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 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/CV/21/2271

Re: Property at 6 Netherblane, Blanefield, Glasgow, G63 9JW ("the Property")

Parties:

Mr Jonathan Bowman, Mrs Jennifer Bowman, 9 Blane Crescent, Blanefield, Glasgow, G63 9HT ("the Applicant")

Ms Monique Goodwin, 49 Netherblane, Blanefield, Glasgow, G63 9JP ("the Respondent")

Tribunal Members:

Valerie Bremner (Legal Member) and Melanie Booth (Ordinary Member)

Decision (in absence of the Respondents)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that a payment order be made in favour of the Applicants and against the Respondent in the sum of One Thousand One Hundred and Seventeen Pounds and Fifteen Pence only (£1117.15) with interest at the rate of 3% per annum from the date of the order until payment.

The decision of the Tribunal was unanimous.

Background

1. This application for a payment order was first lodged with the Tribunal in terms of Rule 70 of the Tribunal rules of procedure was made on 24th October 2021 and accepted by the Tribunal on 12th November 2021. A case management discussion was fixed for 22nd December 2021 at 11.30 am but this was postponed at the request of the Respondent and a new case management discussion was fixed for 21st January 2022 at 10am.

Case Management Discussion and Procedural History

2. At the case management discussion on 21st January 2022 the Applicant Jonathan Bowman attended to represent both Applicants. The Respondent attended and represented herself. The Respondent had lodged responses to the claim before the case management discussion.

3. The Applicants sought a payment order under two heads of claim. The first related to an agreement which it was suggested the parties had made in December 2018 for the Respondent to pay the Applicants £10 per week due to a faulty storage heater at the property. The Applicants said that the Respondent had agreed to pay this until the heater was sorted. It had not been sorted at any stage during the tenancy and the Applicants indicated that only £90 had been paid towards the £10 per week and that, as at the end of the tenancy, the sum of £1,117.15 was due to the Applicants in terms of this head of claim. Although the Applicants had described this as a breach of the tenancy agreement and the repairing standard, they were seeking to recover sums due in terms of what they described as a separate agreement made with the Respondent which they said she had breached by failing to pay £10 weekly as agreed.

4. Their other head of claim related to a period of nine days between 22nd January 2018 and 31st January 2018 when a Rent Penalty Notice had been served on the Respondent. During this period the Respondent was not permitted to collect rent, but as the rent had already been paid for this period, the Applicants' position was that the rent payment made for this period had been retained for a period and although it had been paid back in September 2021, the Applicants were seeking interest on the sum over the period which the sum had not been repaid to them amounting to £368.04.

5. The Respondent's position was that the agreement to pay £10 per week was not intended to be a long-standing agreement and had been entered into to ensure that the Applicants were not out of pocket due to increased electricity costs and for the inconvenience to them. The Respondent suggested that she had paid £123 towards these costs and that if the Applicants were seeking to enforce any agreement made between the parties that the Tribunal had no jurisdiction to hear this as it related to an agreement other than the tenancy agreement and suggested that the appropriate forum for this was an action for damages in the Sheriff Court.

6. As far as the second head of claim was concerned, the Respondent 's position was that the Applicants were not entitled to interest on the sum, which was paid back in September 2021, but if they were so entitled, the sum they were claiming was excessive.

7. As there was a dispute between the parties as to whether any sums were owed and a point regarding the jurisdiction of the Tribunal had been raised as to whether it could deal with the claim said to arise from an agreement separate from the tenancy agreement, the Tribunal decided to fix a Hearing on matters, and this was set down for 22nd April 2022. The Tribunal issued a Direction to parties to set out their position on the heads of claim and the nature of the tenancy agreement between them before the Hearing which had been fixed

