Housing and Property Chamber
First-tier Tribunal for Scotland

**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 of the Private Housing Tenancies (Scotland) Act 2016**

**Chamber Ref: FTS/HPC/CV/21/0358**

**Re: Property at 3f Viking Way, Renfrew, PA4 0LU ("the Property")**

**Parties:**

**Harpreet Singh Sidhu, C/O 10-12 High Street, Renfrew, PA4 8QR ("the Applicant")**

**Miss Nathalie Lowe, 3f Viking Way, Renfrew, PA4 0LU ("the First Respondent")**

**Mrs Catherine McAleer , 13 East Avenue, Renfrew, PA4 0TA ("the Second Respondent")**

**Tribunal Member:**

**Ms H Forbes (Legal Member) and Miss J Green (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment in the sum of £3024.67 should be granted against the First and Second Respondents in favour of the Applicant with interest at the rate of 3% per annum above the Bank of England base rate.**

**Background**

1. This is an application dated 9th February 2021, made in terms of Rule 111 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended ("the Rules") seeking an order for payment for rent arrears in the sum of £5427. The Applicant's representative included with the application a copy of the tenancy agreement between the Applicant and the First Respondent, incorporating a guarantor agreement signed by the Second Respondent, and a copy rent statement.

2. By letter dated 24th March and email dated 18th May 2021, the Second Respondent made written representations.

**3.** By email dated 31st March 2021, the Applicant's representative lodged an application to amend the sum sought to £6527.

4. Case Management Discussions took place by telephone conference on 13th April and 10th May 2021. The First Respondent's position was that the rent was not lawfully due as repairs had not been carried out to the Property when reported and she did not have full enjoyment of the Property, particularly in relation to a hole cut into the kitchen floor that rendered the kitchen unusable, and problems with draughts and mould throughout the Property. The Second Respondent's position was that she was only given one page of the tenancy agreement to sign and was not aware of the terms and duration of the tenancy agreement.

5. By email dated 6th May 2021, the First Respondent lodged productions.

6. By email dated 10th May 2021, the Applicant's representative lodged an application to amend the sum sought to £7077.

7. By email dated 17th May 2021, the Applicant's representative lodged a witness list and productions.

8. By email dated 18th May 2021, the First Respondent submitted a request for postponement of the hearing set down for 25th May 2021. The request was granted.

## The Hearing

9. A hearing took place by telephone conference on 24th June 2021. The Applicant was not in attendance and was represented by Ms Euphemia Matheson, Solicitor. Both Respondents were in attendance.

### Evidence on behalf of the Applicant

#### Mr Ian Troy

**10.** Mr Ian Troy gave evidence. He has worked in the private rented sector for 8 years. He has been in his current position with Penny Lanes Homes, who provided letting agent services to the Landlord, for 5 years, and has been qualified as a letting agent for 3 years. He is a member of the Association of Residential Letting Agents.

11. Mr Troy described the sign-up process for tenancies. The tenant and guarantor go through a credit and reference process. When that is complete, they will discuss dates for the tenancy to commence. The letting agent will try to get all parties to sign the tenancy agreement at the same time.

12. In this case, the First Respondent was the tenant. She and her partner were the occupants of the Property. A guarantor was required because the First Respondent and her partner did not pass the credit checks.

13. As guarantor, the Second Respondent was sent an online application for the credit checks. She then came into the office on 3rd January 2019 to sign the tenancy agreement. Asked to describe the procedure, Mr Troy said he would have asked her if she understood, and given her the tenancy agreement to sign, and a copy to take away. Asked whether it was the whole tenancy agreement that was provided, Mr Troy said it would have been. It was put to him that the Second Respondent was likely to say she had only been given one page to sign. Mr Troy said he could only go by the usual procedure and he did not remember that far back, but he would have provided the tenancy agreement in full as that is the usual practice. The tenancy agreement had been created by that time and was available, although it was not signed by the landlord and tenant until a later date.

14. Mr Troy confirmed that the tenancy agreement on page 2 of the Applicant's productions was the tenancy agreement for the Property. The rent was £550 per month, as reflected in the letting advert on page 43 of the Applicant's productions. The tenant and letting agent signed on 15th January 2019. Mr Troy read from page 30 of the Applicant's productions, and explained that the guarantor was responsible for all payments of rent throughout the tenancy and for any other payments due.

15. Referred to page 44 of the Applicant's productions, Mr Troy explained it was a timeline showing the interaction with the Second Respondent in relation to signing the tenancy agreement as guarantor. Asked what information was available relating to the tenancy agreement, Mr Troy said the letting agent could have answered questions about the length of the tenancy. It was open to the Second Respondent to ask any questions.

16. Mr Troy was referred to page 33 of the Applicant's productions, which was a report of an inspection carried out on 14th January 2020. Mr Troy was not at the inspection. He was at the Property two weeks later, when the condition was the same as during the inspection. The condition of the Property was recorded as 'consistent with use'. The condition and cleanliness was reasonable. There was mould on the ceiling. There were photos of a hatch cut into the kitchen floor. This had been cut by a contractor called by the First Respondent and her partner at Christmas 2019 to fix a leak. The Landlord had reimbursed the cost of the contractor. On page 41, there was a comment that the tenant was complaining of a threat to life and withholding rent. When Mr Troy attended with a colleague, the leak had been attended to, but the hole was there. The tenant said the floor was not stable. Mr Troy did not believe there was a threat to life. The floor was stable and the kitchen was accessible. The hole required to be fixed but it was dry and stable. Mr Troy was shown mould in the bedroom.

17. Referred to pages 48 and 49 of the Applicant's productions, Mr Troy said these were invoices from Glenvale Joinery Ltd and SJM Plumbing and Gas Services Ltd respectively. Both contractors had attended the Property on 6th

December 2019 to repair the leak but no access had been provided. Call-out charges amounting to £126.60 in total had been invoiced by the contractors.

18. Page 46 of the Applicant's productions was an email exchange between Mr Troy and the First Respondent dated 11th March 2020. Mr Troy said the delay in fixing the floor was a combination of a struggle to gain access and to get contractor quotes. The Landlord had requested a third estimate to fix the kitchen floor. Mr Troy said that was where everything stopped and that he believed the letting agent did not have a contact telephone number for the First Respondent.

19. Mr Troy was referred to emails between the letting agent and the First Respondent and her partner which had been lodged by the First Respondent. An email dated 17th January 2019 from Mr Troy's colleague to the First Respondent's partner, Daniel McAleer and copied to the First Respondent (page 2) stated that contractors would be arranged to deal with a problem with the boiler and mould on the windows, and a cleaner would deal with food waste stains in the kitchen cupboards. Permission was given to the tenant to strip wallpaper. Further emails on 6th and 23rd December 2019 (pages 5, 7 & 11) mentioned the lack of access to contractors.

