconvenience than any party in the above cases (cases referred to were included in the Applicant's list of authorities and some are referred to below) *The have effectively lost the use and enjoyment of their home as a result of the extensive issues within the property. They have endured having to continuously report repairing issues and consistently chase for updates as to when the repairs would be dealt with. They have required to enlist the assistance of environmental health and the local authority due to them being*

helpless in having the repairs actioned at their own request. In addition both of the Applicant suffer from a number of ailments which have been exacerbated by the stress and anxiety suffered as a result of the condition of the property. Refer the Tribunal to documents 15 of the Applicant's Inventory of Productions. Combining loss of amenity and inconvenience the sum of £3000 is reasonably claimed.

17 The Respondent's position is set out in their written submissions:-

1. In response to the written submissions lodged by the Applicant the submissions reference a number of authorities including Renfrew District Council v Gray 1987. It is submitted that much of this case law predates the Housing (Scotland) Act 2006 which brought about the repairing standard and provided a clear statutory remedy for breach of the repairing standard. It is on the basis of the property failing to meet the repairing standard that the Applicant is seeking a remedy then the said 2006 Act provides the remedy not the common law referred to. It is submitted that this should have been the basis for any claim, given that otherwise we would be in a position where one could choose between the common law remedies or those afforded by legislation which it is submitted is not the intent of the 2006 Act.
It is further submitted that it is an exaggeration to suggest that on taking possession for the property it was not fit for purpose. It is not stated on which basis this conclusion has been reached and so the Applicant are called upon to specify the basis of this statement. The first viewing of the property for the Applicant was in April 2016 and at this time no comments were made as to the condition of the property. The Applicant moved in to the property in mid May and thereafter the issues were noticed for the first time.

Jurisdiction of the claim is not disputed.

2. It is not disputed that there were repairing issues within the property and it is not disputed that these issues were reported to the letting agents. However, the Respondent's position is that all complaints regarding repairing issues were dealt with appropriately and timeously during the tenancy.

3. It is submitted repairs were effected timeously to the best of the ability of the Respondent and it is further submitted that the Respondent complied with their contractual obligations as well as those imposed by the 2006 Act.
It is submitted that the Applicant are fully aware of their legal rights in relation to their tenancy agreement and having also taken legal advice and advice from environmental health it is submitted that they would have been aware of the remedies of withholding rent or claiming an abatement as well as applying for a Repairing Standard Enforcement Order (RSEO) which could have entitled them to a rent penalty notice. It is submitted that making this application after they have vacated the property following two years of uninterrupted occupancy and after all the

remedial works the intention of this claim is simply one of financial gain. The fact the Applicant paid all of their rent in full and on time and occupied the property for two years despite now claiming it was in a squalid condition is a clear exaggeration and entirely denied by the Respondent.

It is submitted the 2006 Act supersedes the archaic common law authorities provided by the Applicant's agent. The Act would not encourage rogue landlords in this way as the local authority can also make an application for an RSEO which they did not do in this case. The fact the Local Authority took no enforcement action against the Respondent would also serve to highlight the issues complained of by the Applicant were not as serious in their nature as the Applicant are suggesting. The Applicant over the course of their short tenancy benefitted from new roof tiling, a new bathroom, a new boiler, new windows, a new garage roof, a new oven, a new lock on the back door all at considerable expense to the Respondent. The Respondent acted reasonably to effect repairs as soon as practicable and complied with their contractual and legislative liabilities to the best of their abilities.

The Respondent believes the Applicant are serial complainers who have failed to take any appropriate remedies under the 2006 Act or by withholding rent.

The Hearing

18. Ms McAtier advised that the only witness for the Applicant would be the Mrs Parker herself, although they would be referring and relying on the affidavit from Ms Clinton, and the letter and correspondence from Ms Richardson at environmental health.

19. It was agreed that the Applicant would address each issue set out in the written submissions for which she was claiming the Respondent had breached the terms of the Short Assured Tenancy.

20. The issues which the Applicant claimed had occurred in the Property and which led to a breach of the obligations in the tenancy agreement and which in her view led to the Property not meeting the tolerable standard are:-

- **Black mould being present in the Property**
- **Gas Fire in the Property self igniting**
- **Back door of the Property failing to close and remain shut**
- **Issues with the toilet and shower not working**
- **All windows in the Property not being draught proof and being unable to open properly**
- **No ventilation in the Bathroom**
- **Live wires exposed in the kitchen and faulty wiring in the bedroom**
- **Garage roof leaking**

The Tribunal then went on to hear evidence from the Applicant and the Respondent's witness Mr Watt about each of these issues.

20.1 Black mould.

Mrs Parker confirmed that she only had a short viewing of the Property before she and her husband took entry, and immediately saw that the paper was bubbled and wet and it came off in her hands with mould showing underneath. She e-mailed the letting agents Rent Locally on 21st May, advising of the wet wall and black spores which she advised in the e-mail could cause aspergillus to people with low immunity levels which Barry (Mr Parker) has due to his cancer. In her e-mail of 21st May Mrs Parker advised that they would "see that the paper is renewed once that the damp is sorted out." Mrs Parker also mentions that the middle of the houses roof ridging is completely gone and the slates from it are not fixed to the roof.
The Applicant in their written submission confirm that they took entry on 25th May but the repair and decorative works to the wall were not resolved until June/July. This is agreed by the Respondent who in their written response confirm that repair works were carried out within 4 weeks and they state that they believe the mould and dampness present at the beginning of the tenancy were the result of faulty roof tiling and lead work. Mr Watt in his evidence admitted that "the Property was relatively tired when we got it. It is our job to bring the Property up to standard before we let". He went on to confirm that we put our own decorators before she moved in and was no issue brought to our attention. We sent out a contractor who said it was roof works that were needed.

