

**Housing and Property Chamber**  
First-tier Tribunal for Scotland

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**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) Act 2014 and Rule 70 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) (Regulations) 2017.**

**Chamber Ref: FTS/HPC/CV/18/0851**

**Re: Property at 29 Hillview Street, Glasgow, G32 7BQ (“the Property”)**

**Parties:**

**Mr Christopher Kavanagh, 52 Ardlui Street, Glasgow, G32 7AY (“the Applicant”)**

**Ms Marie Wilson, 29 Hillview Street, Glasgow, G32 7BQ (“the Respondent”)**

**Tribunal Members:**

**Martin McAllister (Legal Member) and Elizabeth Dickson (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determines that the Respondent requires to pay the sum of £3,002 to the Applicant**

**Background**

This is a matter which was dealt with over three days of Hearings- on 27<sup>th</sup> July 2018, 17<sup>th</sup> September 2108 and 13<sup>th</sup> November 2018. On 27<sup>th</sup> July preliminary matters were dealt with and on that date an application for recovery of the Property was dismissed. It was adjourned from the second date to the third date after evidence had been heard. This was because of shortage of time. It is an application in respect of recovery of rent arrears.

At all the Hearings, the Applicant was represented by Mr Hislop, solicitor and the Respondent by Ms Nelson, solicitor. The applicant was supported by Mrs Elizabeth Kavanagh and the Respondent was supported by Ms Patricia Wilson on 17<sup>th</sup> September 2018 and by Mr Lee Paul Crossan on 13<sup>th</sup> November 2018.

## Findings in Fact

1. The Applicant and Respondent are parties to a short assured tenancy dated 31<sup>st</sup> August 2005 in respect of the Property.
2. There are rent arrears due by the Respondent to the Applicant in the sum of £3530.
3. The Applicant is due to compensate the Respondent in respect of her purchase of a fridge and a washing machine for the Property.
4. The Respondent endured excessive upheaval and disruption in October 2017 when the bathroom in the Property was being refunded.

### Preliminary Matters on 17th September 2018

Ms Nelson said that she had lodged Productions late because Legal Aid had only been granted days previously. She submitted that late submission would not be prejudicial to the Respondent and that not much time would be required to read them and that some consisted of photographs.

Mr Hislop said that he had no objection to the productions being accepted into the Process but he indicated that there was no indication of when the photographs had been taken. The Respondent's solicitor had lodged a report from Professor Tim Sharpe, Architect, dated 7<sup>th</sup> August 2018.

Mr Hislop had sent a letter to the Tribunal dated 12<sup>th</sup> September 2018 together with a schedule of work the Applicant proposed to carry out on the Property.

Ms Nelson said that, since the initial Hearing on 27<sup>th</sup> July 2018, the applicant had made payment of £900 to the Applicant. Mr Hislop acknowledged this and said that £400 had been paid in respect of the rent due for September. He said that the payments had been made late.

Mr Hislop said that the sum now owed by the Respondent was £3,530 and he made a motion to amend the amount claimed to be £3,530 rather than £2,030 as stated in the application.

Ms Nelson had no objection to the application being amended in this regard to reflect that the outstanding sum is £3,530 although she stated that she would be seeking an abatement of rent.

Mr Hislop stated that he did not consider abatement to be appropriate in the circumstances.

Ms Nelson set out the basis of the abatement she was seeking.

She said that in July 2017 the Respondent had to replace a washing machine and fridge which had originally been supplied to her by the Applicant. She said that the cost of this was £510 and that this sum formed part of the abatement being sought by the Applicant. No documentation was produced to support this outlay.

Ms Nelson also stated that she would be seeking abatement of rent from December 2017 to the present and she said that she calculated this to be ten months at £400 per month making it a total of £4000 which added to the £510 meant a total sum of £4,510

sought as an abatement of rent. Subsequently, in her submissions on 13<sup>th</sup> November 2018, Ms Nelson amended the sum sought in respect of abatement.

Mr Hislop stated that he saw no abatement to be justified and that his client's position is that he does not consider the property to be or to have been uninhabitable. Mr Hislop said that his client had not been given sufficient access to inspect the property or to do any remedial work required. Mr Hislop said that his client's position was that the Respondent had caused damage to the property.

Mr Hislop said that the Applicant had not provided the washing machine and fridge.

Mr Hislop said that the architect's report obtained by the Respondent was the first detailed specification provided to the Applicant of what were considered to be defects with the property.

Mr Hislop said that the Tenant had fallen into arrears of rent early in 2016 and had offered additional monthly payments to reduce them but that no payments had been made.

Owing to shortage of time, the Hearing was adjourned for further evidence to be heard and the matter to be determined. The Parties agreed that all possible efforts would be made for the Applicant to have access to the Property for the purpose of assessment and carrying out of repairs. The Respondent agreed that she would pay the monthly rent on 1<sup>st</sup> October 2018 and 1<sup>st</sup> November 2018.

#### Preliminary matters on 13<sup>th</sup> November 2018

Parties accepted that, since the last Hearing, two payments of rent had been made and that, accordingly the sum outstanding in rent amounted to £3,530 and Ms Nelson confirmed that she was content that the Application be amended to show that as the sum sought although she reiterated that she would be moving the Tribunal to issue an order abating the rent.