20. Mr Troy said the Landlord confirmed on 23rd December 2019 that the tenant could arrange their own contractor (page 16). By email dated 29th January 2020 (page 35) Mr Troy informed the First Respondent that the Landlord was happy to do the flooring work but had asked that a rough price be sought from the tenant's contractor and a contractor arranged by the letting agent. Mr Troy had also stated in the email that the Landlord was going to wipe off some debt and pay the tenant's contractor's £390 invoice. Responding to questions from the Tribunal as to why the debt was being wiped, Mr Troy said the tenant was unhappy with the length of time for the floor and leak to be sorted. It was compensation.

**Cross-examination of Mr Troy**

21. Under cross-examination by the First Respondent, Mr Troy said he had attended at the Property on 29th January 2020 with Mr Dickson. The First Respondent and her partner, Mr McAleer, were present. Asked whether there was a plumber and a joiner present, Mr Troy said he couldn't remember that. He only remembered four people being present. The First Respondent referred him to page 30 of her productions, an email dated 27th January 2020, in which Mr McAleer had recorded the view of the contractor regarding works needed to the kitchen floor. Asked whether Mr Troy was still of the opinion the floor was safe and dry and sound, he said he was not a tradesman and it did not look unstable. He agreed that the letting agent should take advice from tradesmen.

22. Asked why he had said there was no phone number for the First Respondent, Mr Troy said the phone number was not working. Asked whether three months was a reasonable time to take to address repairs, Mr Troy said there

was no set timeframe for repairs in the tenancy agreement. Information and quotes had been required. All the information was in the email chain and it showed there had been contact back and forth, and delays with contractors. The delays were not all down to the First Respondent and Mr McAleer. Asked why the Landlord required a third quote for the work to the kitchen floor, Mr Troy said the cost was high. Mr Troy said the kitchen was fully functional and could still be accessed and used. Mr Troy agreed it had taken two months to fix the leak under the kitchen floor. It was his position that it was a reasonable amount of time because a repair with sealant had been attempted, but the issue arose again. He agreed that no further works had been carried out to repair the floor. He said there had been no further contact from the tenants after March 2020.

23. Mr Troy said he was aware of the mould on the windows from 17th January 2019. He agreed that the only works carried out to the windows was to replace the handles.

24. Mr Troy said the letting agent gave the First Respondent's details to the contractors to arrange access in December 2019, as she was the tenant. He was informed the following day that access had not been possible. He agreed that both occupants' numbers were given to contractors after that.

25. Mr Troy was referred to the repair timetable in clause 14 of the tenancy agreement. He agreed it was the landlord's responsibility to arrange repairs but there was a delay due to the failure to provide access. He was referred to page 14 of the First Respondent's productions which was an email dated 23rd December 2019 that mentioned a contractor arranged by the Landlord no longer wishing to do the job. He was unaware why they would not do the job.

26. Asked whether he accepted that a leak into the electrical system was dangerous to life, Mr Troy said it would be classed as an emergency repair.

27. Under cross-examination by the Second Respondent, Mr Troy was referred to an email dated 3rd December 2019 (Item 2 of Second Respondent's productions) regarding credit references. He accepted there was no mention of the tenancy agreement.

28. Asked about the circumstances of her signing of the agreement on 3rd January 2020, Mr Troy said the Second Respondent would have been given a full copy of the tenancy agreement. He agreed she had not been sent a copy thereafter, nor had the tenant. Responding to questions from the Tribunal as to whether he remembered providing a full copy of the tenancy agreement at the time of signing, Mr Troy said he could not say that for definite but it was their practice to give a full copy of the tenancy agreement. He accepted there was no evidence that he had given the full tenancy agreement to the Second Respondent.

**Re-examination**

29. Under re-examination, Mr Troy said all information was available if asked for at the time the credit references were carried out.

30. Mr Troy said he had seen no water in the kitchen hole in the Property and no reference to water in the inspection report. He said the first he heard of any water was on 23rd December 2019. He had not seen any reports from contractors. He had only seen two quotes from the tenant's contractor and a contractor arranged by the letting agent. There had been no reference to the issue being life threatening.

31. Mr Troy said they had booked the work in early December as soon as possible as the tenant and her partner were unhappy. If the work was arranged too soon, the tenant could have changed it. Responding to questions from the Tribunal, Mr Troy said the call-out charges were waived by the contractors to keep everyone happy. It was not a case of the contractors accepting liability. He was just trying to keep everyone happy and avoid hassle. He called in a favour from the contractors.

32. Responding to questions from the Tribunal as to why the repairs were never carried out to the kitchen floor, Mr Troy said the Covid-19 pandemic meant repairs were not kept on top of. The letting agent was relying on tenants chasing up repairs and no property inspections were being carried out.

33. Responding to questions from the Tribunal as to why the debt of £821.23 was wiped in January 2020, Mr Troy said the First Respondent and her partner had informed them they were unhappy. The Landlord suggested this as a gesture to keep the tenant and keep her happy. The letting agent had not expected this. Asked whether any reason had been given for further arrears, Mr Troy said he believed the First Respondent had said in an email that she was struggling. She was contacted in July 2020 regarding entering into a repayment agreement.

34. Responding to questions from the Tribunal as to how long it took to deal with the Second Respondent when she came to sign the agreement on 3rd January 2019, Mr Troy said it did not take long. He always asks if the person has any questions. If there are no questions, then it's a case of in and out. He said he would tell them he had the paperwork and give an opportunity to read through it, and then ask if they were happy. He would not go through every page with them. The tenants get a copy of the tenancy agreement in advance, but the guarantor does not. They tend to have about one guarantor a month. It is not that common. Asked whether they had changed their procedure after this matter arose, Mr Troy said no.

**Evidence for the First Respondent**

35. The First Respondent said the letting agent had failed to comply with their duty in respect of the repairing standard set out in clause 14 of the tenancy

agreement. She moved in on 15th January 2019. She reported a leak from the boiler two days later. There were two separate issues. The boiler had a fault and there was a leak in the heating system pipes. A gas engineer came out and fixed the boiler. They were unaware of the leak at that time. The pressure dropped repeatedly throughout the year. In November 2019, the downstairs neighbour reported a leak into their property. Their fire alarm was affected. It was reported to the letting agent in November and again in December. In November, a maintenance man attended and put sealant into the system. He told the First Respondent it was a temporary fix. Although the letting agent had written in an email that there was no gas in the system and it could not be checked, that was not correct. The meter was stating there was an overload. The boiler was not working properly.

36. By December 2019, they had already reported issues with mould. The windows were not sealed and there was a constant draught in every window. They had to tape up the vents in the windows and wear extra clothes. They purchased electric heaters and spent at least an extra £30 on heating each week. Her partner's son had asthma. The atmosphere was sticky and it was hard to breathe.