8. At the hearing Mr Bowman again appeared for the Applicants and the Respondent, Ms Goodwin again appeared and represented herself. At the start of the hearing the Applicant, Mr Bowman indicated that he had taken legal advice in mid-March 2022 and that this advice differed from the legal advice that he had received prior to lodging the Applicants' claim. He wished to amend his claim on the second head regarding the Rent Penalty Notice and to seek damages for losses which he said the Applicants had incurred as result of the failure to refund the money timeously. The Applicants' position was that they had incurred overdraft interest as a result of the failure to return the money collected in rent for the period in which the Rent Penalty Notice was in force and were seeking damages in the amount of the interest accrued. The Applicants requested time to contact their bank regarding overdraft charges and to work out applicable interest rate charges. The Applicants were prepared to withdraw their claim under the second head regarding interest on the Rent Penalty Notice and lodge a fresh application for this new head of claim if the Tribunal would not permit the claim to be amended. The request to amend the claim was opposed by the Respondent who had prepared for the hearing on the basis of the claims already made and indicated that she would require time to consider any amended claim if this was permitted.

9. The Tribunal adjourned to consider whether the hearing should be adjourned to allow the Applicants time to lodge an amended claim in relation to damages arising from the circumstances around the rent penalty notice. The Tribunal considered the overriding objective to deal with matters fairly and with no unnecessary delay. Whilst it was possible to deal with one issue and for the Applicants to lodge a new application regarding any damages claim, the Tribunal considered it was preferable for parties to have the matters dealt with in one application as any amended claim appeared to relate to the same circumstances as set out in the application already, this would have matters dealt with more quickly for both parties and the current Tribunal members were familiar with the issues. Given these factors and that the Applicants appeared to have received differing legal advice and were not legally represented, the Tribunal considered it was appropriate to allow the Hearing to be adjourned for the Applicants to submit representations and any evidence regarding a head of claim for damages which would, if allowed, replace the claim for interest on the rent paid during the period of the Rent Penalty Notice, and to allow time for the Respondent to answer any new claim as deemed appropriate. The hearing was adjourned to a later date and the Tribunal issued another Direction to parties for the Applicants to lodge their amended claim as regards the rent paid at the time of the Rent Penalty Notice and any supporting documents and for the Respondent to lodge representations regarding her position on the new head of claim when she received the information.

10. A further Hearing was fixed for 9th June 2022. The Applicant had submitted further representations and an amended claim for losses said to be sustained in the form of bank overdraft interest together with supporting documents. The Respondent had lodged her response to the new claim in which she queried the amounts sought by way of overdraft interest. She did not accept that these sums were due by her.

11. At the hearing on 9th June the Tribunal members had sight of the Application, a short assured tenancy agreement, a claim breakdown, e-mails and letters, a copy cheque payable to the Applicants and a series of text and WhatsApp messages. In addition, the Tribunal had sight of all the representations made by both the Applicants and the Respondent after the first case management discussion, Direction responses

and associated documentation lodged by both parties submitted after the case management discussion and the hearing in April 2022 which did not proceed, as well as the new head of claim lodged by the Applicants together with supporting documents and the response of the Respondent.

Applicants' Claim

12. The Tribunal allowed the claim to be amended in terms of Rule 13 of the Tribunal rules of procedure and Mr Bowman for the Applicants confirmed that they were no longer seeking to recover interest on the amount of rent returned sometime after the Rent Penalty Notice was put in place. They were proceeding on what was said to be a breach of the contract between the parties by which the Respondent was due to pay £10 per week to the Applicants until the issue was 'sorted". The sum being sought under this head of claim was £ 1,117.15 plus interest at the rate of 3.5% or whatever rate of interest deemed appropriate by the Tribunal. The Applicants were also seeking to recover overdraft interest they said they had accrued during the period when the rent paid during the period of the Rent Penalty Notice had not been returned to them by the Respondent. The Applicants were seeking £300.59 under this amended head of claim.