The Respondent have lodged a copy of an invoice from Andrew Clarkson Roofing dated 4th July 2016 describing the following works having been carried out:-

Renew broken roof tiles
Cement verge
Cement point ridge tiles
Re dress lead to chimney stack
Cement point chimney stack
Clean gutters

In addition an invoice for redecorating was lodged dated 29th June 2016 for 2 days at the Property wallpapering bedroom and living room plus kitchen celling repair.
The parties then both agreed that no further complaint was made about mould or dampness until November 2017, when Mrs Parker described being at a funeral with her husband after which they bought a picture which they then tried to hang on a wall replacing another picture which was already there. On moving the existing picture Mrs Parker advised they found lot of black mould and reported it to the letting agent who said they would look at it.

She then contacted the local authority's environmental health department on or around 13th November 2017, and that Leigh Richardson inspected the Property on 24th November 2017 where she found, (according to Ms Richardson's letter of 7th September 2019);-

There was no dampness noted and it was thought the black powder on the wall was caused by condensation only.
Some windows were not well sealed and therefore rooms not wind and watertight, large gap that will require extensively sealed with thicker than average sealant tape.
Electrical cable in kitchen not covered
No extractor or window in bathroom
The lighting should be checked as bedroom light keeps coming on erroneously

Mrs Parker advised Mr Watt visited in December maybe on the 3rd and saw the mould on the upper wall. Mrs Parker advised she and her husband found the stench dreadful and even visited their doctors to check if their spit was affected by the mould. She advised it was okay.
Mrs Parker advised she felt they had to contact environmental health services to get some response and that she had asked repeatedly for the landlords address to contact them directly but was not given this. She then asked if the letting agent would pass a recorded delivery on to the landlords but they confirmed that they could deal with all the repairs. Mrs Parker confirmed that no further works were done and that environmental health eventually wrote to the landlords advising that the house was below the tolerable standard and that she had no alternative but to move out. Mrs Parker advised that she was told of 2 possible houses she could look at but one she could not find and the other, the owner withdrew the offer to let. It is Mrs Parker's view and this is confirmed in the Applicant written submissions that the mould must have recurred and have been present throughout the tenancy. Mrs Parker referred to issues with the roof but in the Applicant's written submissions reference is made to the "initial repair works having failed to identify the cause of the mould and prevent the same from developing."

Mr Watt advised that the recurrence of the mould which he confirmed himself was quite severe, was not related to the first issue. He advised it had been a bad winter the gable end of the property was exposed and the cavity wall insulation was faulty. He stated that water penetrated the wall causing damage and water ingress and confirmed that the company that there was a guarantee for the cavity wall insulation this was called upon and the company that issued it replaced the cavity wall insulation. He admitted the weather delayed this and that they (letting agents were quite busy but it was done as quickly as we could do it. He also confirmed that a property had been offered to Mr and Mrs Parker but it was withdrawn by the landlord, potentially after statements made by Mrs Parker about knowing her rights.

20.2 **Gas fire**

Mrs Parker advised that her issue with the gas fire was first identified on a cold day in July 2016 when she put it on. She went out it was not on, but later she saw it clicking and sparking and she said she phoned the letting agent who said they would send an electrician. She also advised neighbours saw it sparking and clicking. It is agreed in the joint minute of admissions that the applicant reported the gas fire self igniting to the letting agent. The Applicant then contacted an emergency gas engineer to attend the property. The applicant have lodged as part of their productions a report from SGN confirming there is a warning on the fire and Mrs Parker advised she was told that she should advised her landlords and letting agents immediately of the problem. The Applicant then contacted the letting agents to notify of the issue. Mrs Parker advised it was ten days later a contractor attended and found no issue though he thought it might have something to do with the boiler. She advised that despite this it kept coming on and that her granddaughter videoed it. In addition her sister saw this and has provided an affidavit to this effect. She also advised that to her knowledge a spark click and smell was very worrying and she thought there could have been an explosion and that terrified her.
She advised she reported it again and again the letting agent sent someone out but no fault was found. Mrs Parker was not clear about dates at this point and thought it was around September/October. She advised the office had again told her gas engineer found nothing wrong but on another day the tenants went out and when they came back the fire was on and the house like a sauna.
Eventually she advised another engineer came maybe a week later in November 2016 and said he found a fault and he capped it off because he couldn't get a part.

Mr Watt advised in his evidence that he knew there had been a complaint to the office and that they had sent out a gas engineer who could not find a fault. He advised that the engineer thought it was the back boiler coming on but that on the third visit he capped it off because it was not required as the central heating had been put in and the fire was not needed.

20.3 Back Door

Mrs Parker advised that the back door never shut properly in that it would blow open and would bang. She did however confirm that it would shut and stay shut if locked. She confirmed that to her knowledge the closing mechanism was never repaired. In her written submission it is claimed the door would not shut or lock but this is not supported by her verbal testimony, where she confirmed that "the door kept blowing open and open, it was never repaired and the door would not remain shut when closed, would have to lock it". Mrs Parker claimed it was an inconvenience if Mr Parker was out the back and she was in a bath when he wanted to come in and the

door was locked. She was also concerned about someone coming into the house if the door would not stay shut.
The Applicant have lodged e-mails showing they raised this issue with the letting agents several times on 9th October, 23rd October, March 2017 and told Mr Watt on his visit in May 2017 and again mentioning it in November 2017.

Mr Watt merely stated that in his view this was not a major issue because the door could be locked therefore each party just had to have a key. The Respondent in their written response advise that this was not a repairing issue at all, that the door could be blown open during stormy weather and that they required to use a deadbolt fitting to ensure adequate locking which they were shown how to do on 28th October 2016 by a contractor. They further submit that Mr Watt instructed the fitting of a new lock purely for the benefit of the Applicant and that this was only a minor operational issue and that there was no breach of the tenancy agreement.