37. On 2nd December 2019, the First Respondent and her partner advised the letting agent that the issue with the leak was ongoing and that a contractor had said the floor had to be lifted. The plumber telephoned on Thursday 5th December and said he would come next Friday. They took this to mean the following week, hence the lack of access when the contractors arrived the following day. The contractors made one phone call to the First Respondent's partner. The First Respondent and her partner were taking her partner's child to school. They would not have wanted to miss this had they known the contractors were coming. They were not prepared to pay for the missed call-outs as they did not feel it was their fault. It was her understanding that the charges were waived because of the miscommunication. There was no point thereafter when access was denied.

38. On Christmas Eve 2019, the contractor arranged by the letting agent cancelled and the First Respondent and her partner arranged a contractor. The leak was repaired but the floor was damaged due to the length of time the leak had been there. The First Respondent said she and her partner were told it was dangerous to walk on the floor. Her partner was 17 or 18 stone in weight. They were told the joists were rotten. This was obvious. Further investigation was required and the floor needed to be lifted.

39. The First Respondent said she was ignored by the letting agent after her partner moved out in February 2020. She felt abandoned by the letting agent. She only had a roof. She had no use of the kitchen. Her asthma deteriorated. She did not feel safe in the Property. The repairs have still not been carried out to the kitchen floor. There was little cooperation from the letting agent or the Landlord.

40. The First Respondent said she did not have full enjoyment of the Property. They were in desperation and felt unsupported by the end of 2019. They spent months with no heating. There was a very cold spell. They could not use the kitchen. The floor bounced when it was walked upon. She moved the kettle and microwave to the living room. Before lockdown, she ate out, but was no longer able to do that after lockdown. She had to spend extra on ready meals and heating.

41. The First Respondent said the Landlord had agreed they would have use of the cellar, and she believed this was included in the rent. The Landlord had said he would fix the window and get keys but this never happened and they did not have use of it.

**Cross-examination**

42. Under cross-examination, the First Respondent was referred to the photograph on page 54 of the First Respondent's productions, and asked where a person might fall into. She said there was wet insulation in the hole. The tiles had been lifted, a hole cut, and the joist had been cut. They had been told by experts that the whole floor was weak. Asked when she had stopped using the kitchen, the First Respondent said it was Christmas 2019. There was no hot water. She would have moved everything by January 2020. Referred to page 23 of the First Respondent's productions, she accepted that a photograph taken on 14th January 2020 showed the microwave still in the kitchen. She said she must have moved it by February 2020. They had not been at home much around Christmas as they had been visiting family and friends. They had stayed with her partner's parents for two or three weeks due to the state of the Property. After her partner moved out in February 2020, she moved the items to the living room for her own safety.

43. Responding to questions regarding the wiping off of £821.23, the First Respondent said it was reimbursed because it was the Landlord's lawful duty to do that. She accepted her rent arrears commenced in March 2020. Asked whether she had agreed to repay the arrears at £200 per month, she said she may have done after the letting agent threatened eviction. She was scared of getting thrown out. She had lost her job and was in a bad place. She accepted she had made three payments and had not been able to keep to the agreement.

44. The First Respondent accepted the boiler was repaired. She did not accept that the second repair to the heating system had been carried out promptly. The Property could not be heated from November to December 2019. The leak was dangerous.

45. Asked whether access to the cellar was included in the schedule for the Property, the First Respondent said they were told they would get access. They did not push this because of the other more important issues.

46. The First Respondent said she had notified the letting agent in January 2020 that she was withholding rent. She denied that the real reason for seeking an abatement of rent was that her employment situation had changed.

47. The hearing was adjourned at the close of the day with the evidence part heard.

**The hearing – 23rd August 2021**

48. The hearing continued by telephone conference on 23rd August 2021. The Applicant was not in attendance and was represented by Ms Euphemia Matheson, Solicitor. Both Respondents were in attendance.

**Mr Daniel Matthew McAleer**

49. Mr McAleer gave evidence for the First Respondent. He is currently unemployed and has previously worked as a chef. He lived with the First Respondent at the Property from January 2019 to February 2020. He is the son of the Second Respondent.

50. When he moved into the Property there were complaints about the cleanliness and maintenance. The boiler was leaking. He took 79 photographs of the condition of the Property but these were no longer available. The boiler was fixed but the pressure began to drop in March 2019. A contractor put in a sealant in November 2019 and said it would not solve the problem. Mr McAleer had gone back and fore between the Landlord and the letting agent to try and have the problem fixed, but they were saying it had already been fixed. The downstairs neighbour had water running through their ceiling, and their fire alarm was going off.

51. Mr McAleer was told that the contractors would attend in December 2019 but the appointment was missed due to miscommunication. He would have been back from taking his child to school and available by 9.10am. He refused to pay the call-out charges and threatened legal action. The charges were waived. The Landlord agreed to them getting their own contractor. Mr McAleer said the floor took ages to dry out after it was opened up. It had been rotten for the best part of a year. The joists were affected. Two joiners said the floor must be stripped back and at least two joists replaced. There was a hole in the floor that had to be jumped over to reach the boiler. They were advised to put hard wood over the floor by the letting agent but this would not have helped. Mr Troy attended, with his boss, at Mr McAleer's request, and saw the kitchen at the same time as two joiners. The issue was fully evaluated at that meeting and the Landlord's representatives were told the full extent of the problem. Mr Troy said he was to get a second opinion. Nothing further was heard and the work was not carried out. Mr McAleer felt the combination of electricity and water was a deadly fault.

52. Asked whether he enjoyed his time in the Property, Mr McAleer said it was not at all enjoyable. It was one of the worst places he has ever lived. They were

paying extra for heating. They could not use the bath. They had to stay at his mother's house. As a chef, he was frustrated at not being able to use the kitchen. It was a huge problem. The letting agent downplayed the issues massively. The letting agent had rushed them to move in. The first month's rent was waived because the place was not ready.

53. There was mould throughout the Property. It was ongoing from the first day. The occupants had cleaned it off and decorated the Property. A couple of weeks after painting the bathroom, a damp patch appeared on the ceiling. It was in two rigid lines and the contractor said it was probably a leak from above. Mr McAleer repeatedly told the letting agent about this. Someone came and took photos. Nothing was done by the time he left the Property. The back of the Property was damp due to problems with the roof. The front of the Property was neglected. Damp had been allowed to set in. Ian Troy had told Mr McAleer not to phone with any more complaints.