Ms Nelson said that her client had forwarded her an email the previous day which was a report from a builder as to the current condition of the Property. She said that, on arrival for the Hearing, her client had handed her a number of photographs of the Property. She sought to have the email and photographs lodged in evidence. Mr Hislop said that he had seen neither the photographs nor the email. A short adjournment was allowed for him to look at these and, after the adjournment, Mr Hislop objected to them being introduced in evidence. Mr Hislop said that there was no indication of when the photographs had been taken and he said that some had previously been lodged. He said that his client did not accept the contents of the email and that nothing was known about the author who Ms Nelson did not intend to lead in evidence. He said that some of the items detailed in the email were the first indication of those alleged defects. Ms Nelson said that the reason the report had only now been produced was that her client was waiting until Mr Kavanagh had completed the works that he had been doing and that the Property had only been inspected on 9<sup>th</sup> November 2018.

The Tribunal did not allow the email and photographs to be introduced into evidence. It considered that, in fairness to the Applicant, it was unreasonable to allow them to be introduced on the day of the Hearing.

Parties agreed that, since the Hearing on 17<sup>th</sup> September 2018, Mr Kavanagh had carried out some works to the Property and Ms Wilson had paid rent.

Mr Hislop said that his client's position was that insufficient access had been provided to his client to allow him to complete works but he did not accept that the property is or ever was, during the tenancy, uninhabitable.

Issues to be determined by the Tribunal:

1. Are there rent arrears?
2. Was rent withheld by the Tenant?
3. Was it appropriate to withhold rent because of the condition of the Property?
4. Was the Property in such a condition as to make it uninhabitable or be in a condition which would significantly affect the Respondent's enjoyment of it?
5. Was the Landlord obliged to replace the washing machine and fridge?
6. Is it appropriate to make an order abating the rent or part of it?

### **Matters of Agreement**

The Respondent has been a tenant of the Property since 31<sup>st</sup> August 2005.  
There are currently arrears of rent amounting to £3530.  
The Landlord has done works to the Property which have not been completed.

### **Evidence on 17<sup>th</sup> September 2018**

Ms Wilson said that she had told the Landlord about the repairs needed to the Property some considerable time ago and that currently the problem was the leaking roof, the skylights, the smell of dampness and the fact that the kitchen is falling apart. She said that any repair which had been done was shoddy. She said that doors are falling off the kitchen cabinets and that the formica in the kitchen is starting to come off.

Ms Wilson said that when the Landlord had been in a few weeks previously she had pointed out where water was running down from the skylight window. She said that the Landlord had taken bathroom tiles off and cut a hole in the wood to get to the pipes which were leaking.

Ms Wilson said that the issue with the radiator was that, because of the way it had been installed, it was impossible to clean below it. She said that there was still an issue with the bathroom door and that all the issues she had mentioned were still outstanding.

Ms Wilson said that she had spoken to the Landlord's wife on 9th August 2017 and had showed her some photographs which demonstrated the extent of disrepair.

Ms Wilson referred to Photograph number 1 which had been lodged. She said that she could not remember when the photograph had been taken.

Ms Wilson referred to photograph 2 which had been lodged and which showed the shower area and the taps. Ms Wilson said that the Landlord's wife had been made aware of the issues shown in the photographs.

Ms Wilson referred to Photograph 3 which she had lodged and which showed the condition of the radiator.

Ms Wilson referred to photograph 4 which showed a kitchen cupboard door coming off. She said that the photograph had been taken in July 2018.

Ms Wilson said that Mrs Kavanagh had been aware of the issues with the house in August 2017.

Ms Wilson referred to photograph 5 which she had lodged and which showed faults with kitchen unit doors. She said that the photograph had been taken last year at some point.

Ms Wilson said that she was unsure when some of the other photographs had been taken.

Ms Wilson referred to photograph 6 which she had lodged and which shows the leak under the sink. She said that she thought this had been fixed in October 2018. She said that the Landlord had been made aware of the leak in August 2017.

Ms Wilson referred to photograph 7 which she had lodged and showed a socket detached from the wall. She said that had been like that for two years and that she had made the Landlord aware of it two years previously. She said that she had spoken to the Landlord about this and had also told Mrs Kavanagh on a few occasions. She made reference to occasions in August 2017 and February 2018 when she had told Mrs Kavanagh about it.

Ms Wilson referred to Photograph 8 which she had lodged and which showed the crack in the kitchen which is on the wall and the cam ceiling which she said has now got wider. She said that she had mentioned this to the Landlord two years ago.

Ms Wilson referred to photograph 9 which showed the skylight window in the kitchen. She said that Mr Kavanagh said that the moisture was caused by condensation but she said that water comes in when it is raining. Ms Wilson said that the Landlord was made aware of this issue over the previous seven or eight years. She said that, according to the architect's report, expanding foam had been used to put in gaps. She said that this had not stopped the ongoing problem of water ingress. She said that Mr Kavanagh insists that the issue is caused by condensation.

Ms Wilson referred to photograph 10 which showed the area of the leak at the skylight window.

Ms Wilson referred to photograph 11. She said that Mr Kavanagh had done works to the bathroom in October 2017 and that the photograph shows the poor conditions which she had to endure. She said that she had to live like that for two weeks, when she had no W.C.. She said that a chemical toilet (portaloo) had been provided by the Landlord and that the whole works took five weeks and that the specific works to the bathroom took three weeks.