13. **Jurisdiction Issue**

Before considering evidence on the Applicants' claims the Tribunal considered the jurisdiction point raised by the Respondent. The Respondent's position was that the remedy which the Applicants should have sought was to apply to the Tribunal to enforce a breach of the repairing standard and if seeking compensation on the basis of a breach of the repairing standard they would require to set out their losses which they had not done. If the claim was based on a breach of any agreement made between the parties, it was said by the Respondent that the claim should have been made in the Sheriff Court as the First Tier Tribunal had no jurisdiction to consider a claim arising from a contract which was not a tenancy agreement. The Respondent referred to the Housing (Scotland) Act 2014.The Applicant confirmed he was seeking damages for breach of the contract agreed between the parties in December 2018 by which the Respondent was due to pay the Applicants £10 per week until a broken storage heater was "sorted."

14. The Tribunal considered the terms of Section 16 of the Housing (Scotland) Act 2014 which states :-

Regulated and assured tenancies etc.

(1)The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal—

(a)a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act

(b)a Part VII contract (within the meaning of section 63 of that Act),

(c)an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act

(2)But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

15.The Tribunal referred to the Upper Tribunal decision of ***Anderson v Stark UTS/AP/19/0012*** which considered whether the FTT had jurisdiction to consider the enforcement of a guarantee in relation to a private residential tenancy.

16.In ***Anderson,*** Sheriff Ross found that the FTT did have jurisdiction over a personal guarantee and noted :-

"Whether a dispute "arises from" a PRT depends, in my view, on the individual circumstances of each case. It is a matter of fact and degree. It is unlikely to be enough simply to point to a tenuous causal connection, such as bankruptcy arising through the failure to pay rent, and which is not covered. This case involves a purported guarantee, and it is possible to envisage that such a claim might be tenuous, for example if the guaranteed debt arose mainly for reasons not connected to a PRT, or only loosely connected in time. The question is a mixed question of fact and law in each case. [12] On the present facts, my view is that the guarantee does arise from the PRT, for the following reasons:- [13] First, the purported letter of guarantee requests the grantee to enter into a proposed tenancy agreement, which is then identified as being between a named individual and over an identified property. The obligations to pay rent and other charges are all defined by the terms of the lease referred to and endure only as long as the tenant remains bound by the lease. The obligation is one of indemnity under that contract, not a free-standing liability, and the obligation increases according to the terms of the lease. The letter of guarantee is inextricably bound up with the terms of the lease. It appears entirely artificial to describe this guarantee as not arising from the PRT. It has no logical existence or purpose without it. [14] Second, the natural and ordinary effect of the words "arising from" is unrestricted and imprecise, and invites a wide, inclusive approach. It is quite the opposite of a defined award. It tends to show that the legislature intended the FTT to deal with all PRT-related events, to the exclusion of the sheriff court, and not just the core lease"….

17.In the current application both parties accepted that they had entered into an agreement as a result of their relationship as landlord and tenants in terms of a continuing short, assured tenancy which had started some years before. The extent and nature of the agreement was in dispute and whether it was legally binding, but it was not disputed that it related to a faulty storage heater at the property leased by the Respondent to the Applicants and that the agreement centred around the payment of £10 per week to the Applicants until the issue of the storage heater was "sorted".

18. The Tribunal considered that the decision in ***Anderson*** applied to the current application although the type of tenancy involved was different. The agreement under consideration could be said to arise from the tenancy given that it was entered into by the parties to the lease and related to a matter covered by the lease i.e., the provision

of functioning heating equipment by the landlord. In terms of s16 of the 2014 Act it could be said that this agreement arose from the assured tenancy. The words "arising from" are said in ***Anderson*** to be wide and imprecise and as such can be interpreted to cover matters which do not arise just from the lease itself.

19. The Tribunal found that it had jurisdiction to deal with both heads of claim and heard evidence from both the Applicant Jonathan Bowman, and the Respondent, Monique Goodwin. Both adopted their written submissions during their evidence.

Applicants' Position

20. In July 2016 the Applicants entered into a short, assured tenancy with the Respondent at the property at 6 Netherblane, Blanefield, Glasgow which ran from 1st August 2016 for a period of six months and continued on a monthly basis until 8th March 2021. The Applicants lived there with their children.

