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 18 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/23/4478

Re: Property at 0/1 71 Wilverton Road, Glasgow, G13 2NW ("the Property")

Parties:

Mr John McCawley, 30 Norwood Drive, Glasgow, G46 7LS ("the Applicant")

Ms Anne Marie McKnight, 0/1 71 Wilverton Road, Glasgow, G13 2NW ("the Respondent")

Tribunal Members:

Andrew McLaughlin (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

[1] The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") refuses the Application and does not make an Eviction Order.

Background

[2] The Applicant seeks an Eviction Order under ground 13 of Schedule 5 of the Act. The Application is accompanied by a copy of the tenancy agreement and the notice to leave with proof of service. The relevant notice under Section 11 of the Homelessness (etc) (Scotland) Act 2003 is also produced. The Applicant founds upon certain alleged breaches of the tenancy agreement and these breaches are set out in the Application. There had been a prior Case Management Discussion which had regulated the progress of the Application and the timescales for the production of evidence.

The Hearing

[3] The Application called for a Hearing at Glasgow Tribunals Centre with evidence and submissions heard over two days on 19 August 2024 and 16 December 2024. The Applicant represented himself. The Respondent was represented by her solicitor, Ms Sophie Berry of Govan Law Centre. There was one preliminary matter to address prior to evidence commencing. The Respondent wished to produce certain late papers. These appeared to be documents from a tradesperson which made certain unflattering remarks about the Applicant. The Tribunal heard from both parties as to whether these documents should be received. Having done so, the Tribunal decided that they should not be received and that no further regard should be had to them. The Tribunal considered that there was no good reason as to why they had only been produced at the last minute and that if the documents were allowed, it would materially prejudice the Applicant by depriving him of an opportunity to gather his own evidence to counter the remarks contained within the late documents.

[4] The Tribunal thereafter commenced proceedings by ensuring that each party had access to the extensive documentation produced by both sides and that each party was ready to start the Hearing. That being confirmed, the Tribunal began hearing evidence. At the conclusion of each witness' evidence, the other party had the right to cross-examine and at the conclusion of all evidence each party had the opportunity to make closing submissions. The Applicant wished to give evidence himself and also to call one witness. The Respondent wished to give evidence herself and call no other witnesses.

[5] The Tribunal comments on the evidence to be heard as follows.

Mr John McCawley

[6] Mr McCawley is a retired solicitor. He purchased the Property on 21 February 2022. The Respondent was the sitting tenant at that time. Mr McCawley did not meet the Respondent prior to the purchase. He explained that he had gone into the arrangement on the understanding that, as the tenancy was a "*short assured tenancy*" he could bring it to and end somewhat more flexibly. The parties initial meeting was described as affable. Mr McCawley noted that there were no interconnected smoke alarms and the gas certificate was out of date. Mr McCawley explained that he arranged to address these matters and also to replace the kitchen. He explained that this was done shortly after purchase in March 2022. Mr McCawley explained that the Respondent was desperate for a new kitchen and said that she would also pay for some redecoration. Mr McCawley said he agreed to this as he hadn't budgeted for redecoration. Mr McCawley explained that he valued having good relations with the Respondent. He described giving sweets to her children and giving the Respondent herself a small financial gift. He described problems first developing between the parties as a consequence of issues to do with the

fitting of the kitchen. Mr McCawley explained that he agreed to pay for re-tilling an area in the kitchen and new flooring. The Respondent's nephew was a tiler and the Respondent wanted to choose her own flooring. Mr McCawley would supply the tiles and the Respondent would supply the tiler.

[7] Parties agreed that the Respondent would send photos of the completed job and Mr McCawley would send money afterwards for the costs of the tiler. Mr McCawley explained that the Respondent then said that she wanted the money upfront. Mr McCawley didn't agree to this. Mr McCawley arranged for boxes of tiles to be delivered from Travis Perkins who are a national supplier of building materials. They were blue tiles. The Respondent however had wanted grey tiles. Mr McCawley gave evidence about how when the tiler turned up to install the tiles, every single one of the tiles was broken. Mr McCawley was unequivocal in attributing the blame for this to a deliberate act by the Respondent. This was one of the Respondent's actions which were said to constitute a breach of the tenancy agreement. Mr McCawley had no direct evidence that the Respondent broke the tiles and his evidence was entirely based on supposition.