Ms Wilson referred to photograph 12 which showed when the portaloo overflowed. She said that the portaloo had been given to her on a Wednesday and that it had overflowed on the following Sunday. She said that the Landlord came on the Monday and took it away to be emptied.

Ms Wilson referred to photograph 13 which shows the living room and was taken during the period when the Landlord was doing repairs. She said that the whole house was covered in dust when the works were being done.

Ms Wilson referred to photograph 14 which was taken in October 2017 said that it shows works being done and what she described as the poor conditions in which she had to live. She said that there were delays of up to three weeks for the works to the bathroom to be completed.

Ms Wilson referred to photograph 15 which shows the bathroom. She said that she told the Landlord about the leaking sink.

Ms Wilson referred to photographs 16 and 18 which shows the portaloo which she had been given.

Ms Wilson referred to photograph 17 and shows sheets used as dust covers when works were being done. She said that she had to make arrangements to cover her furniture and belongings for a period of five weeks and that she was physically exhausted because of it.

Ms Wilson said that, on two occasions in August 2017, she spoke to Mrs Kavanagh about the repairs needed to be done and that she never said anything in response.

Ms Wilson said that, in October 2017, the new bathroom was installed and that an area around the skylight window was plastered. She said that, on one occasion, she had texted Mrs Kavanagh and said that she did not want Mr Kavanagh to take access to the Property without her presence. She said that this was disregarded and that the Landlord went ahead and went in to the Property. She said that previously she had allowed access by the Landlord without her presence.

Ms Wilson said that she had talked to Mrs Kavanagh in February 2018 and had told her that the bathroom was leaking and had let her see photographs which showed the defects at that time.

Ms Wilson said that she had gone to the Citizens Advice Bureau in May 2017 and that she thought that they were going to prepare a letter for her to send to the Landlord. She said that the letter was not done by them. At the end of November 2017 she thought that the C.A.B. would send a letter to the Landlord but it didn't and she only found out in February 2018 that the letter had not been sent. She said that the C.A.B. apologised to her and prepared a letter for her to sign dated 23rd April 2018. This letter from the Respondent to the Applicant was produced and stated "I write concerning the repairs urgently required and repeatedly requested. I am dissatisfied with the issues I have with my bathroom as the work you completed is not up to standard and has dampness. In addition my radiators are not working efficiently and the plug sockets are not safe to use. The skylight is leaking and there are significant cracks on the outside walls. I have withheld my rent since December 2017 and will continue to do so until the repairs are completed by a qualified tradesperson and to a satisfactory quality". Ms Wilson was not sure when she had sent the letter. She said that it could have been May 2018 when it had been sent.

Ms Wilson said that the Landlord responded and that his letter dated 23<sup>rd</sup> May 2018 requested that she contact him so that matters could be dealt with regard to access to assess the repairs. She said that she did not make contact because the Landlord had already served a Notice to Quit.

Ms Wilson said that when she moved into the Property there had been a washing machine and fridge, that these broke and had not been replaced by the Landlord. She said that she made the Landlord aware of this but that nothing was done. She said

that she had been made aware by another of the Appicant's tenants that the Appicant had renewed white goods in her tenanted property. Ms Wilson said that the cost of replacement of these items had amounted to £510.

She said that the Landlord had replaced the oven two years previously and she could not understand why he would do this if it was his position that he did not replace white goods.

Ms Wilson said that rent arrears had built up over a period of time

In response to cross examination, Ms Wilson said that she moved into the Property in September 2005 and had been up to date with rent until 2015 and that since then she had accumulated arrears. She said that she thought that the dispute she was having with the Landlord over repairs was because of arrears of rent.

Ms Wilson said that she had painted the kitchen units white without the Landlord's permission.

Ms Wilson disputed that she had denied the Landlord access to the Property. She accepted that she had dogs in the Property and said that other tenants of the Landlord had dogs in their properties. Ms Wilson said that the Landlord has repaired four doors in the previous four years when the faults had been brought to his attention.

Ms Wilson said that after the previous hearing of the Tribunal she had allowed access to the Landlord and had again allowed access two weeks previously.

Ms Wilson accepted that she had agreed to allow access on 14th August 2018 but that she had cancelled this because she had to go to work. She agreed that she had also cancelled arrangements made for twentieth and twenty seventh August 2018. She accepted that she had told her son not to allow anyone in when she was not there and that this was why access was denied to the Landlord on 5th September 2018. She said that she had offered specific dates and times to the landlord including a Sunday.

Mr Kavanagh's evidence:

Mr Kavanagh said that he was an experienced builder and at one time was approved by NHBC.

He said that when the Property was let in 2005 it was in good condition and that between 2005 and 2015 Ms Wilson had not intimated any significant problems to him. He said that in June 2017 there was a problem with rent arrears which had accumulated. He said that he never provides white goods in properties he lets out and he said that Ms Wilson has never raised with him the matter of the fridge and washing machine.

Mr Kavanagh said that he first became aware of alleged defects when his wife told him in February 2018 that Ms Wilson had spoken to her about the matter. Mr Kavanagh said that, following upon this, he went to the Property but was denied access by Ms Wilson's son. He said that Ms Wilson communicated to him that she thought that he was harassing her. He said that he received nothing in writing about alleged defects with the Property.