21. In November 2018 the largest of four storage heaters at the property ceased to function and this was reported to the Respondent by the Applicants. A temporary repair to the heater failed. In terms of text messages between the parties in December 2018 regarding the matter, the Respondent offered to pay the Applicants £10 per week electricity until this was "sorted". The Applicants took this to mean that she would pay £10 per week until the heater was repaired or replaced. The Applicants asked how this would be paid and then accepted the offer by giving their bank details over when the Respondent suggested she would pay by BACS. The Respondent offered in addition to this sum to pay for a small heater, but the Applicant, Mr Bowman indicated that they had an oil-fired heater they could use. The Respondent paid three payments totalling £90 towards the agreed sum of £10 per week on 17th December 2018, 14th January 2019 and on 1st February 2019.

22. In February 2019 the parties were in contact by email and the Respondent advised that she had sourced two second hand heaters as a temporary solution, one of which was to replace the broken one in the hall at the property. The Applicant, Mr Bowman queried whether the replacement had the same heat output as the heater which had failed, and he stated in a separate message that he believed this solution would not work technically due to wiring and would require redecoration. He said the Applicants were "happy to soldier on with the current arrangement" if the storage heaters were all to be replaced with new ones in the summer of 2019. He heard nothing back on this e-mail and denied in his evidence that he had rejected the offer of a temporary replacement storage heater and said that, despite his comments, the Respondent could have had the heater installed. He understood after this exchange that the £10 per week payments would carry on but no further payments were received from the Respondent.

23. The issue of the £10 per week payment was not raised with the Respondent until September 2020 in the course of emails regarding a number of matters at the property. Mr Bowman in his evidence indicated that this was because they were still renting the property and had had a good relationship with the Respondent which they did not want to spoil. He raised the issue with the Respondent in September 2020 and again in March 2021 when the tenancy had ended. His position was that the offer of £10 per

week had no preconditions attached to it and had been an agreement entered into which was in place until the heater was repaired or replaced. It had not been repaired or replaced and he understood the requirement to pay the £10 per week was in place until the end of the tenancy. He said that discussions had taken place by email in September 2020 between the parties on the various options for new heating to be installed but this was then being linked by the Respondent to an increase in the rent. No new heating system was installed during the Applicants' tenancy at the property.

24. On the second head of claim the Applicants were seeking compensation amounting to £300.59 said to be bank overdraft interest paid by them during the period when the Respondent had failed to return to them rent which they had paid during a 9-day period when a Rent Penalty Notice was in place. Mr Bowman's evidence was that the Applicants had received a copy of the Rent Penalty Notice and in anticipation of receiving the refund which amounted to £192.33, they had allocated that sum to other spending. They had not initially understood that a refund was possible but had made enquiries and taken advice on the issue. The refund was not received until September 2021, after the Applicants wrote to the Respondent in August 2021, formally requesting the return of the money which should not have been collected in terms of the Rent Penalty Notice served by Stirling Council. Mr Bowman's position was that the Applicants had suffered a loss as the money was on a bank overdraft on which they had been required to pay interest. His position was that their loss amounted to £300.59 which he had calculated was the amount of overdraft interest paid by the Applicants during the period when rent, which was the subject of the Rent Penalty Notice, had not been refunded. The Respondents were concerned that the Applicant had ignored the notice and effectively used the money as her own until they wrote seeking payment in August 2021. Mr Bowman said that this had not been pursued earlier as they were still tenants at the property and had not wished to raise it in case it caused issues during the tenancy.

Respondent's Position

25. Ms Goodwin gave evidence regarding both aspects of the claim for payment. She said that she had offered the £10 per week towards the heating as a gesture of goodwill to compensate the Bowmans during that time when the heater was not working. She said she had not thought out what she was committing to at the time, and when asked what she had thought at the time, she indicated that she could not really remember. She stated that she had not intended this to be a long-term arrangement.

