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 under section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/CV/20/0708 & FTS/HPC/CV/20/0743

Re: Property at 2 Small Holdings, Sauchenford, Stirling, FK7 8AP ("the Property")

Parties:

Miss Cara Craig, 2 Small Holdings, Sauchenford, Stirling, FK7 8AP ("the Applicant")

Mr Russell Gordon, Mrs Lesley Gordon, 92 High Blantyre Rd, Hamilton, Glasgow, ML3 9HS; Glenside Farm, Plean, Stirling, FK7 8BA ("the Respondent")

Tribunal Members:

Helen Forbes (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment should be granted against the Respondents in the sum of £2754.75.

Background

1. By applications dated 18th February 2020 (FTS/HPC/CV/20/0708) and 29th February 2020 (FTS/HPC/CV/20/0743), made in terms of Rule 70 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended ("the Rules"), the Applicant is seeking orders for payment in respect of council tax and electricity paid during her tenancy. The Applicant was the tenant of the Property, which includes a house ("the House"), yard, arena and stables. The tenancy agreement commenced on 1st February 2016 and ended on 28th October 2020.

2. The Applicant submitted the following documentation in respect of FTS/HPC/CV/20/0708: copy tenancy agreement between the parties; copy Council Tax bill for 2019/2020; information regarding an adjacent holiday

cottage; photographs of the Property and an email from Stirling Council. The Applicant is seeking an order in the sum of £3804.84 in respect of council tax, which is one third of the sum sought by Stirling Council in respect of the Property, over the term of the tenancy agreement.

3. The Applicant submitted the following documentation in respect of FTS/HPC/CV/20/0743: copy tenancy agreement between the parties; copy electricity bills for the period 13.1.18 to 19.1.20; information regarding an adjacent holiday cottage; and photographs of the Property. The Applicant is seeking an order in the sum of £7600 in respect of electricity, which is one third of the sum sought by Eon in respect of the Property, over the term of the tenancy agreement.

4. The House forms part of a larger building ("the Larger Subjects"), which includes a holiday cottage let by the Respondents. There has been no division of the Larger Subjects for the purposes of utilities and council tax, and there is only one electricity meter, which is situated within the holiday cottage. Consequently, the Applicant is held responsible for electricity and council tax for the Larger Subjects by Eon and the local authority, respectively.

5. Case Management Discussions took place on 7th August and 7th December 2020, and 25th January 2021 by teleconference call.

6. By email dated 5th November 2020, the Applicant lodged an amendment to her application to the effect that she is claiming £630.79 (electricity) and £3447.43 (council tax) from the Respondents, this being one third of payments actually made, rather than the amounts billed by the utility company and the local authority.

7. A Direction was issued by the Tribunal dated 7th December 2020.

8. By email dated 17th January 2021, the Applicant lodged written submissions and productions.

9. By email dated 24th February 2021, the Applicant lodged an amendment to her application, seeking a payment of £3633.98 in respect of council tax.

10. By emails dated 26th February 2021, both parties made written representations.

11. By letter dated 2nd March 2021, the Respondents lodged written representations and productions. The items were date-stamped 5th March 2021 by the Housing and Property Chamber.

12. By email dated 5th March 2021, the Respondents made written representations and lodged a witness list with the names of two witnesses.

13. By email dated 8th March 2021, the Applicant made written representations, including an objection to the late lodging of the witness list by the Respondents.

The Hearing

14. A hearing took place by telephone conference on 10th March 2021. All parties were in attendance.

Preliminary Issues

Late lodging of witness list

15. The Tribunal requested information from the Respondents as to the matters to be spoken to by their two proposed witnesses. Mrs Gordon said one would speak to the amount of electricity used in the livery yard. The other had been to the holiday cottage and could speak to whether or not it was occupied. Mrs Gordon said she had forgotten to include the witness list within her written representations.

16. The Applicant maintained her opposition to the Tribunal allowing the witnesses to be heard, as the list had not been lodged 7 days before the hearing, in terms of Rule 22. A consequence of the late lodging of the list was that she did not have time to prepare adequately. She submitted that the witness evidence was not relevant. There was no dispute over the electricity used in the livery yard. Responding to questions from the Tribunal as to what she would have done by way of preparation had she known of the witnesses at an earlier stage, the Applicant said she would have contacted the Respondents to ask for details as to their relevance.