Mr Kavanagh said that in October 2017 he had upgraded the bathroom. He said that the work was done within two weeks and did not accept that it had taken five weeks. He said that when work was being done sheets were put over the furniture because of the dust.

Mr Kavanagh said that some damage had been caused to the Property by animals which the Tenant had been keeping without permission. He said that some kitchen units had been damaged as a result of burning when a slow cooker went on fire. He said that some damage had been deliberately caused to the kitchen units. He said that he had rented the Property to one person but that there were now three people living there and he said that this was also why the chemical toilet had overflowed. He said that damage had been caused to the Property by the occupiers.

Mr Kavanagh was referred to the photographs which had been lodged by Ms Wilson. His responses were that he required access to look at the issues raised by her. He also said that he had given no permission to Ms Wilson for the painting of the kitchen units and, if there were defects with the property, as shown in the photographs then he had not had proper intimation of them. He said that if there are defects to the Property that he would fix them.

Mr Kavanagh said that he had no reasons from the Tenant as to why she had stopped paying rent

In response to cross examination, Mr Kavanagh said that, in February 2018, his wife told him that Ms Wilson had raised issues with her and that, following that, he went to the Property but had been denied access and that Ms Wilson then phoned him and said that she did not want him coming to the Property when she was not there and that he would be receiving a letter from the C.A.B. He said that, in that conversation, Ms Wilson said that he was harassing her.

Mr Kavanagh said that Ms Wilson had not allowed him to carry out repairs.

Mr Kavanagh accepted that he perhaps could possibly have carried out some repairs such as to the skylight without getting in to the Property but he said that he was concerned at the suggestion of harassment and he also said that a full inspection internally and externally would be required before he could determine what, if any, work required to be done. He said that he had originally thought that the issue with the skylight window was due to condensation but that he now considered that there was something else going on which he would need to investigate. He said that he had installed a vent two years previously to try and allow more air to come into the Property. He said that he accepts that there is a leak which he will need to solve. He said that when the bathroom was upgraded in October 2017 there had been no problem with the skylight window.

Mr Kavanagh said that he believed that his tenant got a good property from him which she had not looked after properly

Mr Kavanagh said that, prior to February 2018, Ms Wilson allowed him to take access to the Property by using his key.

Mr Kavanagh said that he had turned a blind eye to the existence of a dog or dogs in the Property.

Mr Kavanagh accepted that he had no proof that Ms Wilson had damaged doors.

Mr Kavanagh accepted that the Property has to be maintained to the repairing standard referred to in the Housing (Scotland) Act 2006. He said that he had not given the Tenant a washing machine and fridge with the tenancy but he accepted they might have been present at the commencement of the tenancy. He said that in August 2017 the arrears stood at £510 and that he had never had any indication from Ms Wilson that there was an issue with the washing machine and fridge.



Mr Kavanagh said that the main reason for not doing any work required to the Property was because he had not been allowed access.

### **Evidence on 13<sup>th</sup> November 2018**

Mr Kavanagh said that he had done some works to the Property since the previous Hearing. He was referred to the schedule of works which accompanied his solicitor's letter of 12<sup>th</sup> September 2018.

1. Loft insulation- Mr Kavanagh said that there is sufficient loft insulation.
2. Shower leak- Mr Kavanagh said that he had taken off the tiles behind the shower, fixed the leak and refixed the tiles.
3. Roomlights/Skylight windows- Mr Kavanagh said that they are now not leaking and that further repairs are required. He said that he had ordered flashing which will require to be fixed.
4. Roof- Mr Kavanagh said that he had replaced the complete front section of the roof and had replaced slates and valleys. He said that he wants to do works the side roof and that this will be done as soon as possible.
5. The kitchen extract fan- Mr Kavanagh said that no work required to be done.
6. Plasterwork around rooflights- Mr Kavanagh said that the necessary plasterwork had been done.
7. Mr Kavanagh said that he had made good decoration after any works carried out by him.

Mr Kavanagh said that he has not had satisfactory access to the Property. He said that he had been allowed in but for limited periods and at times felt that he was rushing to do jobs. He gave as an example an incident that had occurred the previous weekend. He said that the Respondent had texted him on Sunday advising that there was a leak at a skylight. He said that he texted her on 8.20 am the next day advising that he would be at the Property at 10 am later that morning. He said that he went at 10 am and 11 am and did not get access. He said that he got access at 2.30 pm and that Ms Wilson had told him that she had not got the text message.

Mr Kavanagh said that he replaced the kitchen cupboard doors.

In response to questioning Mr Kavanagh accepted that, in relation to the incident the previous weekend, he had arrived at the Property without receiving confirmation from Ms Wilson that the arrangement was suitable for her. He accepted that he had not been refused access when access had been agreed since the previous Hearing but he said that, on occasions, he did not get access for long enough to allow him to

complete some works, and gave examples when he was asked to leave as Ms Wilson had other appointments.