26. Ms Goodwin said that she had stopped paying the £10 per week in February 2019 when Mr Bowman said he would "soldier on". She said that he had rejected her offer of a second-hand heater which had been sourced by an electrician. She said that Mr Bowman had declined the heater and mentioned the upheaval of decoration of the property and queried whether the heater had the right output. She said in her evidence that she wished she had insisted on fitting the second-hand replacement heater which she had offered at that time.

27. Ms Goodwin accepted that she had been in an email exchange with Mr Bowman in September 2020 regarding the £10 per week agreement and that she had asked for proof of electricity bills paid by them at that time to demonstrate their usage since they

were seeking that she pay them a sum of around £900 which was said to be the accrued balance on the agreement. She accepted in her evidence that in the original agreement there was no qualification to suggest that the sum be paid for a certain period of time or based on electricity usage at the property.

28. As regards the Rent Penalty Notice, Ms Goodwin explained that she had not initially received this as it had been sent to a previous address. She had received an e-mail regarding her registration, but this had gone into an email sub folder. The Respondent advised the Tribunal that all these emails went into her sub-folder, and she missed this email. As soon as she became aware that there had been a lapse in her landlord registration, she had dealt with this, and it had been a simple oversight on her part. Her registration was rectified quickly. She questioned why the Applicants had not raised the issue of the rent paid during the period of the Rent Penalty Notice with her earlier or deducted the sum due from subsequent payments of rent due in terms of the tenancy agreement. As soon as the Applicants had raised this with her in August 2021, she had refunded the rent payment. She had simply overlooked doing this and accepted that she was required to refund the money. She had not intentionally kept the money from the Applicants and had been in contact with the council to confirm the amount to be refunded and paid it back quickly when the Applicants had requested it.

29. The Respondent indicated that she had intended to fit new heaters in July 2019 and had made enquiries regarding various ways of doing this. One had proved to be unsuitable for the property and she was still exploring different systems in September 2020 and had been in email contact with the first Applicant at that time to discuss options.

30. The Respondent did not accept that she had caused any loss to the Applicants by refunding the rent subject to the rent penalty notice as late as September 2021. She pointed out that the rent for the property was £650 per month and queried as to how the wait for a refund against a usual monthly rental payment of £650 could cause an overdraft and associated bank interest charges. She queried why the sum had been spent by the Applicants before it was received and did not accept that the late payment of the refunded rent had caused any loss to the Applicants. She also challenged the interest rates provided by the Applicants and said that these did not prove the amount of any loss as they were yearly summaries and not monthly interest charges.

31. At the end of the evidential part of the hearing it became clear that additional financial information might assist the Tribunal in reaching a decision on the second part of the Applicants claim. The Hearing was continued to allow the Applicant to lodge additional financial information and for the Respondent to be given time to respond to this as required. The Applicants submitted a document setting out bank interest charged on their overdraft and their breakdown of monthly charges. They also submitted emails between the parties in February 2019 on the subject of a second-hand storage heater and other issues.

32. The Respondent also made representations and set out her position that the documents lodged by the Applicants did not show that the Applicants were overdrawn in the amount of the rent penalty notice refund at any stage during the period when the rent was not refunded to them and suggested that the Applicants' approach of

using compound interest was incorrect. The Applicants responded to this submission requesting that the Tribunal ignore the calculations of the Respondent and award interest on the loss they said they had sustained due to her failure to refund the sum due to be refunded under the Rent Penalty Notice. The Applicants indicated that they were willing to supply additional information to assist their position but that this was confidential, and they did not wish for this to be shared with the Respondent.

33.The Tribunal invited final submissions in writing and confirmation that the matter could be dealt with without another hearing and indicated that further information could be provided by either party but that this would require to be shared with the other party. The Applicants lodged a response summing up their position in law on their claims and submitted no further documentation. The Respondent also submitted written representations and suggested that the Applicants were trying to profiteer out of the situation of the broken heater and could have raised the issue of the refund due for the period of the Rent Penalty Notice earlier. Both parties were content to have the matter dealt with without another hearing. The Applicants submitted final written representations on 5th September 2022 reiterating the legal basis of their claims.