Evidence regarding a verbal agreement between the parties

17. The Tribunal had previously highlighted the issue of whether evidence should be allowed to be led to indicate that there had been verbal agreement between the parties that the Applicant would be responsible for paying the electricity and council tax for the holiday cottage as well as the Property, thereby departing from the terms of the tenancy agreement. There was some discussion in this regard. The Respondents continued to insist that there was a verbal agreement between the parties, and wished to be heard on this matter. The Applicant insisted there was no such agreement.

Tribunal decision on preliminary matters

18. The Tribunal adjourned to consider matters.

19. The Tribunal noted that the Applicant was notified of the witnesses on 5th March, five days before the hearing. The Tribunal considered that the Applicant could have made her enquiries regarding the witnesses in the time allowed, and had not done so. The Tribunal considered that it would be

appropriate to hear from the witnesses, as it appeared that they would be speaking to relevant matters.

20. The Tribunal took the view that the terms of the tenancy agreement were unclear. There was dubiety over the subjects of the tenancy agreement and the responsibilities of the parties. In the circumstances, the Tribunal agreed to hear evidence on this matter from parties.

21. The Tribunal reconvened and informed parties of its decision.

22. The Tribunal informed parties it would not be hearing or taking into account any evidence regarding discussions that had taken place between the parties in relation to a proposed settlement that had not come to fruition, details of which both parties had lodged in their written submissions.

23. There was some discussion regarding an email lodged by the Applicant from Eon dated 3rd November 2020, which had an attached schedule showing payments made to Eon in respect of electricity. Although the Tribunal had received the email and the schedule as separate documents, they wished to see the original email with attached schedule. The Applicant agreed to lodge the email during the lunch break.

Evidence and representations by the Applicant

Verbal agreement between the parties

24. The Applicant said she was given the keys to the Property from Mr Gordon on the evening before the tenancy commenced. Mr Gordon told her that the meter was within the holiday cottage, and that she should tell him when she had arranged a provider and the cost per unit for electricity. She said she was taken aback to hear this. She then spoke to the previous tenant (LB) about this. She referred the Tribunal to screenshots of text messages between herself and LB dated 1st February 2016, the date of commencement of the tenancy. Asked by LB what Mr Gordon had told her about the electricity, the Applicant included the following statement in her reply: *He said to me that he has a separate meter in the holiday cottage and that if I tell him how much my electricity supplier charges per meter he will look and see how much he's used each month and give me the cash.*

    LB's reply included the following: *He should have gave me a good few hundred. And guess what he's giving me for 14 months electricity, £144.*

25. The Applicant denied there was a verbal agreement between the parties that she would be responsible for the electricity and council tax for the holiday cottage. She said she mentioned this issue a few times thereafter to Mr Gordon, when he was at the holiday cottage cutting the grass. He said he would sort it out and he never did. She referred the Tribunal to an email dated 10th July 2018, sent by the Applicant to the Respondents' solicitor. It stated, among other things:

I have raised a number of issues previously which your clients have refused to consider. I will therefore seek to bring these up at the case management discussion. These are:

Non payment of your clients share of council tax, as they have subdivided the property without building warrants or indeed notifying the council there are 2 separate properties, I am being charged for the whole property including your clients holiday cottage.

Non payment of share of electricity bill as your clients have both properties running from one electricity meter which I have been advised by SP energy networks is in fact illegal as I have no access to the meter for my property.

Responding to questions from the Tribunal as to why she did not raise this matter in writing before July 2018, the Applicant said she raised it verbally on several occasions. She said Mr Gordon's behaviour became intimidating and the relationship broke down.

Electricity usage

26. The Applicant said she had been told by a previous tenant that the Respondents were paying her £30 per month for electricity used in the holiday cottage. The holiday cottage is a two-bedroomed property. The Applicant had undertaken research and been informed that holiday cottages tended to have higher electricity bills than other properties because occupants were not as careful as they might be at home.

27. In response to written submissions made by the Respondents in regards to electricity usage, the Applicant said she rarely used the tumble drier or electric heaters. The tumble drier would be used to dry bedding, approximately once a month for a short time. She refuted the account given in the Respondents' production D.2.3 which was an email dated 14th February 2018 from the Applicant's solicitor to the Respondents, which stated: *She has had to buy oil heaters to heat up the house.* The Applicant said this had been inaccurately transcribed by the paralegal that typed the email, and that she did not say she had purchased the heaters.