[8] Mr McCawley then spoke about issues relating to the alleged blocking of the drains which was said to give rise to one of the breaches of the terms of the tenancy founded upon. There were issues with the drains in the Property. Mr McCawley described how he suspected that the source of these issues may have been the Respondent's misuse of the drains by flushing items inappropriately. In September 2022, Mr McCawley explained that parties had reached "*a bit of an impasse*" on this. Mr McCawley explained that he said to the Respondent that he would instruct exploratory works and if it was determined that the Respondent had caused the issues then "*she would pay for it*" but otherwise it would be Mr McCawley who would pay. Mr McCawley discussed how this was relevant to one of the alleged breaches of the tenancy because the Respondent hadn't agreed to this. The precise details of the proposition put to the Respondent seemed vague and the Tribunal noted that it all seemed very subjective.

[9] Mr McCawley also described issues with flooding which affected the Property and which came from an upstairs property. There were 17 separate incidents of water ingress. Mr McCawley explained that he concluded that this must be from some form of anti-social behaviour from the upstairs neighbour. Mr McCawley wanted the Respondent to engage with Glasgow City Council about this. Mr McCawley explained how he considered that this was a breach of the tenancy because the Respondent was failing to take action to stop the up-stairs neighbour from flooding the Property. The Tribunal discussed this in some detail with the Applicant as it appeared uncontroversial that the Respondent herself was in no way the source of any of the flooding that affected the Property.

[10] Mr McCawley then described another alleged breach of the tenancy conditions by the deliberate cutting of some vinyl flooring. It appears that the parties had agreed that some vinyl flooring would be fitted in the kitchen. Mr McCawley said that the fitter he

had instructed had been told by the Respondent that she didn't like the colour of the vinyl that had been fitted. The Respondent then sent a photo of the vinyl after it was fitted to Mr McCawley. The Respondent reported that the vinyl was damaged and it required to be replaced. The Tribunal were shown photos of the vinyl. Mr McCawley then said that he had spoken to the fitter who reported that the vinyl had been left in perfect condition. Mr McCawley spoke about how he believed that the Respondent had deliberately cut the vinyl which he considered to be a breach of the tenancy. Mr McCawley explained that the Respondent must have deliberately damaged it to get the vinyl that she wanted. Mr McCawley was unequivocal in attributing the blame for this to a deliberate act by the Respondent. This was one of the Respondent's actions which were said to constitute a breach of the tenancy agreement. Mr McCawley had no direct evidence that the Respondent cut the vinyl and his evidence was entirely based on supposition.

[11] Mr McCawley then described how the Respondent "*complained*" to Glasgow City Council about repairing issues in the Property. The Applicant considered this "*complaint"* to be unfair and disingenuous. The Tribunal was referred to correspondence which Mr McCawley had received from a Lynn Staunton from Glasgow City Council about alleged breaches of the repairing standard. Mr McCawley was called upon by the local authority to rectify these alleged breaches. Mr McCawley was greatly irked by this letter. He felt that the Respondent had misled the local authority by misrepresenting the position about the works the Applicant had already agreed to do in the Property and also decorations which the Respondent had already agreed to undertake herself. Mr McCawley stated that the Respondent had made materially misleading accusations to the relevant local authority alleging that the Applicant breached his legal obligations as a landlord in relation to: *a failure to redecorate following rewiring; a failure to replace kitchen flooring; a failure to repair drains and (4) a failure to take action regarding water ingress from a neighbouring property*. Mr McCawley explained that these allegations were false and caused him harm, distress, inconvenience and considerable time expenditure.