**Cross-examination**

54. Mr McAleer said the problems with the heating system were reported in the second half of the year, from August to December. He reported this by telephone and was told to communicate by email, in or around November 2019, as the letting agent said he was complaining too much. The gas engineer came and applied liquid sealant in or around the end of October, beginning of November. The gas engineer said the Landlord would not pay for a proper repair. Referred to page 2 of the First Respondent's productions, Mr McAleer confirmed a contractor had been arranged by 17th January 2019 to repair the boiler. Someone came to look at the windows a couple of weeks later and installed new handles. It did not help with the draughts. The contractor offered to leave silicone. Referred to page 5 of the First Respondent's productions, an email dated 23rd December 2019, Mr McAleer agreed it took 13 days for the initial problem with the boiler to be fixed.

55. Mr McAleer said the contractors had not given proper notice of their intention to attend on 6th December 2019. He had tried to call them back at 9.07 that day. The whole thing was badly organised.

56. Questioned as to which contractor was the first to mention lifting the kitchen floor, Mr McAleer said he and the neighbour were the first to mention it. Responding to questions from the Tribunal as to whether he was disputing that a contractor arranged by the letting agent had also mentioned it, Mr McAleer said no, but no one came to do the work. Mr McAleer said he was not given a quote by his contractor or anything in writing. There were lots of panicked phone calls to the letting agent. They did not approve the work and the contractors never returned.

57. Mr McAleer confirmed he was reimbursed by the Landlord for the joiner's bill of £390. He believed the £821.23 was written off because the Property was not in a liveable state. He had withheld rent because of the state of the Property. It was not a debt. It was his position they were not getting the

service they had paid for. He did not consider it a goodwill gesture on the part of the Landlord, particularly when two households could not wash or heat their properties for two months.

58. Under cross-examination by the Second Respondent, Mr McAleer said he had spent over £130 on additional heaters and around £45 per week extra for two months. He was off work sick and he had to borrow from his parents. He felt they had spent around £1000 due to the problems with the Property.

59. Mr McAleer described the layout of the kitchen in relation to the hole and said if one walked one step to the left, they would have fallen into the hole. They could walk down the kitchen, following the path of the one safe joist. He was 17 stone and the floor moved when he walked on it.

**Re-examination**

60. Mr McAleer said he had told the letting agent a couple of times that he was not paying the rent. He had telephoned, visited and emailed.

61. Mr McAleer confirmed there were two different issues with the central heating system – the boiler was repaired and a further problem with the heating system arose later.

**Evidence for the Second Respondent**

62. The Second Respondent said she was unaware of the terms of the tenancy agreement. She was only aware of short term leases and assumed she was only guarantor for a fixed period. She was not aware of what she was signing. The whole procedure was hurried and no copy of the tenancy agreement was given then, or when it was signed. The first time she saw the tenancy agreement was when this application was lodged. She was only given one page to sign. Mr Troy was unable to provide any evidence that she had been given the full tenancy agreement. No one explained what she was signing. If she had been made aware that she should have sought advice, she would have done so. Everything was dealt with in an easy-going manner. There was no information provided. She signed 12 days before the tenancy agreement was signed and if anything had changed in the interim, she would not have known.

63. She was not included in any emails and was unaware of the issue with rent arrears until the summer of the first lockdown when she was contacted by the letting agent. She spoke to the First Respondent and was told a payment arrangement had been set up, and everything was all right. She did not hear anything further until 27th December 2020, during the second lockdown, when she got a phone call from the letting agent.

64. The Second Respondent was in the Property several times and saw that it was not up to standard. The First Respondent and Mr McAleer were always battling to try and get repairs carried out. She did the laundry and fed them. They stayed with her due to cold and damp in the Property. It was a very cold winter and

their expenses were increased significantly due to the state of the Property. They were struggling to keep going. The kitchen was not in a useable state and has still not been repaired. The Landlord and letting agent were culpable.

65. The Second Respondent said she could not do anything to change the situation in the Property due to lockdown. The First Respondent could not be evicted due to government policy, and this had disadvantaged the Second Respondent and led to an increase in rent arrears.

**Cross-examination**

66. The Second Respondent said she was asked to be guarantor around the end of November. She had no experience of guarantors. She was aware it would be her responsibility to pay arrears of rent. She thought that was her only responsibility. Directed to the page she had signed, the Second Respondent agreed that, when reading it with hindsight, it was clear it covered more than just rent arrears. She believed the reason a guarantor was required was because her son was unemployed and the First Respondent's salary was not enough to cover the rent. Neither of them had passed the credit checks. However, they managed to pay the rent for a year. She said she thought it was a short term lease and she would not be responsible for anything thereafter. She would have expected to be told by the letting agent to get advice. She did not dispute that she had signed the page.

67. The Second Respondent said she was aware of what was involved in the credit checks and that the purpose was to check that she could pay the rent if necessary. Her problem was that she was not told it was a long term let and that there was no finite point at which her responsibility would end. She had thought her responsibility as guarantor ended after the first year.

68. The Second Respondent said she believed a payment arrangement had been put in place but she was not party to it. She was copied into an email from the letting agent to the First Respondent on 17th June 2020 and in July 2020, she was copied into the email with the Notice to Leave. She would have expected to have heard more from the letting agent, but because she had received so little in the first place, she was not surprised that she was not hearing anything.

69. Her son had asked to stay on in the Property when the relationship with the First Respondent ended and she would have been his guarantor, but that was refused. She understood the First Respondent was staying for another month.

70. Asked whether she had thought to take advice, the Second Respondent said she thought it was an easy procedure, a normal occurrence. No one made it a big deal or mentioned legal obligations. If she had been given a copy of the tenancy agreement at the time of signing, she would have realised there was no end date to the lease. She would have taken advice and probably been told not to sign it. There was no indication she needed to see a solicitor. She said there was naivety on her part. Asked if she would have guaranteed a loan for her son, the Second Respondent said yes, if it was a small personal loan. She

would have known the exact amount. She would likely have sought advice in that situation.

71. Responding to questions from the Tribunal as to whether she had considered an advice agency such as CAB or looked on the internet for advice about becoming a guarantor, the Second Respondent said she took reassurance from Mr Troy, the First Respondent and her son. Mr Troy did not foresee any problems as long as the credit checks were passed.

**Submissions**

**The Applicant**

72. Ms Matheson submitted that the guarantor agreement had been validly executed and entered into. It is a cautionary obligation and is covered by the Requirements of Writing (Scotland) Act 1995, and must be in writing. There must be a primary obligation. In this case, the tenancy agreement was in contemplation at the time the guarantor signed. There was no ambiguity about the guarantor's obligations and the terms of the tenancy agreement had been agreed. The deed signed by the Second Respondent could only refer to the tenancy agreement. The language of the deed was clear. Both Respondents were named. The contemplated private residential tenancy, the credit reports and the guarantor agreement show that a principal obligation was in place. No one was bound until the tenancy agreement commenced. It is not uncommon that the guarantor agreement did not come into existence until the tenancy agreement came into existence. There was no obligation for the creditor to spoon-feed the Second Respondent. The tenancy agreement stated the duration of the agreement. Responding to questions from the Tribunal as to how the Second Respondent could know this when she was not given a copy of the tenancy agreement, Ms Matheson said the agreement signed clearly mentions the tenancy agreement. The cautionary obligation could not exist without the tenancy agreement. She conceded that the drafting of the agreement signed by the Second Respondent was not the best, but it could refer to nothing other than the tenancy agreement.