20.4 Toilet

On 9th January 2017 the Applicant advised that they reported to the letting agent that the toilet flush was not working properly and they had to use a pail of water to flush the toilet and that they had to use this for some time. They further submit that no repair was actioned until 13th January 2017 after they contacted the letting agent on 12th January to inform them that water was also coming through the ceiling from the bath. It is agreed between the parties that the contractor did not find any issue with the toilet at that time. The Applicant contacted the letting agent again on 31st January to advise that there remained an issue. On 20th February the Applicant confirm they required to contact the letting agent arranged for a contractor to attend at the property on 23rd February. Mrs Parker advised that the contractor came with a part for the toilet but it did not fit on 23rd February. She further advised that the seal on the bath burst and water came down as well as the shower was not working. The Respondent admit that the Applicant did contact them about the shower and that the contractor attended on 23rd February and in their written submissions acknowledge that due to the reported issues with the shower it was decided the most efficient thing to do would be to replace everything at the one time. “Parts were ordered and all repairs were carried out at the same time on 8th March so that the disruption would be minimal. The Respondent acknowledge that, on the advice of their contractor there were no issues until 23rd February, and the issues were resolved by 8th March.”

20.5 Windows

The Applicant submit that they first raised the issue of the windows not being draught proof on 21st May 2016 and that on 2nd September a new hinge tilt window was installed in the property along with new handles. The Applicant avers that this did not

address the significant draughts or the fact some windows would not open. Mrs Parker spoke of blinds blowing around throughout the house. It is agreed In terms of the parties joint minute that “on or around April 2017 a new central heating system was installed in the property by Warmer Homes Scotland. That Warmer Homes Scotland also attempted to carry out some draught proofing works around the windows and doors within the property but could not complete the same due to the age and lack of seals around them.”
It is also noted that Ms Leigh Richardson reports in her letter of 7th September 2019 that when she inspected the property on 15th November 2017 she noted that “some windows not well sealed and therefore not wind or watertight, large gap that will require extensively sealed with thicker than average sealant tape”.
Mrs Parker confirmed that she raised the issue of draughts several times to the letting agent, including to Mr David Watt on his visit and inspection on 16th May. Mrs Parker sent further e-mails regarding the draughts, in particular she sent an e-mail on 3rd October 2017 asking again for the landlords address to raise issues directly with the landlord and mentioning:-

“1. The windows that would not open. They some of them only open 6 inches some not at all. They were not meeting the safety regulations they were letting in wind and it was very draughty they still do today 3-10-17. 1 new style safety window was installed so that we had a safe escape root onto the porch balcony”
The letter also mentions the gas fire manually lighting itself, the back door and the garage roof.

Mrs Parker also confirmed in her evidence that the new central heating worked well and had reduced her heating bills.

Mrs Parker confirmed that Mr Watt’s son John Watt attended in December 2017 and said that one or two of the hinges were preventing the windows opening and he replaced some hinges and sealed them up. The Respondent in their written submissions confirm that Mr J Watt upgraded the seals in December 2017 but acknowledge that complete draught proofing could not be carried out given the age of the windows. Given the information the Respondent ordered new windows for the property which they allege were fitted in January 2018.

Mrs Parker alleged that no windows were replaced in January 2018.

In a letter dated 22nd March Ms Richardson of Environmental Health writes to the owner of the property that “Furthermore although not an element of the Tolerable Standard privately rented property must meet the repairing standard. There is a repair issue in this standard the windows are not wind and water tight, large gaps are present in each window with the exception of the box room window although not an

element of the Tolerable Standard this presents a repairs requirement.", which is item no.8.1 of the Applicant inventory of productions.

20.6 Electrical items

Mrs Parker advised that when the new central heating was put into the property in or around February /April 2017 two units were moved in the kitchen and this left 2 big cables exposed. She advised her husband tested them and they were found to be live cables. She then advised she asked for an electrician to come and deal with these and that the gas engineers taped the wires into the wall as best they could. She then confirmed that despite further complaints to the letting agent about the live cables being left out nothing was done until December 2017. Mrs Parker also referred to comments made by the contractor replacing the oven that the wires were live and advised that he taped them off at the at time and taped them to the wall.

The Respondent agree in their submission that an area of kitchen units had to be moved to accommodate the new boiler however although they admit there were left exposed for some time they deny they were live. They also agree that David Watt attended to the boxing of the wires in or around December 2017 but again submit this was just a tidying up exercise and that the wires were not live. Mr Watt confirmed that in a previous life he was an electrician and that he boxed the wires in on or around December 2017 at the same time attending to an issue with the bedroom lights coming on and off. He also confirmed that "we had Martin one of our chaps at the property who made it safe".

The Respondent in item D of their inventory of Productions have lodged an invoice from Martin at Home Solutions dated 15th September 2017 which narrates work done at 41 Sorn Road to "supply and fit electric over. Old oven disposed 2 live wires made safe beside boiler".

20.7 The Garage Roof

The Applicant avers that the garage roof leaked from the commencement of the lease until December 2017 when some new felt was placed on the roof by Mr John Watt. They refer to the tenancy agreement which includes all outbuildings and aver that the same repairing obligations apply to the garage as to the house. They refer to several complaints made by e-mail dated December 2016, April 2017, August, 11th September 2017 and 3rd October 2017. In their inventory of productions the Applicant have lodged a copy of their e-mail dated 11th September 2017 (production 2.3) in which they state "the garage ceiling was still leaking like a sieve reported in July 2016 and all times when Katie did house visit and also to Mr Watt" they go on to mention damage to Barry's collection of cars and aeroplanes and that the boxes they were stored in are damaged. The Applicant then go on to ask for the landlords

address to try and claim on their insurance (as they cannot get house insurance as the back door mechanism does not lock sufficiently). The Applicant go on to say that when they try to report this issue (with the garage) “I was told today that the garage was not the landlord’s responsibility to prepare the roof I would like written confirmation please.”