[12] Mr McCawley then gave evidence regarding a damaged bedroom carpet and explained how and why he thought that the Respondent must have deliberately damaged the carpet. Again, the Tribunal were referred to relevant photographs. Mr McCawley referred to a previous inspection of the Property at which there had been no reference to any damage to the relevant carpet. Mr McCawley described how later on it was discovered that the carpet appeared to have been deliberately cut at the door. Mr McCawley's position was that it was clear that the Respondent wanted a new carpet and had deliberately damaged the carpet and it was all part of the same pattern of behaviour. Mr McCawley explained that when he challenged the Respondent about the issue, the Respondent was unusually slow at responding which further fuelled Mr McCawley's suspicions. Mr McCawley explained that at that point all trust and confidence between parties was lost and he started eviction proceedings. Originally, he had tried to raise proceedings on the basis of a Section 33 Notice, but this notice was

"*challenged*" by the Respondent's solicitor. Mr McCawley explained that the Respondent's solicitor objected "*to everything*". The Tribunal noted that at a previous Case Management Discussion, Mr McCawley had accepted that a Section 33 Notice and Notice to Quit were incompetent and as such the Application was only to proceed in terms of the AT6 served under Ground 13 of the Schedule. When the Tribunal looked at the alleged damage to the carpet it was struck by how minor and seemingly trivial the matter was. The Tribunal could not consider Mr McCawley's evidence as being in proportion to the matter at hand. In any event, Mr McCawley had no direct evidence that the Respondent cut the carpet and his evidence was entirely based on supposition.

[13] Mr McCawley also spoke of various items which he said had been improperly removed from the Property. He referred to an inventory of items said to be included in the sale which he had obtained on the purchase of the Property. Mr McCawley compared this inventory to his own findings of what remained in the Property. His position was that the Respondent must have improperly disposed of certain items which were on the inventory but not in the Property.

[14] Mr McCawley also spoke to allegations that the Respondent allowed drugs to be used in the Property. He described smelling an "*earthy smell*" which he believed to be cannabis. The Applicant also described a situation hearing the Respondent "*dashing into her son's bedroom*". He then said that he was approached by a man outside the Property at his car who said words to the effect of: *"They are smoking weed all the time- it's not fair on the neighbours*". Mr McCawley also described an occasion when he saw an ash tray in the Property from which the Applicant concluded that the Respondent must be smoking in the Property again in breach of the tenancy.

[15] Mr McCawley also described how he was aware that the Respondent kept dogs in the Property in breach of the Respondent's obligations under the tenancy.

[16] Mr McCawley also gave evidence that the Respondent had breached the terms of the tenancy by carrying out internal decoration and that she had installed a large television bracket which had been drilled and bolted into the lounge wall without written permission from the Landlord which was expressly prohibited by the terms of the tenancy agreement.

[17] Mr McCawley referred to photographs and notes throughout his evidence. His position was that the Respondent had breached the terms of the tenancy agreement. The Tribunal had sight of the tenancy agreement. It was accepted that the Applicant had initially submitted the wrong version of the tenancy to the Tribunal but that the Respondent then submitted the correct operative version. The Tribunal ensured that all parties were considering the correct version of the tenancy agreement. This tenancy agreement, which commenced on 28 April 2016, contained at Condition 8 various obligations on the Respondent in terms of the use of the Property. The Tribunal

considered the Applicant's evidence against the relevant terms of the tenancy agreement below which were the conditions referred to in the Application.