73. Ms Matheson referred to the case of Veitch -v- Murray & Co (1869 2 M 1098 (1864) as authority that the Tribunal may consider the circumstances surrounding the cautionary agreement and that the obligation need not be confined to one document. Correspondence between the parties and additional documents can be included. In Aitken & Co v Pyper (1900) 8 SLT 258 (1900) reference to the insurance policy was found to be a sufficient description of the principal obligation. In this case the guarantee references the parties. The language of the guarantee is clearly that which relates to a tenancy. Both Respondents are named in the deed. Young -v- Clydesdale Bank Ltd. (1889) was authority for the proposition that a cautioner should look after their own interests.

74. Ms Matheson said the Second Respondent was aware she was exposing herself to risk. She submitted that the Second Respondent's belief that it was a

short assured tenancy was not a stateable defence. She accepted that she had signed the document and she understood its nature. She had taken representations from her son and the First Respondent and did not take any further action. Asked by the Tribunal whether the letting agent had erred in not providing the full tenancy agreement, Ms Matheson said, if it was found that was the case, it was regrettable, but there was enough detail of the nature of the debt in the guarantor agreement. One of the obligations was to pay unpaid rent. It was harsh and unfortunate in hindsight, but the Applicant's position is supported by the authorities. There is an element of buyer beware in these transactions. There was no evidence of misrepresentation and the Second Respondent did not foresee any problems. It was accepted that the First Respondent had breached the tenancy agreement by not paying the rent. The cautionary obligation then kicked in due to the breach.

75. With regard to the issue of abatement of rent, Ms Matheson submitted that there was no evidence of direct loss by the First Respondent. She appeared to be seeking 100% abatement of rent due to the problems with the kitchen. It was necessary to show deprivation of use and that was accepted up to January 2020, when the debt on the rent account was cleared by the Landlord after rent had been withheld. Payment of rent was made in February 2020, then a payment plan was entered into in the summer of 2020. Thereafter, there was no intimation or evidence of the withholding of rent. Ms Matheson referred to Stewart -v- Campbell & Others (1889) as authority that the First Respondent had acquiesced by entering into the payment agreement, and accepted that the debt was due. In the event that the Tribunal did not accept this position, Ms Matheson submitted that a full abatement was not appropriate. The percentage put forward must be a reasonable sum. The First Respondent had several opportunities to put forward a claim and had not done so. She could not seek an abatement now as no intimation of retention had been given. It was not disputed there were repairs issues. There had been issues with access but it was clear there was an intent to carry out the work.

76. Ms Matheson submitted that Mr Troy's evidence was credible and given in a straightforward and clear manner. The First Respondent and her witness had tended to exaggerate using claims such as risk to life and the fear they would fall through the kitchen floor, in an attempt to get 100% abatement. There was inconsistency when they were asked to clarify matters. There was inconsistency regarding timings. It was accepted that there were faults on the Applicant's side but the letting agents had tried to remedy matters when notified. They had organised contractors quickly, but it was too quick for the First Respondent and her partner. They were reimbursed when they arranged a contractor. The First Respondent had struggled financially and could not meet her obligations. That was why she was seeking a full abatement.

**The First Respondent**

77. The First Respondent submitted that she had made at least one intimation of withholding rent in January 2020. She entered into the payment plan because she was constantly harassed and threatened with homelessness by the letting

agent. She was trying to keep herself safe during lockdown. It was still her opinion that she should not be paying rent.

78. It was the First Respondent's position that she had not exaggerated and it was not her or her partner who had come up with issues such as risk to life. This had been said by tradesmen. Water in the electrical system was a danger to life. All the information received had been passed to the letting agent. It was not just the floor. There were problems with damp and mould, and the windows were not wind tight.

79. The First Respondent referred to the glossary in the tenancy agreement and the definition of a house in multiple occupation contained in section 125 of the Housing (Scotland) Act 2006, which states that a house is not a house if there is no kitchen or facilities for washing. In this case, there was a bathroom but it was mouldy and damp. The Property would not be classed as adequate under this rule.

80. The repairing standard had not been met. By the time the First Respondent left the Property, the kitchen floor still had not been repaired. The Property was still mouldy and draughty. It was not wind and water tight. She was without water for two months. One missed appointment was not an adequate reason for failing to carry out repairs.

81. The issues with the Property caused the First Respondent to have trust issues. It was detrimental to her mental health, her life and her relationship. The Property is not in a liveable state and has not been so since 2019. Responding to questions from the Tribunal, the First Respondent said she was claiming an abatement for the period from March 2020 onwards.

**The Second Respondent**

82. The Second Respondent submitted that giving her one page of the tenancy agreement did not give her sufficient information. She had no chance of understanding. The letting agent had a responsibility to give her information or inform her of the bare bones of what she was signing. The letting agent failed to provide a copy of the tenancy agreement. The single page does not have sufficient information. It does not mention the date of commencement or length of tenancy. The Second Respondent accepted she should have looked into matters but she should have been given more information.

83. The Second Respondent was not made aware of the debt until a late stage, when she got a couple of forceful calls in June and September 2020. She has been landed with a debt due to a situation which she could not change. If it was not for the pandemic and Government restrictions, the First Respondent would have been evicted sooner and the debt would be less.

84. The Second Respondent submitted that the Property was in a state of disrepair for the duration of the tenancy. There was no exaggeration by the occupants. She had been in the Property and saw what it was like. The occupants spent

much of December 2019 with her due to the cold weather and state of the Property.

**Further Procedure**

85. By note dated 1st and issued 3rd September 2021, the Tribunal requested further submissions within 14 days as follows:

    1. The Tribunal invites written representations on Lord Clyde's judgement in the case *Smith v. Governor and Company of the Bank of Scotland [1997] UKHL 26; [1997] 2 FLR 862 (12th June, 1997)*, and in particular in response to the following points:

        (i) Did the creditor (the Applicant's representative) in this case owe a duty of good faith to the Second Respondent owing to the personal relationship between the debtor (the First Respondent) and the proposed cautioner (the Second Respondent) to ensure that the cautioner's consent was fully informed and freely given?