In a further e-mail dated 3rd October 2016 (item 2.7 of the Applicant inventory of productions) the garage roof is mentioned again – “garage roof was reported to the office on 27th July 2017 as it was leaking like a sieve it is not hellish water pouring through the whole of the roof Katia has seen this herself on last visit 8th Sept 2017 – have phoned your office and asked that it be repaired response was “it is not our landlords responsibility to repair that roof and if anything we had stored in the garage was damaged it was our fault - as you are not allowed to store your items in the garage – you Shirley Ann said we could store in the loft as the items were a one off collectables the boxes, e.g. aeroplanes - di cast, came in, were only cardboard I said were not allowed to use in our lease you said it would be okay to do so – I asked about claiming for the damaged boxes from our landlords insurance as we cannot get household insurance for our property as our back door was faulty …”

Mrs Parker in her oral evidence said they were told where we can store their stuff by Shirley Ann. She also stated that when they complained in July 2016 that water was pouring through the roof of the garage she was told it was not the landlord’s responsibility. She advised that she kept complaining about it and that Mr Watt offered to do this himself and in December 2017 Barry agreed he would do it if Mr Watt supplied or paid for the materials. She advised that lots of stuff including the boxes for Barry’s valuable cars and aeroplanes were damaged. She went on to explain we didn’t feel we could go for a Repairing Standard Order because we didn’t have full evidence to bring to you (the Tribunal). Mrs Parker also stated at this point that it was a “lovely house and lovely location if it had been sorted out that would have been perfect for the rest of our life”.

The Respondent in their written submissions submit “that the tenants were made aware that the garage looked fine but that it was in a bad state of repair. This was reiterated on several occasions. They were advised not to store perishable items and were recommended to use the loft space for this kind of storage. The Applicant were made aware that the intention of the Respondent was to dismantle the garage and replace it with a smaller wooden hut however the Applicant said it would be good for Mr Parker to have somewhere to potter and they would be happy to do any repairs themselves. There appeared to be a mutual understanding in this respect so no repair works were carried out to the garage.
Mr Watt carried out repairs in December 2017 which he paid for personally to re-felt the roof for the benefit of the tenants. It is submitted that although the garage was in a state of disrepair no action was taken at the request of the tenants, who were fully

aware of the condition of the garage and yet still placed perishable items in the garage in full knowledge damage could be caused. There has been no specification of loss incurred in this regard. It is argued that the letting agent acted reasonably in that the replacement of the building was not carried out at the request of the tenants and despite this the letting agent went above and beyond to personally repair the roof for the benefit of the tenants."

Mr Watt confirmed in his oral evidence that he knew from the outset that the garage was a problem and that he wanted to do away with it but that Mr Parker had a motorbike and he wanted to tinker with it. He agreed that he came to an arrangement with the Applicant that if they repaired it he would pay for the costs but in the end because there was heavy water penetration he got his son to attend to it who was a joiner and he re-felted it in December 2017.

FACTS AGREED

1. The Applicant entered into a Short Assured Tenancy with the Respondent which commenced on 20th May 2016.
2. The Tenancy ended on 1st May 2018
3. The rent agreed was £550 and was paid in full by the Applicant for the duration of the tenancy
4. Shortly after the commencement of the tenancy the Applicant informed the Respondent's letting agent of black mould within the property as well as some other issues
5. Repair works to the roof and redecoration works were carried out to the Property in June/July 2016.
6. The Applicant next complained of black mould in November 2017and reported this to Environmental Health.
7. During the course of the tenancy the Applicant raised various repairing issues with the Respondent's letting agent. Namely:-
    a. Complaint about gas fire self- igniting on 4th July 2016
    b. Garage roof leaking on 15th July 2016
    c. From 9th October 2016 that the back door of the property was blowing open
    d. Toilet not working and on 20th February 2017 that the shower was not working and toilet still not working

e. Complaint to Mr Watt the Director of the letting agent when he attended the property on 16th May 2017, that the gas fire was still igniting; the back door still blowing open; that the windows were draughty throughout, that there were live wires exposed in kitchen. Mr Watt advised the repairs would be instructed .

f. On or around 24th October the Applicants wrote to the Respondent letting Agents with a list of outstanding repairs .

g. On 12th November a further list of repairs was sent to the Letting Agent

8. On or around 13th November the Applicant's contacted the Local Authority Environmental Health to request assistance.

9. Environmental Health visited the property on 24th November 2017 and found the following defects:-

    a. Black powder

    b. Windows not sealed not wind and watertight

    c. Electrical cable in kitchen not covered

    d. No extractor in bathroom

    e. Lighting coming on and off in bedroom

10. Mr Watt attended the property again on 3rd December 2017 and again on 19th December 2017 and on the latter date advised he was an electrician and was there to carry out electrical repair works.

11. That the wire was sealed off in the kitchen on September 2017 when the oven was replaced.

12. That there was an intermittent fault with the gas fire and it was shut off in October 2016.

13. That the windows were never fully wind and watertight.

14. That the garage roof was in a state of disrepair but the Applicant were made aware of this at the start of the tenancy.

15. That the repairs to the garage roof took place on January 2018.

16. That the back door did not shut properly unless locked.

17. That 2 live wires in the kitchen were exposed around February-April 2017and not properly made safe until September 2017.

18. The Respondent's Letting Agents arranged for a surveyor to attend at the property on 1st February 2018 and the letting agent advised Environmental

Health on 12th February they were waiting on a quotation for the works for dampness and mould.

19. Environmental Health found the Property failed the tolerable standard on March 2018.

20. The tenancy ended on 1st May when the tenants moved out into another property they had found.

REASONS

The Respondent has contractual obligations to the Applicant as regards the repair of the property which are set out in Clause 17 of the Tenancy Agreement and are applicable for the duration of the tenancy.