Condition 8 (a) is in the following terms:

"*to keep the Subjects (which will have a Secure lock) and the contents therein clean and in good order and without prejudice to the generality, to keep those items specified in the inventory and contents agreed or about to be agreed between the Landlord and you (hereinafter referred to as "the inventory", which items you accept are in good order and condition, in such condition, fair wear and tear excepted. You further bind and oblige yourself not to cut, mark or paint any part of the Subjects or erect any signpost, aerials or nameplates or install any hooks or staples in any part of the Subjects without prior consent from the landlord*"

Condition 8 (b) is in the following terms:

"*To give the Landlord immediate notice in writing of any structural damage to defects to the Subjects in the fixtures and fittings or contents thereof as soon as the same shall take place or become apparent and to indemnify the Landlord against any additional loss occasioned by the landlord through your failure to give such notice*"

Condition (8 f) is in the following terms:

"*not to carry out any internal or external redecoration of the Subjects without the Landlord's prior written consent. Not to alter the appearance or redecoration or structure of the premises or its fixtures or fittings either internally or externally without first obtaining the prior consent of the Landlord or his agent. Such consent will not be unreasonably withheld. (in order to avoid misunderstandings or disputes later, it is strongly recommended that the tenant obtain confirmation in writing of any such consent granted.*

Condition 8 (g) is in the following terms:

"*Not to keep any pets in the property, without the Landlord's prior written consent. If consent is granted, all soft furnishings and carpets must be professionally cleaned at the expiry of the tenancy*."

8 (n) of the agreement is in the following terms:

"*not to do anything that may be deemed a nuisance to the Landlord or adjoining proprietor's under declaration that what amounts to a nuisance for the purpose of this clause shall be determined at the Landlord's sole discretion."*

Condition 8 (r) of the agreement is in the following terms:

"We understand that there is to be no smoking in the property. Any costs incurred relating to eliminating odours /staining will be chargeable to the tenant.

Condition 8 (v) is in the following terms:

"*To prevent an environment where legionella bacteria can grow and where showers are fitted the tenant should clean, descale and disinfect the shower head at least every six months, for showers only used occasionally they should be flushed through by running them for at least two minutes every week. If a property is vacant for any time ensure all hot and cold water systems are flushed through by running water for at least 2 minutes before first use."*

[18] Mr McCawley's position was that the breaches and behaviours displayed by the Respondent all constituted a "*nuisance*" and that Condition 8 (n) specifically stated that what was to constitute a nuisance was to be determined at his sole discretion and that therefore the Respondent was in breach of the conditions of the tenancy within the meaning of Ground 13 of Schedule 5 of the Act. Mr McCawley also submitted that the Respondent was in breach of Condition 8(r) which prohibited permitting smoking in the Property; breach of Condition 8 (g) which prohibited the keeping of pets without consent by keeping two dogs in the Property and also in breach of Conditions 8 (f) and 8(a) by carrying out internal decorations and installing a large television bracket without written permission. The alleged cutting of the bedroom carpet was also submitted as being a breach of Conditions 8 (v) and (a) of the tenancy Agreement. The removal or losing of items by the Respondent was also said to be a breach of Condition 8 (a). The Tribunal also considered Condition 8 (b) which was referred to in the Application and 8 (v). Mr McCawley had made brief reference to a risk posed by "*legionella*" in the context of the Respondent supposedly not stopping the upstairs proprietor from flooding the Property and in respect of the issues with the drains. The Tribunal found the Applicant's evidence to be credible to the extent that the Tribunal did not think that the Applicant was being dishonest. However, the Tribunal could not accept the Applicant's evidence as being reliable. It seemed largely based on supposition and innuendo. There was very little positive evidence to support the allegations of breaches of the tenancy. The Tribunal also could not help but note that the Applicant also appeared to have lost his perspective about certain matters. For example, the cut in the carpet the Tribunal was referred to seemed particularly minor and unremarkable. The Tribunal could not consider that the concern shown about this by the Applicant was objectively warranted.

[19] After the conclusion of the Applicant's evidence, the Applicant then called his wife, Mrs McCaulay to give evidence.

Mrs McCawley

[20] Mrs McCawley's evidence was in short compass. She described how she undertook an inspection of the Property and noted some of the issues raised by the Applicant's own evidence whose evidence she largely corroborated. She was asked by the Applicant to particularly focus on the issue of the bedroom carpet which she said showed no sign of fraying or damage at the time of her inspection. The Tribunal found Mrs McCawley as unlikely to be fabricating evidence but was still left with the impression that this cut in the carpet was being blown out of proportion.