        (ii) Should the creditor have taken reasonable steps to secure that he remained in good faith so far as the proposed transaction was concerned by a) warning the cautioner of the consequences of entering into the proposed cautionary obligation; and b) advising her to take independent advice?

    2. The Tribunal would draw parties' attention to Lord Macfadyen's opinion in the case of *Wright v. Cotias Investments Inc 2001 SLT 353* that a court may find the rule applies where the person who is in a close personal relationship with the cautioner is not himself the borrower, provided he had an interest to use the personal relationship to prevail on the cautioner to agree to act as such, and the existence of the relationship is known to the creditor.

    3. For the convenience of the Respondents, the case of *Smith v. Governor and Company of the Bank of Scotland [1997] UKHL 26; [1997] 2 FLR 862 (12th June, 1997)* can be sourced by searching the internet. However, the Respondents, and in particular, the Second Respondent, may wish to take legal advice on this complicated matter.

    4. Parties should be aware this is not an opportunity to revisit the evidence heard during the hearing. Written representations should only be made on the specific questions above.

86. By email dated 13th September 2021, the Second Respondent requested an extension to the time allowed for lodging submissions, due to difficulties in obtaining legal advice. The Tribunal granted the Second Respondent an extension of a further 14 days.

87. By email dated 17th September 2021, the Applicant's representative lodged written submissions.

88. By letter dated 3rd October 2021, the Second Respondent, who had not been able to obtain legal advice, submitted written submissions.

**Further Submissions on behalf of the Applicant**

89.

1. Smith v Bank of Scotland and Wright v Cotias Investments Inc relate to real securities. The present case does not relate to a real security. This is the first reason these cases should be distinguished from the present cases.

2. Reference is made to paragraph 29 Lord Clarke's opinion in Royal Bank of Scotland v Wilson 2004 S.C.153 (a copy of which is produced). That paragraph states the following: "In my opinion, the principle of good faith implies no more than that the creditor ought not to take such a security from the wife where, on an objective judgment of the circumstances, he has reason to think that the wife's consent to grant it may have been vitiated by misrepresentation, undue influence or some other wrongful act committed by her husband" If the tribunal are not with us in distinguishing Smith and Wright on the basis that they only apply to real securities, there has been no evidence lead or averments made that suggest a misrepresentation was made to the second respondent by the applicant's agent or by the first respondent that would have induced the second respondent to enter into the guarantee. It is submitted that the duty arises where a misrepresentation, undue influence or some other wrongful act is committed by the party in the relationship. No averments are present to that effect.

3. The relationship between the parties is not that of mother and son residing together. It is accepted in Wright is the kind of relationship, that in the event a misrepresentation, undue influence or other actional wrong had occurred a duty on the creditor to provide certain advice could arise. No averments have been made that the second respondent's son made a misrepresentation to the second respondent inducing her to enter into the agreement. It is accepted that the Respondent's son was in receipt of benefits and had lost his job. No evidence was led or averments made that the second respondent's son misrepresented that fact. His mother was aware he was in financial difficulties. It is trite law that there is no obligation on a creditor, unless expressly asked, to make any disclosure to the prospective cautioner as to the level of indebtedness of the borrower. This is affirmed in Smith by Lord Clyde at p 7 of the attached Westlaw printout following the ration in Young v Clydesdale bank. The only representation made by the Applicant's agent was the first respondent had failed a credit check. There is no duty on the Applicant to advise a potential cautioner of the extent of that failure or level of indebtedness. The fact a disclosure was made regarding the failure of the credit check is sufficient to show that the applicant's agent acted in good faith.

It is submitted that a duty was not upon the applicant's agents to provide certain advice to the second respondent, and they have acted in good faith by not holding the first respondent out to be creditworthy when clearly, she was not. The information the second respondent had was sufficient to enable the her to assess her exposure to risk.

4. The relationship between husband and wife residing together does not give rise to a presumption of undue influence. The rule in Wright includes mother and son in the classes of relationship where an obligation could arise for a creditor to provide certain advice. If the relationship between spouses cannot give rise to a presumption of undue influence neither can the relationship between parent and child. It is submitted that the relationship with the principal debtor falls outwith the categories set out in wright but even if the tribunal do not accept that it is submitted that the relationship does not presume undue influence. The first respondent is not the second respondent's daughter, and she does not reside with her. Already the relationship between the parties is less close and intimate then class of relationship described in Smith.

5. The second respondent has not made any averments that would point to an actionable wrong on the part of her son or the first respondent. This relationship is covered by the rule in Smith as per Wright. An actionable wrong on the part of the son is still a prerequisite to the cautioner being afforded a remedy under the rule in Smith. No averments have been made that the second respondent's son used the relationship with his mother to compel her to sign the agreement. No actionable wrong has been pled on his part. In Smith the wife's averments were she would not have signed but for the misrepresentations of made by her husband. The first respondent avers she had she received legal advice she would not have signed. A par 50 of RBS v Wilson it states clearly that the failure to advise or warn is not itself enough to afford a remedy in the absence of an actionable wrong. In this case the second respondent at least had the same amount of knowledge of the financial circumstances of the first respondent at the time of signing as the applicant's representative. There was no reason to believe this was a misrepresentation as it had been independently verified by a credit refencing agency. The first respondent's son's personal circumstances we at least know to her at the time not to be in good order. A check was not carried out on him by the applicant's agents and they had no reason to believe he had made a representation to his mother that his finances were in good order.

6. The Applicant's agents acted in good faith due to the fact they advised the second respondent that a guarantor was required due to a failed credit report. The implication of this was that there was an issue regarding the first respondent's credit worthiness and or ability to meet the rent payments. The applicant's agents were not under any duty to disclose any further details than that. No misrepresentation as to the credit worthiness of the first respondent was made by the Applicant's agents. There has been no evidence led to suggest that any misrepresentation as to the credit worthiness of the first respondent was made by the Applicant's agents nor by the First Respondent.

The second respondent has not made any relevant averments that the Applicant's agents were acting in bad faith. Neither has she made any averments or led evidence that the first respondent was acting in bad faith

7. It is submitted that Smith and Wright should be distinguished on the basis that there is no averment of an actionable wrong on the part of any party in a relationship with the second respondent and that is a key component to be established before she can be entitled to the remedy sought. The Applicant's acted in good faith by disclosing the failure of the credit check to the second respondent. Their failure to advise the second respondent to seek legal advice does not entitle the second respondent to a remedy in the absence of an actionable wrong being averred or any averments of bad faith.

**Further Submissions by the Second Respondent**

90. In Lord Clyde's judgement the principle where there are circumstances which would lead a reasonable man to believe that there is a possibility that the cautioners consent was not given freely or that the cautioner was not fully informed, owing to the closed nature of the debtor-cautioner relationship, then the creditor in order to remain in good faith has the duty to take reasonable steps to inform the cautioner about the consequences of the transaction or urge her to undertake independent advice.