28. The Applicant said the boiler within the Property did not work well. It was looked at by an engineer, but it only worked intermittently over the winter, and it was noisy. There had been talk between the parties about grants for replacing the boiler but this had come to nothing. There was a sewerage spillage that meant the oil tank that fuelled the boiler could not be accessed for a time. She had told the Respondents that she would have to get heaters. She purchased oil-filled heaters but she did not have them on all the time. They were used for a couple of months at the beginning of 2020. They had thermostats and retained heat, so they did not have to be on all the time. In the spring of 2020, there was a

heatwave and there was no need for the heaters. The Applicant said there was a period when there was no electricity to the yard from the beginning of 2020.

29. The Applicant said her partner denied having the conversation with the heating engineer, as referred to in the Respondent's production D2.95. She said they used the boiler and purchased oil elsewhere. Her supplier did not send bills or invoices. They would put something through the door indicating the amount owed. Responding to questions from the Tribunal, she said the boiler was in use from February 2016 to the winter of 2019 routinely. It was used primarily for hot water for baths. It was not used much in the summer. They were cautious with the oil, and became more so after the winter of 2018. Latterly, there was no access to the oil tank, and the boiler was not working well. It was serviced in October 2018 and December 2019, and on both occasions, there was oil in the tank, which tended to show they were using the boiler and buying oil.

30. In respect of alleged electricity usage in the holiday cottage, the Applicant said it was extensively occupied for four and a half years. There was a significant amount of electricity used in the holiday cottage. Referring to the Respondents' production 2.44 – 2.51, which detailed the bookings for the holiday cottage, the Applicant said these could not be relied upon as they only indicated one source of bookings. There may have been direct bookings that did not go through that particular website. The cottage had been advertised on Lastminute.com and Expedia, yet no information from these sites had been provided. She referred to screenshots of adverts from these websites that she had lodged. She had also lodged reviews of the cottage from Expedia. There were often people at the holiday cottage at Christmas and New Year. She was unaware what was going on in the holiday cottage in terms of electricity usage. Responding to questions from the Tribunal as to what the Applicant thought might be going on in the holiday cottage, she said they could be using dehumidifiers as there were damp problems in the Property. She had not heard dehumidifiers running but the walls were thick, apart from in the hallway, so she wouldn't have heard them.

31. The Applicant said the holiday cottage was in use almost every day throughout 2019. In 2020, during lockdown, a couple would attend the cottage in separate cars and stay there from 9am to 5pm. The lights were often on late at night.

32. The Applicant said that the horse walker at the yard was only used by one livery client during her time at the Property. The electricity usage at the yard is not high. The tearoom referred to is just a shed, and is rarely used. The same applies to the music system and microwave.

33. The Applicant disputed whether Mrs Gordon had recently stayed in the Property, as claimed. She said Mrs Gordon only lives five minutes away and would have no reason to stay there. The electricity bills lodged by the Respondents showed the holiday cottage usage of around £75 per month. This would average out at £30 per month over a period of a year.

34. It was the Applicant's position that, given that the Property has four bedrooms and the holiday cottage has two, it would be fair to split the electricity and attribute one-third to the holiday cottage.

Council Tax

35. The Applicant referred the Tribunal to the statement from Sheriff Officers dated 24th February 2020 that indicated how much she had paid towards the council tax. The issue of single occupancy raised by the Respondents was not relevant as they would not be entitled to benefit from single occupancy. The relevant amount for the purposes of the application was the amount she had paid. She is claiming £3633.98 from the Respondents, which is one-third of the total sum paid.

36. It was the Applicant's position that the only way to divide the council tax, given the Respondents' failure to do this properly, was on the basis of bedrooms – the Respondents should be liable for one-third of the council tax. She disputed the claim by the Respondents that council tax was based on the valuation of the whole property including the fields. She had seen a similar sized house for sale recently at offers over £350,000 with no lands, fields or stable.

Evidence and representations by the Respondents

Verbal agreement between the parties

37. Mrs Gordon said there was a verbal agreement between the Applicant and Mr Gordon that the Applicant would be liable for the electricity and council tax for the Larger Subjects. The Applicant had sent emails saying how pleased she was with the Property. She did not raise the matter of payment of electricity and council tax for the holiday cottage until the Respondents tried to recover possession of the Property, following a notice to quit served on 3rd August 2017 (production D2.1). Mrs Gordon referred the Tribunal to Clause 6 of the tenancy agreement, which stated that the tenant undertakes payment of all charges. The Applicant had not questioned the tenancy agreement.