Clause 17 sets out the obligations for Repairs and Maintenance:-

17.1 The Repairing Standard
The landlord must ensure that the accommodation meets the Repairing Standard at the start of the tenancy and at all times during the tenancy this duty applies only when the Tenant informs the Landlord of work required or the Landlord becomes aware of it in some other way (inspection visits).
The Tenant accepts the subjects as complying with the Repairing Standard at the start date. The Repairing Standard does not cover work for which you as the Tenant are responsible due to your duty to use the house in a proper manner nor does it cover the repair or maintenance of anything that you are entitled to remove from the house. If you believe the landlord has failed to ensure that the house meets the repairing standard at all times during the tenancy you have the right to apply to the Private Rented Housing Panel (PRHP) the PRHP may reject the application consider whether the case can be resolved by us or refer your application to a Private Rented Housing Committee for consideration. The PRHC has power to require a Landlord to carry out work necessary to meet the Repairing Standard.

17.2 Habitability

The Landlord agrees throughout the tenancy to maintain the accommodation in a wind and watertight condition and in all other respects reasonably fit for human habitation. The Tenant must give the Landlord IMMEDIATE NOTICE of any damage to the fabric of the Property and or its contents where provided.

17.3 Structure and Exterior

The Landlord undertakes to keep in repair the structure and exterior of the accommodation including the following:-

- Drains, gutters and external pipes

- Roof
- Outside walls, doors, window sills, window catches, sash cords and window frames
- Internal walls, floors ceilings, doors, door frames, internal stair cases and landings
- Chimneys, chimney stacks and flues, (including sweeping)
- Pathways steps or other means of access
- Plaster works
- Boundary walls and fences

17.7 Installations

The Landlord will keep in repair and in proper working order the installations in the accommodation for the supply of water, gas, electricity, sanitation, space heating and water heating (with the exception of those installed by the tenant or which the Tenant is entitled to remove) including the following:

- Basins, sinks, baths, toilets and showers,
- Gas or electric fires and central heating systems
- Electrical wiring
- Door entry systems
- Cookers
- Extractor fans
- Smoke alarms

17.8 Defective Fixtures and Fittings

The Tenant must give the Landlord IMMEDIATE NOTICE in writing of any defective fixtures and fittings within the Property. The landlord will repair or replace any of the fixtures and fittings or furnishings supplied by the landlord in the accommodation which become defective through normal use and will do so within a reasonable period of time. Nothing contained in this agreement makes the Landlord responsible for repairing damage caused wilfully or negligently by the Tenant anyone living with the Tenant or any visitor to the Property. Should the landlord be required to carry out the work the Tenant will be liable for the cost of the repair. The only exception to this is damage caused by fair wear and tear through normal use.

17.9 Repair Timetable

The Tenant undertakes to immediately notify the Landlord (or any officer agent or employee specified by the landlord for that purpose) of the need for any repair or emergency. The landlord undertakes to carry out necessary repairs within a reasonable period of time after having been notified of the need to do so.

17.9.1 Payment for Repairs
The Tenant will be liable for the cost of repairs where the need for them is attributable to his fault or negligence that of any person residing with him or any guest of his such costs must be paid by the tenant within 7 days and if not so paid the Landlord may deduct such costs at the termination of the tenancy from the deposit under Clause 7.
The Tenant accepts that when damage has been caused to the property or mechanical breakdown outwith the Landlord's control there will be no reduction in rent. The landlord may however choose at his own discretion to compensate the tenant is he sees fit.

Mould and Dampness

The parties both agreed that on 21st May 2016 mould was found on the Property. Contractors were engaged by the Respondent's letting agent and they indicated that the mould was caused by dampness that had occurred due to water ingress from the roof. Roof works were done as per the invoice from Andrew Clarkson Roofing dated 4th July 2016. The work carried out included lead round chimney, work on ridge tiles, renewing broken roof tiles, cement in verge and pointing chimney and clearing gutters. The fact that the property was not wind and water tight by evidence of the issues that required to be repaired at the outset of the tenancy is a breach of Clause 17.1, 17.2 and 17.3 of the Tenancy Agreement. In this instance the Tribunal felt that the house should have met the repairing standard at the outset and it patently did not and therefore it was not appropriate that the Respondent be given time to repair this. In terms of their own Agreement they state that the
"***The landlord must ensure that the accommodation meets the Repairing Standard at the start of the tenancy*** *and at all times during the tenancy this duty applies only when the Tenant informs the Landlord of work required or the Landlord becomes aware of it in some other way (inspection visit*).
The Tribunal interprets the duty to report repairs as only relevant to the second part of that sentence as otherwise the Agreement would be in breach of the Repairing Standard as set out in the 2006 Act which cannot be contracted out of.

It was agreed that no further issue about mould or dampness was notified until November 2017. The Respondent's submissions are that this was caused by a different cause namely the failure of cavity wall insulation particularly on the gable wall. The Applicant in their written submission suggest the mould and dampness were present throughout the tenancy just not visible until they removed one picture from the living room wall. Respondent led evidence to show it was the failure of the cavity wall insulation which let water in and that they had successfully claimed the insulation company who agreed to replace it. This evidence is supported by that of the Environment Health inspector who notes in a letter that the cavity wall insulation was being replaced.

The Applicant led no evidence from a surveyor or otherwise to suggest the mould or dampness was present throughout the tenancy or that the repair effected to the roof had not been effective and in fact was causing the further mould and dampness found in November 2017 onwards.

The Tribunal therefore accepted that in letting out a Property where there was immediate evidence of mould and dampness with a roof that was effectively leaking water was a breach of contract namely clauses 17.1,17.2 and 17.3. The Tribunal notes and accepts the repairs were carried out and the inconvenience lasted approximately 4 weeks, which is also accepted by the respondents in paragraph 3.2 of their written submissions.

Mould was again reported on November 2107 and despite contractors being engaged the Applicant had to stay in the property and eventually found their own alternative accommodation in May 2018. The Tribunal notes that the Respondent need to have time to effect repairs this time but considers that by March 2108 the Respondent had ample notice of the claim from November 2017 and in particular knowledge of the dampness from January 2018. This is supported by letters and visits from Environment Health and that by March 2018 the Property was not meeting the tolerable standard so agrees that at that point the Respondent were in breach of their contractual and statutory duties for a further 2 months.