    I argue that the Agent for the Applicant at no time offered details or provided information, known to them, about the details of the lease, its duration and the credit check returned on the first Respondent.

    The Second Respondents understanding was that the application for the tenancy had been in joint names and her son had failed the credit check. She was unaware The First Respondent may also have failed this check. The Agent for the Applicant appears also not to have fully explained to either the First respondent or the Second respondents son in any detail at that point anything other than the application would be successful if they supplied a guarantor.

    The Agent for the Applicant fully understood the relationships involved and was aware The Second Respondent was acting in response to a request from her son based on that familial connection and that she was not related to Ms Lowe in any way. With this information I feel he had a duty of care to ensure the Second Respondent was aware that it was solely the First Respondent she was agreeing to guarantee and that she was aware of the possibilities for liability she could face should, as occurred, her son vacate the premises and The First Respondent remain there.

    I would further submit that non-disclosure of the terms of the agreement, there being no copy of the agreement made available to view and subsequently, no copy of the agreement being forwarded to the Second respondent clearly shows she was ill informed by the creditor to an extent that she was disadvantaged and left liable for an unknown risk.

The Second Respondent was unable to avail herself as to the material matters to the obligation which she was about to undertake as the signed lease agreement did not exist at the time of signing the guarantor agreement and no information regarding same was supplied by the Agent for the Applicant as stated by Mr Troy during this Tribunal. The only meeting the Second Respondent had with the Agents for the Applicant occurred at close of business on the first day of trading following the festive season, and was a hurried affair during which the Second respondent received only a single page with a single paragraph there on. This page has no details of the agreement included on it and none were furnished with it then or thereafter by mail or email.

Had all the details, now apparent, been put to the Second Respondent she would have had the opportunity and understanding of the need to seek advice from an independent source. There was no information that the First respondent was not creditworthy and indeed throughout the first year of the tenancy the rent was paid. Again had the Second respondent been informed it was not a fixed term agreement at the outset this would have been information that could and would most probably have altered the Second Respondents actions in this agreement.

The misrepresentation that occurred, I believe, was in the Agent for the Applicant failing in the most basic of duties to inform the Second Respondent of any of the details of the agreement. The Second Respondent was not made aware it was only the First Respondent who was credit checked and indeed the Second Respondent believes her son was unaware of this also. He assumed it was he who had caused the failure of the check as the First Respondent was in full time employment at the time of the application. The Second Respondent was also not informed of the liability placed upon her for an indefinite period or of the potential for infinite debt should any circumstances change.

Lord Clyde also said: “All that is required of him [the creditor] is that he should take reasonable steps to secure that in relation to the proposed contract he acts throughout in good faith. So far as the substance of those steps is concerned it seems to me that it would be sufficient for the creditor to warn the potential cautioner of the consequences of entering into the proposed cautionary obligation and to advise him or her to take independent advice”.

The legal obligation on the Agent of the Applicant is to act in good faith throughout the proposed transaction, that good faith being demonstrated by warning the Second Respondent of the consequences of entering into the obligation and advising her to take independent advice. This did not occur at any point before during or after the signing of the agreement.

One final point I would also make is simply that the model Tenancy Agreement begins with, Section 1: How to use this model. The first paragraph states “A landlord is under duty to provide the written terms of a private

residential tenancy under section 10 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the Act"). This is the Scottish Governments Model Private Residential Tenancy Agreement ("Model Tenancy Agreement") which may be used to fulfil this duty". Until the Tribunal so provided, the Second Respondent had never been shown or given any such document.

**Findings in Fact and Law**

91.

(i) In contemplation of a tenancy agreement between the Applicant and the First Respondent, the Second Respondent agreed to be guarantor for the First Respondent.

(ii) The Second Respondent completed credit checks in late 2018 and attended at the office of the Letting Agent appointed by the Applicant on 3rd January 2019 to sign the tenancy agreement as guarantor.

(iii) The Letting Agent failed to provide the Second Respondent with a copy of the tenancy agreement.

(iv) The Letting Agent failed to warn the Second Respondent of the consequences of entering into the proposed cautionary arrangement as guarantor.

(v) The letting agent failed to advise the Second Respondent to take independent legal advice.

(vi) The Second Respondent was provided with a single page from the tenancy agreement which contained a clause stating that she guaranteed all payments of rent, any other obligations under the Agreement and any other payments due to the Landlord which the Tenant was required to pay under the Agreement.

(vii) The First Respondent and the Applicant's representative signed the tenancy agreement on 15th January 2019, the date of commencement of the tenancy.

(viii) There were repairing issues in the Property, including a faulty boiler, a faulty heating system, mould, damp and draughty windows. These issues were reported to the Applicant.

(ix) New handles were installed in the windows during the tenancy but they did not improve the situation with draughts.

(x) The First Respondent and her partner had to tape up the vents in the windows and wear extra clothes. They purchased electric heaters and spent at least an extra £30 on heating each week.

(xi) The atmosphere in the Property was sticky and caused difficulties with breathing.

(xii) The boiler was repaired 13 days after the issue was reported to the Applicant's representative.

(xiii) The faulty heating system caused a leak into the downstairs property. The issue was reported to the Applicant's representative in or around November 2019.

(xiv) In or around November 2019, the Applicant's contractor attended the Property and installed a sealant into the system, informing the First Respondent and her partner that this was unlikely to be effective and stating that the Applicant would not authorise a more effective and costly repair.

(xv) In early December 2019, due to miscommunication by contractors, an appointment for two contractors to attend the Property to carry out investigations and repairs did not take place.

(xvi) On Christmas Eve 2019, the First Respondent and her partner organised their own contractor, who repaired the leak into the downstairs property. The floorboards in the kitchen were lifted, leaving a hole in the kitchen floor. The contractor uncovered damaged joists.

(xvii) The Applicant reimbursed the First Respondent and her partner for the cost of the repair to the heating system.

(xviii) The First Respondent and her partner notified the Applicant's representative of an intention to withhold rent until repairs were carried out. Rent was withheld for the months of December 2019 and January 2020.

(xix) The First Respondent did not have heating during November and December 2019.

(xx) Due to the low temperature and dampness within the Property, the First Respondent and her partner stayed with the Second Respondent for a period during the winter of late 2019, early 2020.

(xxi) On 16th January 2020, the First Respondent's rent account was credited with the sum of £821.23 as compensation for the repair issues.

(xxii) On 29th January 2020, the Applicant's representatives attended a meeting at the Property with the First Respondent, her partner and two contractors.

(xxiii) On 11th March 2021, the First Respondent and her partner were informed that the Applicant required a third quotation before agreeing to carry out repairs to the kitchen floor.