38. Mr Gordon accepted that it was difficult to prove a verbal agreement, and pointed to the lack of written requests from the Applicant for recompense in respect of electricity and council tax as evidence that there was an agreement. Referring to the text messages from LB, Mr Gordon said that it was a different tenant with a different agreement.

39. Mr Gordon pointed out that the Applicant had been quick to threaten to withhold her rent when she emailed him about a broken shower, giving 24 hours for repair. This should be taken as evidence that she would have contacted him had she expected to be reimbursed for the electricity and council tax.

Electricity usage

40. Mrs Gordon said the share of electricity claimed by the Applicant was wholly disproportionate. She referred the Tribunal to production D47 which was a bank statement from 2012 when the Respondents and their son were living in the Property and running a business in the livery yard. The monthly direct debit payment for both properties and the yard was £112. The Applicant has run up an electricity bill of £21,000 for 58 months.

41. Mr Gordon referred to production 2.44 – 2.51, which indicated occupation of the holiday cottage from 2016 onwards as follows:

    2016 – 186 nights
    2017 – 173 nights
    2018 – 152 nights

    Thereafter, the holiday cottage was shut down and there were no guests in 2019 and 2020. It was always closed in the winter, although Mrs Gordon conceded that there was a guest there for the Christmas of 2017. Although it may have appeared on other websites, there was only one way of booking the holiday cottage and that was through Vrbo, the company indicated in production 2.44 – 2.51.

42. Mr Gordon pointed out that a review for the holiday cottage in the productions lodged by the Applicant, purporting to have been made in 2020, was actually a duplicate of a review posted in October 2018, as indicated in Respondents' production 2.86.

43. Mrs Gordon referred the Tribunal to production 2.53 which showed the layout of the Property, including a hot tub outside. Production 2.57 was a document stating the average costs for electric heaters, and calculating a notional total of £5,880, based on ten electric heaters used for eight hours daily from February to October 2020. Electricity bills had shown that the Applicant used £5,370.45 in electricity during a nine-month period, when the whole family would have been at home due to the pandemic. There was no hot water as the boiler was not being used, so water must have been heated by kettle. There was a dish washer and an electric shower.

44. Mrs Gordon counted ten electric heaters at the Property during an inspection in December 2019. The Tribunal was referred to productions D38 – D43, which all showed the use of white panel heaters within the Property. Production D.44 showed the tumble drier within the Property. Production 2.58 showed boxes from black oil-filled radiators that had been discarded at the Property following termination of the tenancy.

45. Production 2.59 was a bill from Eon dated 20th November 2020, for the sum of £4.17 for a period of two weeks after the tenancy ended. Production 2.60 was a bill from Eon dated 22nd December 2020 for the sum of £123.11. Production 2.61 was a bill from Eon dated 22nd January 2021 for the sum of £107.93.

Production 21 was a bill from Eon dated 20th February 2021 for the sum of £87.50. Mrs Gordon said two people had been staying in the holiday cottage from November 2020 until the second week of February 2021. Mrs Gordon had stayed in the House for nine weeks during that time.

46. Mrs Gordon referred the Tribunal to productions 2.64 – 2.85, which were invoices for oil delivered to the holiday cottage, the House and Mrs Gordon's current property. There is only one oil supplier to the area. The holiday cottage has its own oil tank and boiler. The invoices began on 5th March 2018 and earlier invoices were not available. The only invoices for delivery to the Property were dated after the tenancy ended, which indicated that the Applicant did not obtain any heating oil between 5th March 2018 and the end of the tenancy. This should be taken as evidence that she was not using oil and was relying on heaters. It was Mrs Gordon's position that the Applicant could not get oil from any supplier, because she did not pay her bills. The electricity could not be disconnected due to the needs of the Applicant's family.

47. Production D2.95 was a letter from a heating engineer dated 2nd March 2021, stating that the Applicant's partner had told the heating engineer on a visit to service the boiler of the Property on 9th December 2019 that the boiler had not been used since the tenancy started, and that electricity was used to heat the water and the rooms. Mrs Gordon said that the boiler worked immediately and perfectly after repossession of the Property.