[21] After concluding the Applicant's evidence. The Tribunal heard from the Respondent.

Ms *Anne Marie McKnight*

[22] Ms McKnight has lived in the Property since April 2014. She lives there with her 18-year-old son who has Aspergers, her 11-year-old daughter and a 7-year-old son with autism. The younger two children attend Drumchapel primary school. Prior to the Applicant taking ownership of the Property, Ms McKnight described being on good terms with her previous Landlord. There were never any issues with rent arrears and the tenancy was previously managed by Fineholm Letting. The rent is fully paid up to date.

[23] Ms McKnight denied damaging the tiles. She explained that when they were delivered, they were placed into the hall cupboard at the front of the Property. She said that she didn't touch them and had nothing to do with them being broken when they were opened. They had been in storage in the cupboard for a while as there were problems finding a tiler as described by Mr McCawley.

[24] Ms McKnight also denied deliberately damaging the vinyl. She explained that vinyl had been delivered and left rolled up in the hall for over a week initially. Ms McKnight had wanted grey vinyl. When the vinyl was opened, Ms McKnight saw that it was brown, but it was fitted anyway. Ms McKnight said that "*they discovered a bubble in the middle*". Ms McKnight said that she took a photo of it and mentioned it straight away to the Applicant. The Tribunal was referred to relevant photographs.

[25] Ms McKnight denied strongly that she deliberately damaged the vinyl. Ms McKnight denied that cannabis was used in her Property. She explained that there is a constant smell of cannabis in the close from her neighbours who presumably used cannabis. She explained that she smoked outside on the veranda and did not smoke inside. Ms McKnight did not deny that an ashtray had been seen in the Property by the Applicant. There was no evidence led as to whether that ash tray may have simply been brought in from the outside veranda after outside use.

[26] Ms McKnight addressed the Tribunal on how it came to be that the Applicant received a letter from Glasgow City Council regarding repairing issues. She explained that she had been concerned when the Applicant appeared to be blaming her for slow draining drains and draining issues in the Property. Ms McKnight said she had become overwhelmed by the number of emails she was receiving from the Applicant. She described how someone from environmental health came to the Property and carried out an assessment. It turned out that a tree out the back of the Property had caused disruption to the main pipe and that there was nothing to suggest that the Ms McKnight had done anything wrong that had affected the drains. Ms McKnight described how Shelter had drafted emails on her behalf regarding repairing issues to the Property. The Tribunal considered it likely that the Respondent allowed her agents to report issues to the council despite being well aware of those same issues having already been discussed and addressed with the Applicant. The Tribunal did consider that the Applicant was entitled to feel aggrieved by the letter received about the repairs which did suggest that the Respondent may have misrepresented some aspects of the situation to her advisors or been passive in correcting misrepresentations of the situation.

[27] Ms McKnight denied removing or disposing of items in the Property inappropriately. She explained that when she moved in the Property was partly furnished with mismatched "*bits and bobs*". It was also "*full of junk*". Ms McKnight explained that she had agreed with her previous Landlord to put many of these items in an end cupboard that leads out to the close and which has a hole which leads into the close for the purposes of ventilation.

[28] Later on, Ms McKnight reported seeing mould on many of the items and said that at some point in 2016, the previous Landlord had come in a pick-up truck and removed the entire contents of the cupboard. Ms McKnight denied disposing of any other items herself. Ms McKnight also pointed out that her previous Landlord organised regular inspections through the letting agency and no issue was ever taken with any items which were supposedly missing. Ms McKnight reckoned that it was most of the items on the inventory produced by the Applicant which were said to be missing which were placed in the cupboard and then removed by the previous landlord.