With regard to the Applicant claim that the Property was not wind and watertight because of draughts coming from the windows, the Applicant, in their written submissions, confirm that around April 2017 Warmer Homes Scotland attended the Property to install a new central hearing system and also “attempted to carry out some draught proofing works”. Warmer Homes advise that they could not complete the draught proofing of the windows and doors due to the age of same and lack of property seals around them. On 24th April the Applicant contacted the letting agents to let them know the outcome of Warmer Homes Attendance. They advised they were still experiencing significant draughts within the property and that the property was not wind or water tight. Mrs Parker in her evidence confirmed that some of the windows didn’t open but that there was a draught in the bedroom, living room and bathroom and that when it was bad the blinds would be blown about. She advised that she told Mr Watt about this and the other matters in April, that she wrote in October to Rent Locally and that he advised he would instruct contractors but none were instructed. Mrs Parker also finally mentioned that Environmental Health Services commented on this in their letters. Mrs Parker confirmed that Mr John Watt did come out to the property and checked one or two of the windows and said the hinges prevented it opening. He replaced the hinges and sealed it up but that still did not work. Mrs Parker claims that the windows were never replaced and that they were the same ones when they left the Property in May 2018. Mr Watt stated that the seals on the windows were replaced in 2016. He then sent his son down when Mrs Parker sent a video of curtains blowing around and he replaced all the seals and

ordered new mechanisms which arrived and were fitted in January 2018. Mr Watt was satisfied this had resolved the issues. The Applicant has provided a letter from Environmental Health Services at East Ayrshire Council dated 22nd March 2018 which as well as confirming the house fails to meet the Tolerable Standard due to rising dampness which is substantial. The letter also goes on to state:-

"Furthermore although not an element of the Tolerable Standard a privately rented property must meet the Repairing Standard. There is a repair issue in this standard the windows are not wind and water tight, large gaps are present in each window with the exception of the box room window although not an element of the Tolerable Standard this presents a repairs requirement."

This same comment is made in another letter dated 4th April where the following comment is added "It was also noted that some windows were not well sealed and therefore rooms not wind and watertight, the large gaps around some of the windows would require extensively sealed with thicker than average sealant tape as a minimum to counteract the problem of the large gaps around the windows."

The Tribunal notes that the parties agree that the windows were draughty and that an attempt to repair this was not done until December/January 2018. Mr Watt advised that from January 2018 the repair was complete. This is contradicted by both Mrs Parker and Environmental Health Services and so the Tribunal accepts that the windows were not wind and water tight and that this was the case for the full duration of the tenancy and although the landlord should have had a reasonable time to repair them leaving it until December 2017 to assess and try and carry out a repair which was notified first in May 2016 and again in April 2017 and was not successful is clearly not sufficient. The Tribunal holds that this is a breach of clause 17.2 of the Tenancy agreement.

Gas Fire

The Back Door. It is noted that in their written submissions the Applicant claim the "back door was blowing open and would not lock" but Mrs Parker acknowledged that in fact the door did lock but she claimed it was an inconvenience that it had to be locked and that it did not stay shut if just closed because that meant if someone in the house went for a bath for instance, the other person would be locked outside. The Applicant confirm they first reported the issue of the back door blowing open on 9th October 2016, and again on 23rd October, March 2017, May 2017 and September and October 2017. The Applicant's e-mails in item 2 of their productions confirm their account of the number of complaints to be correct. Mr Watt stated in his evidence that the door always stayed shut when he was there and was able to be locked. He suggested that as it was able to be locked it was not really a problem**.** The Respondent alleged it was repaired but the Applicant denies this. The Tribunal accepts from this evidence that the back door did not shut properly in that if it was windy the door, if not locked, was likely to blow open, however it also accepts the

door could be locked and although that may have been an inconvenience at times it was not a security risk. The Tribunal accepts failure to repair this timeously is a breach of contract, namely Clause 17.8 of the tenancy agreement. This was not a serious issue but accepts it was an inconvenience and that this has lasted for the greater part of the tenancy.

The Toilet not flushing.

Mrs Parker confirmed that the toilet flush was not working and this was first reported on 9th January 2017. She advised a contractor came out on 12th January and found it to be working. She conceded when questioned that it was intermittent, but said they had to use a pail of water to flush the toilet. She complained again around 31st January and a contractor came out again in or around 23rd February and she alleges tried to fit a part which did not work. She confirmed that it was finally fixed when a new shower bath and toilet was fitted in March 2017. Mr Watt claimed that he sent a plumber to check the system and that it was not faulty, and that due to water overflowing from the bath which Mr Watt claimed was from overflowing the bath the landlords decided to replace the whole shower and bath. The Tribunal accepts the evidence of Mrs Parker that there was an issue with the toilet mechanism and that it was probably an intermittent issue. The Tribunal notes the Respondent did send a contractor who did not find any problem immediately however any issue with flushing a toilet and hygiene should be a priority and a delay of several days in sending a contractor to check this was not an acceptable time frame and would be breach of contract.

Electrical Issues

The parties agree that 2 wires were left exposed when kitchen units were removed when the central heating was being g replaced and a new boiler fitted. The parties were not agreed however that the wires were live. Mrs Parker confirmed her husband tested them and they appeared to be live. She requested an electrician attend and this did not happen until Mr Watt attended to boxing them in December 2017. Mrs Parker however remembers that the contractor sent to fit a new oven also mentioned the wires were live and this appears to be corroborated by the invoice Martin at Home Solutions has submitted to the respondents on 15th September 2017 confirming that he made 2 live wires safe. Mr Watt also confirmed that in his evidence saying that “we had Martin one of our chaps at the property who made it safe. I believe it was caused by the removal of units from an old water heater that was defunct. I put some sort of box on it”. The Tribunal finds that the Applicant version of the wires being live for a considerable period is credible and supported by the invoice and work carried out by Martin at Home Solutions as well as Mr Watt’s testimony. This fits with the explanation that Mr Watt was merely boxing the wires in in December when they had been taped off in September. However given they were left exposed and live from the date the central heating was installed until September

2017 the Tribunal finds this is a breach of the tenancy agreement and not a reasonable period in which to repair a potentially dangerous situation.