48. Mrs Gordon said that the Respondents were content to pay the sum of £30 per month for electricity for each month that the holiday cottage was occupied.

Council Tax

49. Mrs Gordon referred the Tribunal to her production 2.23 which comprised section 75 of the Local Government Finance Act 1992, which states at s75(2)(b) that the person liable for the council tax is the *resident tenant of the whole or any part of the dwelling*.

50. Mrs Gordon referred the Tribunal to her production 2.25 which was Citizens Advice Bureau advice on council tax. The advice states that the council tax band is based on the value of the home. Mrs Gordon said it should not be calculated on the basis of the bedrooms in a property. There had been a valuation of the Larger Subjects, and the land, stables and yard at £350,000, which put it into Band H for the purposes of council tax.

51. Mrs Gordon said the Respondents had never seen the council tax demands sent to the Applicant. Although she accepted that this application was based on the amounts paid in council tax by the Applicant, she said they required to see these demands as there may be future claims made by the Applicant. There was no challenge by the Respondents to the amounts included within the Sheriff Officer's information dated 24th February 2020.

52. Mrs Gordon referred to production 2.52 which was a site plan of the whole property outlined in pink. The holiday cottage was shown shaded in green. The Respondents submitted that the holiday cottage council tax liability should be one-tenth of the whole subjects.

53. Responding to questions from the Tribunal, Mrs Gordon said the fields and stables increase the value of the whole property. She accepted that a one-tenth split was a notional division. Mr Gordon said they had attempted to get a professional to answer this question but this had not been possible. It was the Respondents' position that this was a reasonable estimate.

Witness – Carol Anne McPhail

54. Mrs Gordon led evidence from the witness Carol Anne McPhail. She is a telecare support officer. She has been in that post for three and a half years. She and her daughter liveried their horses at the Property for a period of three to three and a half years until January 2018. She confirmed that there was a stable, field, floodlit arena, horse walker, pack room, viewing gallery, toilet, kitchen and wash bay. There was electricity in the stable and there were gallery lights. All the blocks were lit together, using the same switch. The yard lights were on a separate switch. There were no restrictions on using electricity at the stables. The horse walker was used every day. It is motorised by electricity. Ms McPhail would use two or three kettles of hot water to wash her horse every night. There could be up to nine people in the yard when she was there. Other people also boiled kettles and used the horse walker. The livery clients were not charged any extra above the livery fee for electricity. There was no cross examination of the witness by the Applicant.

Witness – Catherine Arthur

55. Mrs Gordon led evidence from the witness Catherine Arthur. She is an administrative assistant and has been in her role for four years. She attended at the holiday cottage from late 2019 and through 2020 with Mrs Gordon six to eight times to check the cottage and make sure everything was in order. She saw no evidence that anyone had been staying at the cottage, and never saw anyone there. There was no clothing, bags, food or milk. Everything had been switched off. It was an empty cottage.

56. Under cross-examination, the witness said the cottage was fully furnished and it appeared as if no one had stayed there for a while.

57. Responding to questions from the Tribunal as to why Mrs Gordon had taken the witness with her to the cottage, she said the Applicant had made calls to the police, accused Mr Gordon of harassment, taken photographs and made threats. She felt she had to take a witness to safeguard her against such behaviour.

58. The Applicant submitted that the evidence of Ms Arthur was not conclusive as people do not tend to leave their belongings behind when they have left. There

were cleaners present between occupants, therefore, it would be clean and empty if visited between occupants.

59. The Applicant was unable to procure a copy of the Eon email of 3rd November 2020 that had been requested by the Tribunal, as her email address had changed. The Tribunal accepted the email and schedule previously supplied.

Findings in Fact

60.

(i) The Property, which comprises a dwelling-house and a stable yard with associated buildings, fields and arena is registered in the Land Register for Scotland under Title Number STG4101. It is in the joint ownership of the Applicants. The Applicants are joint mortgage holders.

(ii) Mr Gordon entered into an assured tenancy agreement with the Respondent commencing on 1st February 2016 at a monthly rent of £1200.

(iii) The tenancy ended on 28th October 2020.

(iv) The tenancy agreement defined the subjects for let as '*the dwelling house known as Glendale Cottage, No 2 Small Holdings and forming with the garden grounds pertaining thereto'*.