Findings in Fact and Law

34. The Applicants and the Respondent entered into a short assured tenancy at the property with effect from 1st August 2016 for 6 months initially and this continued on a monthly basis until the tenancy was terminated with effect from 8th March 2021.

35. The monthly rent payable in terms of the tenancy by the Applicants was £650.

36. The property had seven heaters four of which were storage heaters.

37. In November 2018, one of the storage heaters stopped working and a temporary repair was unsuccessful.

38. In the course of messages between the Applicant, Jonathan Bowman, and the Respondent regarding the broken heater in December 2018, the Respondent offered to pay the Applicants £10 per week until the heater was sorted, and this offer was accepted by the Applicants who gave their bank details for payment.

39. The agreement made between the parties was a legally binding contractual agreement.

40. The Respondent made three payments totalling £90 towards the agreed payments of £10 per week between December and February 2019 and then made no more payments in terms of the agreement.

41. On 12th February 2019, the Respondent advised the Applicant, Jonathan Bowman that she had sourced a second-hand heater as a replacement for the broken one and another for a bedroom and asked when access could be given for these to be installed as a temporary measure until new heaters could be fitted in the summer of 2019.

42. In response, the Applicant, Jonathan Bowman asked if the output for the heater was the same as the broken one and suggested that the solution for the second-hand storage heaters would not work technically due to the wiring and the solution would also involve redecoration. He indicated that the Applicants were prepared to "soldier on" with the current arrangement", if the storage heaters were to be replaced with new ones in the summer of 2019.

43. The Respondent did not respond to the messages from the Applicant, Jonathan Bowman, and paid no further sums to the Applicants in terms of the agreement after 1st February 2019.

44. New storage heaters were not installed at the property in summer 2019 and the Applicants asked for updates on the matter in July and September 2019.

45. In September 2020, the parties exchanged emails discussing options for a new heating system and in the course of these emails, the Applicant Jonathan Bowman called on the Respondent to settle the balance due on the agreement which at that time was around £900.

46.In September 2020 the Respondent replied asking for proof of electricity usage by the Applicants in the course of a discussion regarding the agreement.

47.No qualifications were attached to the agreement between the parties and the Respondent simply offered to pay £10 per week until the broken heater was sorted.

48.The Respondent breached the contractual agreement between the parties by failing to pay any further sums due to the Applicants which fell due after 1st February 2019 until the end of the tenancy on 8th March 2021.

49.The Applicants are entitled to recover sums due to them in terms of the agreement which remain unpaid by the Respondent.

50.The sum of £1,117.15 is lawfully due by the Respondent to the Applicants.

51. In January 2018 the Respondent's landlord registration lapsed and Stirling Council served a Rent Penalty Notice on the parties in terms of the Anti-Social Behaviour (Scotland) Act 1984 which meant that no rent for the property could be collected between 22nd and 31st January 2018.

52. The rent for this period, the sum of £192.33, had already been paid by the Applicants when the Rent Penalty Notice was issued.

53. The Respondent did not find out immediately that a Rent Penalty Notice had been issued but rectified the position regarding her landlord registration as soon as she discovered this had lapsed.
54. The Applicants became aware that they were due a refund on their rent for the period of 9 days when the Rent Penalty Notice was in force.

55. In anticipation of this refund which amounted to £192.33 the Applicants spent this sum of money as they saw fit before the refund was received.

56. In August 2021, after the tenancy agreement had ended, the Applicants called upon the Respondent to refund this sum to them, and the Respondent paid the sum due in terms of the refund by cheque dated 2nd September 2021.

57. The Applicants did not raise the issue of the refund on the Rent Penalty Notice with the Respondent at any time until August 2021 when the tenancy had ended.