[29] Ms McKnight also explained that the previous Landlord had allowed her to redecorate as the walls had previously been yellow when students were living in the Property. She also explained that she had discussed the issue of the TV stand with the previous landlord who had no issues with what the Respondent was doing. Ms McKnight explained that it was actually her previous Landlord who had given her the number of the electrician who installed the TV and the TV bracket in 2018.

[30] Ms McKnight denied cutting any part of the carpet deliberately. She explained that the relevant section of the carpet alleged to have been cut was right next to the door and had started to fray around edges as a result of the friction of the door opening and closing. Ms McKnight explained that this was natural wear and tear and at no point had

she deliberately sought to damage the carpet. Ms McKnight explained that she had since replaced that carpet at her own expense.

[31] The Respondent currently has a French bulldog in the Property. She acquired this dog along with another dog who has since passed away in 2015. She explained that the previous landlord has said that this was fine and he never had any issue at all with the dogs.

[32] Ms McKnight gave evidence about what impact being evicted would have on her and her family. She described how it would upset her children and would be unfair on the family who are settled and happy in the Property. The children's father also lives close by and the arrangement between the children's parents well established and settled. Ms McKnight also described her long-established friendship groups in the area.

[33] The Tribunal found the Respondent to be a credible and reliable witness. What she said seemed entirely reasonable to the Tribunal. The Tribunal had no reason to make any finding that the Respondent was lying and that she had damaged and removed items and belongings as alleged by the Applicant. It was true that Ms McKnight probably did allow a provocative letter to be sent to Glasgow City Council about repairs but the Tribunal did not consider that this meant that the Respondent was not otherwise truthful.

[34] Having heard from parties, the Tribunal found the following facts to be established.

Findings in Fact

1) *On 21 February 2022, the Applicant acquired the landlord's interest in a tenancy in terms of which the Property known as and forming. 0/1 71 Wilverton Road, Glasgow, G13 2 NW was let to the Respondent. The Respondent was a Consumer and the Applicant was acting within the course of business within the meaning of the Consumer Rights Act 2015.*
2) *When the Applicant bought the Property, he had never met the Respondent or been inside the Property.*
3) *Relations between the parties deteriorated soon after the Applicant became the landlord. Arrangements were made for redecoration. The Applicant believes that the Respondent damaged some tiles which had been ordered for the installation in the Property but there is no credible or reliable evidence to support this allegation. On the balance of probabilities, the Respondent did not damage the tiles.*
4) *The Applicant similarly believes that the Respondent deliberately damaged vinyl flooring that was ordered and installed in the Property. Once again though there is no credible or reliable evidence to support this allegation. The Applicant claims*

that the tradesperson told him that the vinyl had been installed correctly but the Respondent explains that this was not the case. On the balance of probabilities, the Respondent did not damage the vinyl.

5) *The Applicant believes that the Respondent deliberately damaged a bedroom carpet in the Property by cutting it. The Respondent denies cutting or deliberately damaging the carpet. On the balance of probabilities, the Respondent did not cut or deliberately damage the carpet.*
6) *The Respondent smokes out on the veranda of the Property. At one point the Applicant saw an ashtray inside the Property. The Respondent denies smoking in the Property. On the balance of probabilities, the Respondent does not smoke or permit smoking in the Property.*
7) *The Applicant encountered a stranger who made a remark that suggested to him that the Respondents smoked cannabis in the Property. The Respondent denies smoking cannabis or that drugs are taken in the Property. The Respondent explains that others in the building do smoke cannabis and that it can be smelled in the close. On the balance of probabilities, the Respondent does not take drugs or permit drugs to be taken in the Property.*
8) *In 2018, The Respondent installed a TV bracket into the lounge wall with the full consent and knowledge of the previous Landlord. The Respondent similarly redecorated the Property with the full knowledge and consent of the previous landlord. The Respondent kept dogs in the Property with the full knowledge and consent of the landlord who by his conduct expressly waived any objection to the conduct of the Respondent.*
9) *The Property is frequently subjected to water leaking into it from an upstairs property. The Respondent bears no responsibility whatsoever for the actions of the proprietor or occupier of the upstairs property. The Applicant has done nothing to seek any relevant orders from court seeking to interdict the upstairs occupier from causing any further nuisance or damage to the Property by causing the ingress of water.*
10) *The Respondent became overwhelmed by the volume of communications she was receiving from the Applicant. She was uncertain of the rights and wrongs of the Applicant suggesting that the Respondent might have to bear the costs of fixing drains in the Property if the Applicant deemed that the Respondent had been found to have been at fault. She instructed Shelter. Shelter submitted a complaint to Glasgow City Council that the Property did not meet the repairing standard. The Respondent ought to have insured that this letter did not misrepresent the private arrangements she had in fact made with the Applicant about certain features of the complaint. However, the Applicant's continued failure to deal with*