Mrs Kavanagh said that she owned the Property with her husband and that he had been a builder for fifty years. She said that Ms Wilson had been a tenant in the Property since 2005. She said that Ms Wilson had been her hairdresser and that she had been a friend. Mrs Kavanagh said that Ms Wilson had arrears on her rent. She said that Ms Wilson had personal issues and that this appeared to have caused issues with payment. Mrs Kavanagh said that she and her husband gave her a chance to catch up with the arrears but they increased. Mrs Kavanagh said that, in August 2017, she had had a meeting with Ms Wilson where a plan was made to allow the arrears to be caught up with. She said that prior to that a Notice to Quit had been served and that it was agreed that this would not be progressed with

Mrs Kavanagh said that, in February 2018, Ms Wilson had a conversation with her and told her that she had withheld payment of rent since December 2017 because of the condition of the Property. This conversation took place at the hair salon where Mrs Kavanagh had gone to have her hair done. Mrs Kavanagh said that Ms Wilson had asked her if she had received a letter about the Property and that she told her that she had not. She said that Ms Wilson said that she had been to see someone about the work needing to be done to the Property. Mrs Kavanagh said that it had been a lengthy discussion and that a lot of it was about what had happened in October 2017 when the shower room was being refurbished. Ms Wilson had told her that the Property had been covered in dust and that she had found the whole situation very stressful. Mrs Kavanagh said that, at the meeting, Ms Wilson had said that she had spoken to her MSP and to the C.A.B. and that, following the advice received from the C.A.B., she was going to open a separate account and put the rent money into it. She said that Ms Wilson had told her that she had joined a menage which meant that she would have funds in May 2018 which she could pay to reduce the arrears. Mrs Kavanagh said that her husband received a letter from Ms Wilson dated April but was only received by him in May 2018. Mrs Kavanagh said that the letter was the first written intimation which had been received which gave details of the alleged problems with the Property. She said that she and her husband had been aware that there had been a leak and that it had been resolved. She said that she knew there to be an issue with the shower room floor but that the solution proposed by the Applicant was unacceptable. It was suggested that the floor be screeded and vinyl flooring installed but that this was unacceptable to Ms Wilson because her dogs slept there and she said they would tear up the vinyl.

Mrs Kavanagh said that there were other improvements and upgrading they wanted to do to the Property. She said that the dogs had damaged the glass in the French doors, that some woodwork had been damaged and also damage caused in the bay window area. She said that a fireplace including a gas fire which had been in the Property had been removed by the Tenant.

Mrs Kavanagh said that the Property was wind and watertight and that the Tenant was not justified in withholding rent. She said that she did not think that the Tenant had properly looked after the Property.

Mrs Kavanagh said that at the commencement of the tenancy there had been a cooker and a fridge in the Property. She said that her husband in his evidence on the fridge had been confused. Mrs Kavanagh said that she didn't know that the Respondent had required the fridge to be replaced and, that had she done so, she and her husband would have arranged for this to be done. She confirmed that a fridge was in the Property at the commencement of the tenancy and that this formed part of the landlord's fixtures and fittings.

Mrs Kavanagh said that a washing machine had not been provided at the commencement of the tenancy and that it may have belonged to the previous tenant. She said that she found the matter puzzling because Ms Wilson had told her that, when she took entry to the Property, the paperwork for the appliance was in its drum. Mrs Kavanagh said that it was entirely possible that a washing machine had been there at the commencement of the tenancy.

Mrs Kavanagh said that she had priced the appliances purchased by Ms Wilson. She said it was an L.E.C. fridge and an Indesit washing machine which were priced at £149 and £179 respectively.

In answer to Ms Nelson, Mrs Kavanagh confirmed that it was a lengthy discussion that she had with Ms Wilson in February 2018 and that following that discussion there had been text messages between them and that her husband had gone to the house so that he could make an assessment of what work required to be done. Mrs Kavanagh said that Lee Paul, Ms Wilson's son, would not let him in and that in a subsequent telephone conversation Ms Wilson had mentioned the word "harassment."

Mrs Kavanagh confirmed that the letter from Ms Wilson arrived in May 2018 and that a response was sent by her husband on 23<sup>rd</sup> May 2018 in which he sought access to the Property. She said that the majority of the photographs which Ms Wilson had shown her in February 2018 related to the condition of the Property while work was being carried out in October 2017. Mrs Kavanagh said that the matters current in February were not major things and she gave examples:- the shower door not closing properly and an issue with a drawer in a vanity unit.

Mrs Kavanagh said that the whole relationship with the Respondent changed in August 2017.

Mrs Kavanagh said that she did not get the opportunity to replace the fridge.

Mrs Kavanagh said that a Notice to Quit which had been served in 2017 stated the incorrect sum of rent arrears and she said that she looked after the account and found it very difficult to track payments from the Respondent. She said that the rent was often paid in instalments and that it came from various sources and accounts making it sometimes difficult to confirm that the payments had come from Ms Wilson.

Mrs Kavanagh did not accept that the Notice to Quit of 2017 had been withdrawn in August of that year because the sum of rent arrears had been wrongly stated. She said it had been withdrawn to give Ms Wilson another chance. She said that Ms Wilson had become very upset and did not want to lose her home which she loved. Mrs Kavanagh said that the Notice to Quit had been withdrawn because Ms Wilson was

upset, had promised to clear the arrears and that they were friends. She said that Ms Wilson had been her hairdresser.

Mrs Kavanagh said that she accepted that no contact was made with Ms Wilson after May 2018 because, by that time, a Notice to Quit had been served.

#### Ms Wilson's Evidence

Ms Wilson said that she had told Mr Kavanagh that the washing machine had broken and that he had told her that he didn't replace white goods. She said that this would have been four or five years previously. She said that two years ago her oven had broken and had been dealt with by her landlord. She said that she had spoken to another tenant of Mr Kavanagh and that she had told her that she had had white goods replaced by the landlord. Ms Wilson said that the fridge and washing machine had been in the Property at the commencement of the tenancy and that she assumed they had been supplied by Mr Kavanagh.