(xxiv) No further repairs were carried out to the kitchen floor.

(xxv) The First Respondent did not have full use of the kitchen from December 2019.

(xxvi) The First Respondent did not have full enjoyment of the Property during her tenancy due to issues with the kitchen, mould, damp and draughty windows.

(xxvii) At the end of the tenancy, the sum of £7773 was outstanding in rent arrears.

(xxviii) A portion of the rent arrears amounting to £4308.39 is not lawfully due.

(xxix) Rent lawfully due in the sum of £3024.67 is outstanding.

(xxx) In terms of the tenancy agreement between the parties, the First Respondent has breached the tenancy agreement and is responsible for paying rent lawfully due.

(xxxi) In terms of the guarantor agreement, the Second Respondent has guaranteed all payment of rent and is liable for rent lawfully due.

**Reasons for Decision**

92. The First Respondent did not have full use and enjoyment of the Property as contracted for due to the problems with the kitchen, and the mould, damp and draughty windows throughout the Property. The Applicant failed to address these issues despite being fully aware of them. Accordingly, the First Respondent is due an abatement of rent as she did not get what she contracted for. The Tribunal did not accept the argument put forward on behalf of the Applicant that the First Respondent acquiesced by entering into a payment arrangement. Neither was the First Respondent required to intimate the withholding of rent due to repair issues. Withholding rent is a separate remedy from that of abatement.

93. The Tribunal accepted the evidence of the First Respondent and her witness that they were informed that the kitchen floor was in a dangerous condition, and that it was rendered practically unusable due to the hole in the floor and the affected joists. The Tribunal did not consider that the First Respondent and her witness had exaggerated the situation. The Tribunal considered that the Applicant's witness, Mr Troy, downplayed the seriousness of the situation, leaving the First Respondent virtually without a kitchen for a significant period of time. Mr Troy's evidence was that the Letting Agent expected tenants to keep on top of repairs during the Covid-19 lockdown. The Tribunal did not accept this

as a satisfactory situation. The Applicant and Letting Agent were aware of the need for repairs. For some reason, the Applicant chose not to have works carried out to repair the kitchen floor.

94. The Tribunal accepted the unchallenged evidence of the First Respondent and her witness that the Property was in a bad state when they moved in, that the first month's rent was waived, and that problems with mould, damp and draughts persisted throughout the tenancy. The Tribunal noted that no work was carried out to alleviate mould or address the damp on the bathroom ceiling. The Tribunal accepted the unchallenged evidence of the First Respondent and her witness that the replacement window handles did not alleviate problems with mould or draughts. The Tribunal accepted the evidence of the Second Respondent concerning the state of the Property. The Tribunal noted that the First Respondent and her partner had to reside with the Second Respondent for a period due to the problems with the Property.

95. The Tribunal accepted the evidence of the First Respondent's witness that the sum of £821.23 was withheld due to disrepair issues. The Tribunal noted that the waiving of that sum on 16th January 2020 was made by way of compensation for the issues experienced to that date. The Tribunal considered that this was separate from any abatement due.

96. The Tribunal considered that an abatement of one-sixth of the rent should be granted in respect of the kitchen, for a period of 17 months, from December 2019 to the end of the tenancy. The total abatement due is £1558.33.

97. The Tribunal considered that an abatement of 20% of the rent should be granted in respect of the problems with damp and draughts throughout the Property for the duration of the tenancy, a period of 27 months. The total abatement due is £2970.

98. The Tribunal considered than an abatement of 20% of the rent should be granted in respect of the lack of heating and hot water during November and December 2019. The total abatement due is £220.

99. The Tribunal considered the further representations made on behalf of the Applicant and by the Second Respondent, together with the authorities provided. The Tribunal did not accept that the cases of *Smith* and *Wright* could be distinguished because they related to real securities. It is clear in *Smith* that Lord Clyde is referring to cautionary obligations and the duty between a creditor and a proposed cautioner.

100. The Tribunal considered that the case of *Smith* imposed a duty upon the Letting Agent to consider that, due to the personal relationship between the Second Respondent, her son and the First Respondent, the consent of the Second Respondent may not have been fully informed, and he ought to have taken reasonable steps to secure that he remained in good faith so far as the proposed transaction was concerned by warning the Second Respondent of the consequences of entering into the proposed guarantor agreement, and advising

her to take independent advice. The Letting Agent did not remain in good faith in this case.

101. However, the case of *Wright*, which was subsequent to *Smith*, has developed the law in this area further, and *Wright* makes clear that, in addition to the requirement of good faith, for a case to succeed under the principle in *Smith*, there must also be some misrepresentation, undue influence or facility and circumvention by a third party. Misrepresentation, undue influence and facility and circumvention have specific meanings within Scottish contract law, and there were no circumstances in this case that would justify finding that any third party engaged in misrepresentation, undue influence or facility and circumvention towards the Second Respondent.

102. The Tribunal accepted the evidence of the Second Respondent that she was only provided with one page of the tenancy agreement at the time of signing. The Tribunal did not find the evidence of Mr Troy reliable in this regard. All he could assert was that he would have followed his usual procedure and provided the tenancy agreement in full, asking if the guarantor understood everything. The Tribunal accepted the Second Respondent's evidence that he did neither in this case. The Tribunal considered his actions in this regard to be wholly unsatisfactory and concerning. There was no good reason why the Second Respondent was not provided with a copy of the tenancy agreement for her perusal prior to signing the guarantor part of the agreement. The Tribunal noted the evidence of the Second Respondent that, had she done so, she would have taken the opportunity to take advice on the terms of the agreement, and may never have agreed to become guarantor.

103. The Second Respondent did, however, sign the guarantor part of the agreement, which referred to the Property and the parties, and the obligations of the guarantor. Notwithstanding the actions of the Letting Agent, the Second Respondent ought to have looked after her own interests and made further enquiries before signing the agreement, including enquiries regarding the length of the tenancy. The Second Respondent was aware that she was exposing herself to risk, and her naïve actions in signing a single page that made reference to a tenancy agreement that was not provided, without making any further enquiries or asking to see the tenancy agreement has led her to an unfortunate position, whereby the First Respondent has breached the tenancy agreement by failing to pay the rent due, and, as guarantor, the Second Respondent is liable for the outstanding rent.

104. The Tribunal made no findings regarding the cellar and whether or not it was included in the tenancy, as there was an insufficiency of evidence in this regard.

**Decision**

105. The Tribunal determined that an order for payment in the sum of £3024.67 should be granted against the First and Second Respondents in favour of the Applicant with interest at the rate of 3% per annum above the Bank of England base rate.

**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.**

H Forbes

**Legal Member: Helen Forbes**

**19th October 2021**
**Date**