58. During the period from February 2018 to August 2021, the Applicants had a bank account on which overdraft interest was charged.

59. There is no connection in fact or law between the delay in refunding the rent refund due to the Applicants and any interest charged in terms of an overdraft facility on the Applicants' bank account.

Reasons for Decision

60. The Tribunal considered the representations submitted and adopted by the First Applicant on behalf of both Applicants, the evidence of the First Applicant and those representations submitted and adopted by the Respondent and the evidence given by her. The Tribunal accepted the evidence of the first Applicant in respect of the first head of claim and found this to be credible and reliable on this head of claim. The Tribunal preferred the evidence of the First Applicant on this part of the claim over that of the Respondent and found, on the balance of probabilities, that the parties had entered into a binding contractual agreement for the payment of £10 per week by the Respondent to the Applicants, until the faulty heater had been repaired or replaced, and that the Respondent had breached this agreement and was liable to pay the sums due under this agreement, to the Applicants, together with interest as requested at the rate of 3% per annum. The Tribunal awarded this sum in interest from the date of the order until payment to reflect the use value of the money based on current bank interest rates.

61. The Tribunal considered the second head of claim in relation to sums said to be due to the Applicants by way of losses they said they had sustained as a result of the Respondent's failure to repay the sum taken in rent during the period the Rent Penalty Notice was in force. As a result of this, the Applicants claimed that they had been charged overdraft interest which was referable to the failure to refund the rent to them. The Tribunal rejected this claim and found that there was no basis in fact or law to suggest that the late refund of the rent taken during the period of the Rent Penalty Notice had caused any loss to the Applicants.

Applicable Law First Head of Claim

62. The Tribunal found that the messages between the parties when the storage heater at the property was broken amounted to a legally binding agreement. It was clear that an offer to pay £10 per week to the Applicants was made by the Respondent

until such time as the heater was "sorted," which in this context was understood to mean that it was either repaired or replaced. The offer was accepted, and the Respondent initially carried out her obligations under the agreement and made payments totalling £90.The legal requirements of a contract were in place as referred to in ***Stair Memorial Encyclopaedia*** volume 15 at paragraph 620. The Respondent said in her evidence that she had paid more than this sum of £90 but the Tribunal took the view, based on the text messages received, that the payment referred to in December 2018 towards the agreement was for £50 and the remaining £33 referred to in the message related to something other than the sums due under the agreement.

63. As far as the intention to create legal obligations was concerned, the Tribunal found that this was not an agreement made in a social context but was an agreement between parties who were known to each other as landlord and tenant in the context of a lease agreement. This was neither an agreement in a social context which would be presumed not to be legally enforceable nor was it a truly commercial agreement which might be presumed to be intended to be legally binding. In order to consider the question of whether there was an intention to be legally bound the Tribunal considered the criteria set out in ***Morgan Utilities Ltd v Scottish Water Solutions Ltd [2011]CSOH 112***.The Tribunal considered whether the parties had expressed an intention to be bound there and then, what would reasonable and honest men have intended or what would reasonable expectations have been if sensible business men had been in the parties' position, how did the parties behave after the alleged agreement and the court or Tribunal should take a neutral approach.

64. In this application the agreement was clear and without qualification and was suggested by the Respondent who made three payments after the agreement was put in place in December 2018, one of these being made straight away. The Respondent could not recall what she had intended at the time but did not intend a long term arrangement. Looking objectively at the terms of the agreement the Tribunal was satisfied that this was a clear legally binding arrangement, without any conditions, for the Respondent to pay the Applicants £10 per week until the faulty heater was fixed or replaced.