Ms Wilson said that in August 2017 she had told Mr and Mrs Kavanagh that she had replaced the fridge and the washing machine. She said that she did not previously tell them about the fridge because she thought that, following the earlier conversation she had had with Mr Kavanagh, it was for the tenant to replace the fridge.

Ms Wilson said that in August 2017 she told Mr and Mrs Kavanagh about the problems with both skylights in the Property and that there were really bad draughts. She said that she had told them that the skylights were leaking.

Ms Wilson said that work was done to the bathroom in October 2017 and that at that time there had been plastering done around the skylight in the kitchen but that no work was done to the skylight in the bathroom.

Ms Wilson said that the Notice to Quit had the wrong sum in it in respect of rent arrears and that she thought in August that she owed £530.

Ms Wilson said that the Notice to Quit was cancelled because the rent was being paid.

Ms Wilson said that, after a hair appointment with Mrs Kavanagh in February 2018, they had a long discussion and she showed her photographs of the Property which showed defects to the skylights, radiators, kitchen cupboard doors, the bathroom door, the shower door and the vanity unit drawer. She said she was not sure if she had mentioned the dampness in the porch.

Ms Wilson was referred to the schedule attached to Mr Hislop's letter of 12<sup>th</sup> September 2018. She said that all the work detailed in the schedule had been completed with the exception of items 3 and 7- completion of work to the bathroom and decoration and making good. She confirmed that Mr Kavanagh had replaced the kitchen cupboard doors and that he had refitted a radiator but that it needed to be finished.

In response to questions from Mr Hislop, Ms Wilson accepted that the letter dated April and sent in May 2018 did not specify all the defects which she later mentioned. Ms Wilson said that she had previously told the Applicant about the defects to the Property and did not think that it had to be done in writing. Ms Wilson said that she had received assistance from the CAB but had not gone to her MSP.

Ms Wilson said that she did not consider the Property to be wind and watertight.

Ms Wilson confirmed that she told Mrs Kavanagh in February 2018 that she had been withholding rent since December 2017. Ms Wilson was referred to the statement of rent which showed that as at 1<sup>st</sup> December 2017 there were arrears of rent amounting to £1230. She said that she had not realised that to be the case and that, because of bereavements in her family, she "was all over the place last year". She said that in December 2017 she thought she was up to date with the rent and that any arrears must have been due to oversight. Ms Wilson said that she opened an account to pay the rent in to and that she made a couple of payments into that account before stopping and then used the money for other things.

Mrs Kavanagh said that, in August 2017, her landlord was aware of the issues with the skylights and the ongoing repairs that were needed.

Ms Wilson said that she can live in the house but that it is not wind and watertight.

## **Submissions**

Mr Hislop:

Mr Hislop said that, prior to February 2017, the Respondent had not intimated that arrears had been allowed to accumulate because of defects with the Property. Mr Hislop said that the Applicant does not accept that there is or were defects with the Property. He said that the works done to the Property amounted to an upgrade and did not adversely affect the wind and watertight aspect of the Property. Mr Hislop said that his client would have been required to have been given specific notice of defects and been given an opportunity to carry out necessary repairs to the Property. Mr Hislop said that his clients had been restricted by the Respondent in relation to the carrying out of repairs. Mr Hislop said that the bathroom had been upgraded and that there had been a leak but that the leak in the pipe had not been intimated to the Applicant before it had been raised in February 2018. Mr Hislop said that his client had felt limited in the approaches he could make to the Respondent because of her suggestion that she considered that he was harassing her.

Mr Hislop moved the Tribunal to grant the application and he referred to a possible time to pay direction and said that he considered that the sums due for rent should properly have been put aside and be available to meet any obligation to the Applicant. He said that, if such an order were to be made, it should be for payment to be made within a reasonable time.

Mr Hislop said that the Applicant was not given specific notice of what the Respondent considered to be defects in the Property requiring to be remedied. He said that the Applicant was responsible and sought to keep the Property maintained in good

condition. He said that Mr Kavanagh was a builder of some experience and knowledge and that it was his intention to keep the Property in good order.

Mr Hislop said that a landlord had to be aware of any defects to a property and he referred the Tribunal to the Case of Susanna Bell v. North Ayrshire Council 2007 at paragraph 44. This was a case relating to an injury suffered by an individual, it was alleged, as a result of a defect to a tenanted property. He said that the duty to maintain a property depended on the landlord's knowledge:

" ....the duty, plainly, cannot arise unless the landlord is aware of the danger and he cannot reasonably be expected to have awareness unless he has been put on notice that there is a defect in need of repair....."

Mr Hislop said that the report of Professor Tim Sharpe was the first detailed intimation of defects. Mr Hislop said that the skylights had been repaired and that, if there are any ongoing problems, the Applicant will attend to them.

Mr Hislop referred the Tribunal to the case of Wolfson v. Forrester's Trustees 1910 1 Reports, P. 318 and stated that this supported his position that a landlord's obligation to keep a property reasonably wind and watertight depends on knowledge.

Mr Hislop said that the Respondent was talking up defects to justify the fact that rent had not been paid.