the choked drain did provide justification for the Respondent seeking advice from a Housing advice agency.

11) *The Respondent previously deposited certain low value, jumbled items into a hall cupboard. These later became mouldy. The Respondent's previous landlord uplifted and disposed of these items and there was no suggestion at the time that the Respondent had done anything wrong. These items were then included on an inventory which the Applicant came into possession of on his purchase of the Property.*
12) *The Respondent's conduct has been consistent with her obligations under the tenancy agreement. She lives in the Property with three children, two of whom are of school age. Two of her children have additional support needs. The family are well settled in the Property and have friendship groups locally. The children attend school locally and are close to their father who lives locally. The Respondent is up to date with her rent.*

[35] Having made the above findings in fact, the Tribunal proceeded to determine whether the ground relied on in Form AT6 was established. Having done so, the Tribunal considered that they have not albeit the Tribunal considered that Condition 8 (n) of the agreement required to be considered separately.

"*not to do anything that may be deemed a nuisance to the Landlord or adjoining proprietor's under declaration that what amounts to a nuisance for the purpose of this clause shall be determined at the Landlord's sole discretion".*

[36] At submissions stage, Ms Berry submitted that even if this condition had been breached, the Condition ought to be construed as being unenforceable under the Consumer Rights Act 2015. The Tribunal noted the decision of Appeal Sheriff O'Carroll in the case of *Mr Mark Horne and RM Robert Horne and Slash Property Ltd 2024 UT36 UTS Ref: UTS/AP/24/0020.* A tenancy contract such as this was construed by the Upper Tribunal as being within the ambit of the Act. The Tribunal was therefore obliged to proceed on that basis. The decision also provides guidance on the approach the Tribunal ought to take in determining whether any contractual term was unfair. The Tribunal accepted Ms Berry's submission as being well founded. Condition 8 (n)was manifestly unfair as a contract term as it sought to provide that the landlord was to be the sole arbiter of what amounted to a nuisance- and effectively therefore the sole arbiter of whether a tenant had breached the tenancy. This created an unacceptable imbalance of power against which the Respondent would have no right of redress. The Tribunal therefore considered this condition to be unenforceable in terms of Section 62 of the said Act. The Respondent therefore could not be held to be in breach of it.

[37] In any event, the Tribunal would not have determined on the facts found established that it would have been reasonable to make an Eviction Order had this

Condition been considered both enforceable and to have been breached. The Tribunal noted the Applicant's submission that the addition of the test of "*reasonableness*" was retrospective and unfair. However, the Tribunal considered that to be irrelevant. It was not for this Tribunal to question the rights and wrongs of the law but simply to apply it to the situation before it. The Tribunal considered that the Respondent's long-standing tenure in the Property, her good conduct throughout the tenancy, her children's medical conditions and their need for stability would have resulted in the Tribunal not considering it reasonable to make an Eviction Order even if the Tribunal had found that Condition 8 (n) of the tenancy was enforceable and had been breached. The competing justification put forward by the Applicant fell way short of tipping the balance of reasonableness in favour of the Applicant.

[38] The Tribunal therefore refused the Application and did not make an Eviction Order.

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.

_____ **15 February 2025**

Legal Member/Chair **Date**