The Garage Roof

The Applicant allege the garage roof was leaking and faulty from the outset of the tenancy until December 2017, this is not really challenged by the Respondent but they do dispute that any repair was necessary averring that the Applicant did in fact accept that the garage was in disrepair and rather than have it replaced with a wooden hut they could use it but not store any perishables in it. There was also a claim that there was an agreement that if the tenants chose to repair it the letting agent would pay for this. The e-mails that the Applicant have lodged confirm the state of the garage roof, which does not appear to be in doubt, but the e-mails also confirm what the Respondent have averred, namely that the Applicant were warned not to use the garage for storage of perishables. The Tribunal finds some of the Applicant's evidence and e-mails difficult to follow but the Tribunal accepts that they did make several complaints about the garage roof and that this was not addressed until December 2017. However the Tribunal does accept as credible Mr Watt's evidence that it was the tenants who requested that the garage be left for them to use and does accept from both Mr Watt's evidence and Mrs Parker's evidence that the tenants were advised by Shirley Ann of Rent Locally to store perishables in the loft and accepts they were warned not to store them in the garage. The Applicant have not lodged a claim for damages for loss of any property, they have merely lodged a claim for damages based on rent abatement averring and damages based on inconvenience and loss of amenity.

The Tribunal finds that, the Respondent although they pointed out the issues with the garage, they did not alter or amend their written tenancy agreement and it does include outbuildings the definition of the Property The Respondent have however made it clear in their dealings with the tenants that they should not store perishables in the garage and the Applicant have despite their claim for damages and averments that property was destroyed not produced any evidence as to the value of any loss.

The Tribunal therefore finds that there is a technical breach of contract in that the Respondent did not repair the structure or exterior of the Garage Roof until December 2017 in compliance with the obligations set out in clause 17.3 of the Tenancy Agreement but that there were verbal warnings made about the condition of this part of the Property and finds that there is no material loss proven by the tenants in respect of damage to property stored in the garage.

Damages

The Respondent has contractual obligations as regards the repair of the Property which are set out in Clause 17 of the Tenancy Agreement above. The Applicant has an obligation to report the need for repairs promptly. The Landlord is not in breach of

the repairing obligations (apart from at the outset of the tenancy) until after the Landlord has had a reasonable period of time to carry out the repairs. The Tribunal has found that certain breach of contract has occurred as set out above.

The Applicant are seeking redress in the form of damages for breach of contract and for breach of the Repairing Standard. The Respondent claim that the Applicant's remedy for breach of the repairing standard lies solely by applying for a RSEO in terms of the 2006 Act. The Applicant acknowledges that that is one remedy but also submits that is not the only remedy. The Tribunal agrees. The Tribunal does not accept that were a RSEO was not sought or granted this displaces the right of an aggrieved party to pursue a claim for damages for breach of contract. It is an actual terms of the parties contract that the Property meets the repairing standard at the beginning of the tenancy and throughout the term of the tenancy. Clause 17.1. This makes it an actual contractual term and therefore if there is a breach of the term there is a right to claim damages. The tenancy agreement goes on to specify in detail various other obligations in relation to repair and maintenance which if not met could be the subject of a claim for damages.

The Applicant have lodged various authorities for this position which the Tribunal accepts and finds uncontroversial:-

Gloag and Henderson – "**Where specific enforcement of a contract is either incompetent or not demanded a party aggrieved by a breach is always entitled to damages nominal or substantial where it causes him loss or at least inconvenience. He may have other remedies**. He may be entitled to an exercise a right of retention whereby without ending the contract he may withhold performance of the obligations incumbent on him until the obligations to him are tendered or performed."

In Paton and Cameron page 91 "There is a general presumption that a lease is to be regarded as a whole, that material failure on the part of the landlord to give full possession to the tenant will give the tenant grounds for reducing the lease if restitution in intergrum is still possible **or failing reduction a claim of damages** while a minor failure will entitle the tenant to an abatement of rent.

If the landlord fails to a material extent to carry out repairs or improvements which he has undertaken the tenant may abandon the lease and depending on the circumstances also claim damages. Short of abandoning the lease the tenant may withhold rent if his loss exceeds rent withheld he may also claim damages but a tenant who has obtained an award of damages cannot also retain the rent in respect of them.

Walker page 74 says:- The subjects must reasonably correspond with the description in the lease or otherwise a claim for loss will lie as well as entitling the tenant to repudiate the lease…..**Where the rent has been paid beforehand or no**

possession has been given or the damage is greater than any amount of rent an action of damages is the only remedy."

These authorities all confirm that damages are one option that can be claimed if there is a breach of contract found in a lease. It is clear from the Authorities quoted that each remedy available to the tenant has different rules and remedies some may be mutually available some may not. The Tribunal therefore rejects the Respondent claim, that by not pursuing a RSEO in terms of the 2006 Act the Applicant is prevented from claiming damages for breach of contract.

The Tribunal does however note that the authorities when discussing claims for damages all agree that damages are **to compensate for loss** arising from the breach of contract. So without evidence of loss there will be no right to damages.

Angus McAllister in his book "Scottish Law on Leases" on Page 107 says "Damages may be claimed in a court action as compensation for any loss arising from breach of contract. **Measurement is the amount of loss so far as can be quantified. Damages can be claimed in addition to any other breach of contract remedy provided a loss has occurred as a result of the breach.**

The author goes on to give the example of breach of the landlord's repairing obligation causing dampness in Gunn v National Coal Board.