Mr Hislop said that if the washing machine and fridge were considered to be landlord's fitments then he would have replaced them.

Ms Nelson:

Ms Nelson submitted that the Tribunal should accept that the Property was not tenatable and habitable. She said that the Applicant had been aware of this in August 2017 when Mrs Kavanagh had been advised of the defects by the Respondent and that those defects had not been addressed.

Ms Nelson invited the Tribunal to accept the evidence of the Respondent as being credible. She said that the Respondent had been consistent in stating what had been wrong with the Property.

Ms Nelson said that the evidence of Mr Kavanagh had been less reliable particular with regard to his contention that the Respondent had told him that she considered that he was harassing her and in relation to the phone call of February 2018 which she said did not take place. Ms Nelson said that Mr Kavanagh's evidence had been inconsistent and that the evidence of Mrs Kavanagh was in conflict with the evidence of Mr Kavanagh in relation to the white goods in the Property.

Ms Nelson said that she was seeking an abatement of rent from August 2017 to the present which she said amounted to thirteen months at £400 per month making a total of £5,200 She said that this included the sum of £510 which the Respondent had paid to replace the fridge and the washing machine.

Ms Nelson invited the Tribunal to dismiss the application before it since the sum sought in abatement of rent exceeded the sum the Applicant was seeking.

Ms Nelson referred to the case of *Renfrew District Council v. Gray*, SLT 1987 (Sh Court,

Page 71, "...it is long established law that a tenant is entitled to an equitable abatement of rent for at least certain degrees of partial non- performance of the lease by the landlord...."

P.72, "...abatement of rent as illustrated by the authorities is an equitable right and is essentially based on partial failure of consideration. That is to say, if the tenant does not get what he bargained to pay rent for it is inequitable that he should be contractually bound to pay such rent..."

P.73, "...I think it not an unreasonable inference that a house which is " completely uninhabitable" has no lettable value at all while it remains in that condition."

Ms Nelson said that if the Property was not tenantable and habitable then the rent should be significantly abated. She invited the Tribunal to apply the repairing standard as defined in Section 13 of the Housing (Scotland) Act 2006. She said that there was evidence that the Property was not wind and watertight and that the Tribunal should accept the terms of Professor Sharp's report which stated that the slates and gutters of the Property were in poor condition with missing flashings.

Ms Nelson said that the Applicant knew of the defects in the condition of the Property and had ample opportunity to resolve them and that he failed to do so. She said that the Applicant knew in February 2018 that the rent was being withheld and the reasons for this. She said that the Respondent put this in writing and that this letter was delivered in May 2018. She said that no repairs had been done by the Applicant until after the first Hearing of the Tribunal which had been on 27<sup>th</sup> July 2018.

Ms Nelson said that, if the Applicant considered that issues with the Property were caused by condensation then the Tribunal should consider why he was carrying out structural repairs.

Ms Nelson referred to the case of *McLeod v. Alexander* 2000 Hous. L.R. 136

Para 42-17 " The main point is of course whether the flat is fit for human habitation."

At Para 42-20 there is reference to the case of *Summers v. Salford Corp* 1942. The *McLeod* case relates to ingress of water where the Sheriff found that the house was found not to be reasonably fit for human habitation and that the Pursuer was entitled to an abatement of rent from the date the defect had been intimated.

Ms Nelson said that the Applicant was aware of the need for repairs in August 2017 and that, for example, the repairs to the skylight had been done fairly recently. Ms Nelson said that the Applicant had sufficient specification of what required to be done. She said that the evidence supported her contention that the Applicant had sufficient access to carry out works. Ms Nelson said that the previous weekend when Mr Kavanagh did not get access to the Property when he arrived at it was a result of him

not having an agreement for access which would be constituted by the Respondent responding to his text message confirming that she would be able to give access.

Ms Nelson invited the Tribunal to consider that the Property was not tenantable and habitable until at least October 2018. She invited the Tribunal to dismiss the Application because the sum sought as abatement was more than the sum sued for. She said that there was no requirement for any rent withheld to be retained by a tenant.

Ms Nelson referred the Tribunal to the Renfrew District Council case where it was held to be appropriate for rent to be abated because the property was uninhabitable.

### **Reasons for Decision**

The Tribunal noted what parties had agreed. It was agreed that the level of rent arrears was £3,530 and that rent had been withheld by the Respondent.

The Tribunal had to determine the position with regard to the fridge and washing machine. Mr Kavanagh's evidence was that these were not provided at the commencement of the tenancy. Mrs Kavanagh said that her husband had been mixed up when he gave evidence on this matter and she said that a fridge had been provided. She said that a washing machine had not been provided but that it was entirely possible that one had been there at the commencement of the tenancy. She said that she had priced these items and that the total cost would be £328. Ms Wilson was clear that both appliances had been provided and she provided no documentation or detailed evidence on the cost and did not challenge Mrs Kavanagh's evidence that the cost of replacement was fairly stated at £328.

The Tribunal accepted that the fridge and washing machine had been provided at the commencement of the tenancy and that it was appropriate for the Respondent to be reimbursed in respect of the cost of replacement. The Tribunal accepted that Mrs Kavanagh had given more detailed evidence on the cost of the appliances and accepted this.