(v) Glendale Cottage is split into two properties, namely the four-bedroomed House and an attached holiday cottage with two bedrooms. The properties share the same address.

(vi) There was agreement between the parties at the time of commencement of the tenancy that the subjects to be tenanted did not include the holiday cottage, the sole use of which was retained by the Respondents.

(vii) The Respondents had responsibility for maintaining the holiday cottage and its garden ground.

(viii) The Respondents retained all income gained from letting the holiday cottage.

(ix) The electrical system is not split between the properties. There is one electrical system, with one meter, which is situated in the holiday cottage.

(x) In terms of clause 6 of the tenancy agreement, the Applicant undertook to make payment of electricity consumed in the Property.

(xi) In terms of clause 6 of the tenancy agreement, the Applicant undertook to become the subscriber for electricity consumed in the Property.

(xii) Due to the properties being considered as one property, and sharing an electric meter, the Applicant had responsibility for paying the electricity bill for the building known as Glendale Cottage, which meant she was also responsible for the electricity used in the holiday cottage.

(xiii) In terms of the written tenancy agreement, the Applicant did not undertake responsibility for payment of electricity consumed in the holiday cottage.

(xiv) Occupants of the holiday cottage booked their accommodation using the booking system on the website of the company previously known as HomeAway and now known as Vrbo.

(xv) The holiday cottage was also advertised on Expedia and Lastminute.com.

(xvi) The holiday cottage was occupied by holiday makers for around 186 days in 2016.

(xvii) The holiday cottage was occupied by holiday makers for around 173 days in 2017.

(xviii) The holiday cottage was occupied by holiday makers for around 152 days in 2018.

(xix) There was occasional daily use of the cottage from late 2018 to 2020.

(xx) The holiday cottage was occupied between November 2020 and February 2021.

(xxi) Mrs Gordon stayed in the Property for a period of around 9 weeks in early 2021.

(xxii) In 2012, there were three people residing in the Property. The monthly direct debit for both properties and all adjacent land and facilities was £112.

(xxiii) The electricity used between the two properties for the duration of the tenancy amounts to approximately £21,000.

(xxiv) As at 24th February 2021, the Applicant had paid a sum of £1895.55 to Eon for electricity.

(xxv) The Respondents have been unjustly enriched by the Applicant having paid electricity for the holiday cottage, contrary to the terms of the tenancy agreement.

(xxvi) The Respondents are responsible for paying to the Applicant as recompense the sum of £30 per month for the electricity used in the holiday cottage during the duration of the tenancy agreement, but only for each month that the cottage was occupied.

(xxvii) The Respondents are responsible for paying to the Applicant the electricity for a period of ten weeks to account for occupation at Christmas 2017 and occasional day-time use from late 2018 to 2020.

(xxviii) Glendale Cottage is considered one property for the purposes of council tax, as no notification has been made to the local authority that it is, in fact, two properties.

(xxix) In terms of clause 8(o) of the tenancy agreement, the Applicant undertook to pay promptly to the local authority the share of council tax due in respect of the Property for the period of the lease.

(xxx) The Applicant did not undertake to pay the council tax for the holiday cottage in terms of the tenancy agreement.

(xxxi) Throughout the tenancy, the responsibility for paying council tax, under section 75 of the Local Government Finance Act 1992, lay with the Applicant.

(xxxii) As at 24th February 2021, the Applicant had paid council tax in the sum of £10,901.94.

(xxxiii) The Respondents have been unjustly enriched by the Applicant having paid council tax for the holiday cottage, contrary to the terms of the tenancy agreement.

(xxxiv) The Respondents are responsible for paying to the Applicant a one-fifth share of the council tax paid by the Applicant.

Reason for decision

Verbal agreement between the parties

61. The Tribunal was unable to find that there was a verbal agreement between the parties that the Applicant would be responsible for paying the electricity and council tax for both properties, as the evidence was inconclusive. The Tribunal took into account the exchange of messages between the Applicant and LB at the start of the tenancy, where the Applicant appeared to believe she would receive a sum in respect, at least, of the electricity, from Mr Gordon. This would appear to support the Applicant's position that she did not agree to take responsibility for all costs. However, the Tribunal also took into account the fact that the Applicant did not raise this matter again, at least in writing, until July

2018, which did not suggest she was concerned about the situation. The Tribunal considered it entirely possible that there was a degree of misunderstanding on the part of both parties in this regard, and that the matter was not fully discussed and explored before the tenancy commenced.