He goes on to describe other remedies including retention and confirms " that a tenant who has suffered loss as a result of the landlords breach may of course be entitled to damages and may claim these by raising an action against the landlord. Alternatively the tenant may simply withhold the rent and if sued by the landlord lodge a counterclaim for damages**.** He goes on to discuss abatement and states "Abatement can easily be confused with retention since **both are competent defences** to an action of a landlord to recover rent withheld by a tenant. However derive from different principles. Retention is in true sense a breach of contract remedy whereas abatement can be available whether or not the landlord is in breach. He goes on to say that abatement was seen at one point as a way of getting round the once held view that it was incompetent for a tenant who had retained rent to counterclaim for damages in the landlord's action. Nowadays the tenant may have the choice either of claiming damages or abatement. In cases where the landlord is not at fault a claim for abatement may be a tenant's only remedy."

Finally in Chapter 7 of "Residential Tenancies" by Peter Robson and Malcolm M Combe the authors describe in detail the various remedies a tenant could take against a landlord in relation to habitability of property and acknowledge that they derive from a number of quite different sources. "there are standards deriving from central government regulation as well as the local state. There are rights and obligations stemming from contract and delict. And the authors acknowledge that "which route the tenants and their advisers have chosen has depended on the

knowledge and experience of the personnel involved in the battle for habitable housing rather than any hierarchy of effectiveness." The authors then go on to explore each route separately but are clear that each is a valid and alternative route and that a statutory remedy does not remove the right to claim under common law or contract.

It has been agreed by both parties that the Applicant did not retain rent in an attempt to try and encourage the Respondent to carry out certain repairs. Nor can they claim abatement as they paid the rent in full. The Applicant are however trying to claim that the damages they believe they are entitled to, should be based on the "equivalent of a claim for abatement", and instead of averring actual loss are claiming that, as they allege the property was uninhabitable for most of the time, they are entitled to a general 80% reduction in rent without proving any specific head of loss. The Tribunal does not accept that this is a competent way of calculating loss. This is not supported by any of the cases or authorities they have quoted. As stated above, abatement can be used as a defence to a claim for payment of rent. It is an equitable remedy where the tenant loses the beneficial enjoyment of the property (for whatever reason). The cases however including Renfrew District Council v Gray all refer to it being used as a defence to a claim for payment of rent, not as a head of loss in a claim for damages after the tenant has fully paid the rent which is the position in this case. If the Applicant had wanted to claim abatement they required to do so while in the property by not paying the rent and then claiming abatement. Having not done so their remedy for any breach of contract lies in claiming damages for the loss they have incurred as a result of the breach. (Even if damages based on the equivalence of an abatement of rent was permissible, the Tribunal does not find as a matter of fact that the repairing issues amounted to the Property being in an uninhabitable condition for 80% of the duration of the tenancy).

The authorities, including all the cases the Applicant has lodged as evidence of quantum for their claim for inconvenience and loss of amenity, show that damages are based on loss that is proven, but that can include damages for inconvenience and loss of amenity. The Applicant has not averred any loss or damage to property, or any loss as a result of having to find alternative accommodation The Applicant mentions stress and distress caused by their constant need to complain and the various breach of contract that they have alleged. The Tribunal has found that the Respondent are in breach of certain repairing and maintenance obligations as set out above but notes that the medical evidence lodged by the Applicant does not in fact show any deterioration in health and the Applicant do not aver or claim any particular sum for this head of claim.

That leaves the Applicant claim for loss based on inconvenience and loss of amenity.

Quantum

The cases that the Applicant has lodged include

Christian v Aberdeen City Council 2001 - £2750 for about 3.5 years of damp conditions

Frankenburg v Dundee City Council 2004 - £500 for one year infrequent water ingress

The Applicant themselves acknowledge that the courts have not awarded large sums of money for insanitary living conditions.

Robson and Combe in Private Residential Tenancies also list a number of cases where damages for suffering for living in the misery of damp and unhygienic conditions are listed but also show the courts have not awarded large sums e.g.

Gunn v NCB 1982 - £300 for 10 months in conditions stemming from inadequately treated rising damp

McEachran v City of Glasgow DC 1988 - £1,950 for three years of dampness from water penetration through roof and gutters

Galloway v Glasgow City Council 2001 - £500 per annum for inconvenience over 5 years plus £250 for clothes carpets and furniture

Taking the above into account and considering that the property was not wind and watertight for over a year due to draughty windows; was damp and mouldy for at least 3 months leading to it failing the Tolerable Standard and being threatened with closure from the Council; that there was a failure to deal promptly with a live electric wire for several months and failure to respond timeously to claims of a faulty toilet even though no fault could be ascertained at first, and the back door although it could be locked was not able to remain shut.
The Tribunal finds that a sum of £650 would be an appropriate award of damages for inconvenience and loss of amenity. In respect of the garage the Tribunal finds that there was no actual loss because the state of the garage was made clear at the outset.

Expenses

Finally in respect of the claim for expenses, the Tribunal finds that no expenses should be awarded to or by either party. The Applicant indicated at the hearing that they were withdrawing their claim for expenses. The Respondent however still maintained a claim for expenses in respect of the first hearing date. The Tribunal having considered this claim finds that the reason the case had to be continued to another date is not wholly or even principally due to the late lodging of substantial authorities by the Applicant, but was caused principally by a variety of events not due to the fault or conduct of the Applicant namely:-

- the listing of the case to start at 2pm, when it was already apparent there were a number of contentious issues;
- the late starting of the case due to member of the press arriving and being inadvertently excluded from the building;
- the case being interrupted by the fire alarm caused by an actual fire in the building.

  In the circumstances the Tribunal finds that the criteria for the award of expenses in terms of Rule 40 of the Tribunal rules, which is that "where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense" is not met and no expenses should be awarded.

Outcome

The Tribunal awards the sum of £650 to the Applicant.

NOTE: This document is not confidential and will be made available to other First-tier Tribunal for Scotland (Housing and Property Chamber) staff, as well as issued to Tribunal members in relation to any future proceedings on unresolved issues.

J Todd **14th October 2019**

_____ _____

Legal Member **Date**