Parties were agreed that rent was withheld. The Respondent accepted that the first written intimation she had given the Applicant of this was the letter which she sent in May 2018 but she stated that she had withheld rent from December 2017. Mrs Kavanagh agreed that she was told in February 2018 that rent had been withheld from December 2017. The Applicant accepted that the current level of arrears was £3,530 and this was consistent with the rent statement lodged by the Applicant. The Tribunal therefore accepted that in December 2017, before the Respondent had withheld rent, there were arrears of £1230.

The Tribunal had to determine whether or not the Respondent was justified in withholding rent because of the condition of the Property and whether or not it should order an abatement of rent.

It seemed to the Tribunal that both parties accepted that repairs required to be done. The fact that the Applicant had carried out repairs to the Property was significant since he must have thought it necessary to do the works. What had to be determined was



whether or not any disrepair of the Property was of such a level that the Respondent was entitled to an abatement of rent and whether or not the Applicant had sufficient notice of what had to be done.

Mr Kavanagh maintained that the works done in October 2017 constituted an upgrade of the bathroom but the Tribunal accepted the evidence of Ms Wilson with regard to the upheaval that the works caused her. She was left without a W.C. and was provided with a chemical toilet which overflowed. The Tribunal could not determine how long the inconvenience caused by the works lasted but considered that, in relation to this inconvenience and upheaval, the Respondent was entitled to some abatement of rent. The Tribunal considered that such abatement should be a figure of £200.

Ms Nelson directed the Tribunal to the repairing standard set out in the Housing (Scotland) Act 2006 as being of some possible assistance in determining whether or not the Property was tenantable and habitable. In particular she referred to the Property not being wind and watertight and asked the Tribunal to accept the terms of Professor Sharpe's Report in this regard. The particular section of the Act referred to by Ms Nelson is Section 13:

"A house meets the repairing standard if-

- (a) the house is wind and watertight and in all other respects reasonably fit for human habitation,
- (b) the structure and exterior of the house (including drains, gutters and external pipes) are in a reasonable state of repair and in proper working order....."

Professor Sharpe's Report states in relation to water penetration from the rooflights and the roof: "During the inspection some evidence of this was noted at the kitchen rooflight and the bathroom rooflight and at the roof and wall to the kitchen space. There was reported sites of penetration in the living room, but this has been redecorated."

Ms Wilson's evidence was that there was water ingress and that she had told Mr and Mrs Kavanagh about the problem in August of 2017 and that there were draughts and that the skylights were leaking. She said that in February 2018 she reported the faults to Mrs Kavanagh.

Mr Kavanagh's evidence was that he had thought that the issue had been caused by condensation but then accepted that "something else was going on."

The Tribunal had no difficulty in accepting that there were issues of water ingress and that the Property did perhaps fail to meet the repairing standard as set out in the 2006 Act (although this was something that, without more evidence the Tribunal was unable to determine) but it did not accept that this necessarily meant that the property was uninhabitable and that the Respondent was correct in withholding rent. It also did not necessarily mean that the Respondent was entitled to an abatement of rent. The matter hinged on firstly the extent of disrepair and secondly whether or not the Applicant was given an opportunity to remedy.

The Tribunal found the cases referred to as being of some assistance. The North Ayrshire Council case supported the view that, for a landlord to be found to be failing in the duty to keep the tenanted property in a reasonable state of repair, he/she has to be put on notice "that there is a defect in need of repair."

In the Forrester's Trustees case the principle was reinforced that it was necessary for a landlord to have knowledge of defects in a property before he/she could be considered to have failed to meet the obligation to repair.

In the case before the Tribunal it was noted that the Respondent had written a letter to the Applicant intimating some defects and, when the Applicant responded by trying to get access to assess what was wrong, the Respondent did not make the contact requested by the Applicant because she did not feel there was any point in doing so because a Notice to Quit had been served. The Tribunal did not consider that there was credible evidence that the Applicant had been properly given notice of defects prior to the letter received in May 2018 or that he was given an opportunity to remedy. An exception to this was in relation to the refurbishment of the bathroom where it was obvious that, as the works unfolded, the Respondent would have advised the Applicant of any teething problems or defects in the works being done.

The Renfrew District Council case stated that a tenant was entitled to an equitable abatement of rent: "if the tenant does not get what he bargained to pay rent for it is inequitable that he should be contractually bound to pay such rent..... I think it is not an unreasonable inference that a house which is 'completely uninhabitable' has no lettable value at all while it remains in that condition."

The Alexander case points the Tribunal to consideration of whether the Property is fit for human habitation.

The Tribunal did not accept that, on the basis of the evidence before it, the Property was in such a condition as to make it uninhabitable. It found that the Respondent had failed to give adequate notice of defects to the Applicant and that, even if it did accept that notice of defects was given in August 2017, the level of any disrepair was such that the Respondent was not entitled to withhold rent and that, other than in relation to the temporary disruption whilst the bathroom was being refurbished, she was not entitled to an abatement of rent.

Prior to the Hearing, Ms Nelson had lodged a copy of Section 1 of the Debtors (Scotland) Act 1987 in relation to a time to pay direction. She made no written or oral submissions on this matter and the Tribunal therefore considered that it did not have an application before it under Section 1 of the Act.

## **Decision**

The Tribunal found that the sum due in respect of the arrears of rent was £3530 but that it was equitable to grant an abatement of rent totalling £528. It therefore made an order for payment of £3002.

## **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.

Martin McAllister

Legal Member/Chair

26/11/18  
Date