62. For there to be a lease in Scots law, there are four necessary elements:

    (i) *Consensus in idem* (agreement) between the parties
    (ii) Occupation of heritable subjects
    (iii) A consideration (rent)
    (iv) A period of time for which the subjects are let

    In this case, the parties had clearly reached agreement on all these matters, and the subjects of let was the Property, excluding the holiday cottage, despite the fact that the tenancy agreement failed to make this clear. There does not appear to have been any confusion over the fact that the Applicant did not have access to the holiday cottage, and was not its tenant.

63. The tenancy agreement stated that the Applicant would have responsibility for electricity 'consumed' in the Property, and for 'the share of Council Tax due in respect of the property.' It did not provide that the Applicant would be responsible for utilities and council tax for a property that she did not tenant, and had no access to. The Tribunal noted that none of the other tenant obligations of the tenancy agreement, such as cleaning, decorating, occupation and contents insurance extended to the holiday cottage.

64. The Tribunal, therefore, found that the Respondents had been unjustly enriched by the fact that the Applicant was held responsible for electricity and council tax in respect of the holiday cottage. The Respondents ought to have been responsible for the electricity and council tax, and the Applicant is entitled to recompense for sums paid out.

Electricity usage

65. It was clear on the evidence before the Tribunal that there was a significant increase in electricity usage during the Applicant's occupation of the Property. The Tribunal found, on the balance of probabilities, that this was due, in the main, to the use of electric heaters by the Applicant within the Property. The Tribunal preferred the evidence of the Respondents in this regard. This evidence was supported by the photographs from December 2019 that indicated significant use of heaters, and the information and notional calculation provided by the Respondents regarding costs for electric heater usage. There was no credible evidence put forward to support the Applicant's inference that a large amount of electricity was being used in the holiday cottage, contributing to the excessive bills. Nor was there any suggestion that increased electricity usage in respect of the yard had contributed to the increased costs. The Tribunal noted that the Applicant did not seem to have queried the large bills during her tenancy, as might be expected if she was concerned that an excessive amount of electricity was being used in the holiday cottage.

66. The Tribunal accepted the evidence of the Respondents that there was only one booking system for the holiday cottage, despite it appearing on two other websites. The Tribunal accepted the evidence of the Applicant that there was occasional usage of the holiday cottage during the day between late 2018 and 2020.

67. The Tribunal found that the Respondents' submission that £30 per month for every month that the holiday cottage was occupied would be a fair sum. The holiday cottage was officially booked for a total of 511 nights, which equates to 73 weeks. £30 per month x 12 ÷ 52 equates to £6.92 per week. The Tribunal found that a further 10 weeks should be added to the calculation to account for the Christmas booking in 2017 and day time usage after holiday letting ceased in 2018, up to the end of the tenancy in 2020. 83 weeks at £6.92 amounts to £574.36 due to the Applicant by the Respondents in respect of electricity for the holiday cottage.

Council Tax

68. Mrs Gordon's submission that the council tax legislation made the Applicant responsible for the council tax for the Larger Subjects was correct, and the Applicant is being held liable by the local authority in terms of that legislation. However, the situation has arisen because the Respondents did not sub-divide the properties, and have been unjustly enriched due to the Applicant being held liable for, and having paid, council tax, contrary to the terms of the tenancy agreement, which refers to the Applicant paying a share of the council tax.

69. The evidence before the Tribunal regarding the apportionment of council tax was inconclusive. The Tribunal was not persuaded by the apportionment suggested by either party. The Tribunal notes that the evidence provided by the Respondents states that council tax is a tax on domestic property and is based on the value of the home, which would suggest it is based on the building itself. However, the Tribunal accepted that the banding system relies on a valuation of the total subjects, which would include the adjacent land, stables and yard. The Tribunal was not provided with any evidence to indicate a breakdown of the valuation of each component of the subjects. The Tribunal found that a fair apportionment of council tax for the holiday cottage would be one-fifth of the total council tax paid, and that the Applicant is entitled to recompense amounting to £2180.39.

Decision

70. An order for payment is granted against the Respondents in the sum of £2754.75.

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.

Helen Forbes

Legal Member/Chair **17th March 2021**
Date