65. The Tribunal required to consider if the exchange between the parties in February 2019 amounted to a rejection by the Applicants of an offer to install a second-hand heater as a temporary measure pending the installation of new storage heaters in the summer of 2019. The Respondent said in her evidence that she considered that the first Applicant had rejected the offer and she had stopped paying in terms of the agreement after 1st February 2019. The First Applicant in response of the offer of a second-hand heater had queried the output of this heater and received no response and then gave his view that the solution offered would not work due to the wiring at the property and there would also be a need for redecoration. He suggested that the present arrangement should continue until the new heaters were installed in the summer of 2019.The Tribunal accepted that this was a reference to the ongoing agreement between the parties regarding the payment of £10 per week. The question arose as to whether this response by the First Applicant was such that the Respondent might have been entitled to regard this response as a breach of contract in itself which might allow her to repudiate the contract or take steps to enforce performance by the Applicants. The Tribunal did not consider that the first Applicant's response amounted to a rejection of the offer of the heater but the expression of an opinion as to whether

the short-term solution offered was feasible. He did express a view on the way forward against the background that this solution was to be temporary only. The Tribunal did not consider that the Applicants had rejected the offer by the making of these comments nor that their response in itself constituted a breach of contract which might allow the Respondent to repudiate the contract or cease to perform her obligations under the contract in order to force performance by the Applicants. Nothing in the comments prevented the second-hand heater being installed at the property by the Respondent. The Tribunal also took account of the fact that the Respondent did not answer these emails either to indicate that she was ceasing to pay the sums due and repudiating the contract or ceasing to pay the sums due until the Applicants agreed the installation of the second-hand heater. The Respondent had made her last payment towards the sums due on 1st February 2019 and the emails regarding the second-hand heater as a replacement took place some 12 days later and the Tribunal considered that there was no clear link in the evidence between the cessation of payments and the email response of the first Applicant on 12th February 2019. For the sake of completeness, the Tribunal considered whether the Applicants had failed to mitigate their losses by responding in the manner that the First Applicant did by email on 12th February 2019. The Tribunal regarded this as an expression of opinion as to the viability of the proposed solution, which was never answered, and as such, it is not possible to find that this was unreasonable, as the Respondent did not address the issues raised.

66. As regard the Applicants' second claim for losses said to have been incurred due to the late payment of the refund of rent which was collected during the period of the Rent Penalty Notice, the Tribunal first considered the term of section 94 of the Anti-Social Behaviour (Scotland) Act 1984 which states:-

94Circumstances in which no rent to be payable

(1)Where a local authority is satisfied that the conditions in subsection (2) are met in relation to a house within its area, the authority may serve a notice under this section on the persons mentioned in subsection (5).

(2)Those conditions are—

(a)that the owner of the house is a relevant person.

(b)that the house is subject to—

(i)a lease; or

(ii)an occupancy arrangement,

by virtue of which an unconnected person may use the house as a dwelling.

(c)that the relevant person is not registered by the local authority; and

(d)that, having regard to all the circumstances relating to the relevant person, it is appropriate for a notice to be served under this section.

(3)Where a notice is served under this section, during the relevant period—

(a)no rent shall be payable under any lease or occupancy arrangement in respect of the house to which the notice relates.

(b)no other consideration shall be payable or exigible under any such lease or occupancy arrangement.

(4)A notice served under this section shall specify—

(a)the name of the relevant person to whom it relates;

(b)the address of the house to which it relates.

(c)the effect of subsection (3); and

(d)the date on which it takes effect (which must not be earlier than the day after the day on which it is served).

(5)Those persons are—

(a)the relevant person.

(b)if the local authority is aware of the name and address of a person who has, by virtue of a lease or an occupancy arrangement such as is mentioned in subsection (2)(b), the use of the house to which the notice relates, that person; and ….

67. The Tribunal noted that this section sets out a sanction on a landlord who was not registered with the local authority and the section prohibits an unregistered landlord from collecting rent at a property during the period when a notice is in force. Aside from the revocation and appeal sections, the Act is silent as to how the provisions of section 94 are to be enforced.

68. In this application, a Rent Penalty Notice was in force for 9 days in January 2018 and the rent due for the period had already been received by the landlord. These facts were not in dispute, and it was also agreed that the sum due by way of a refund of rent paid for this 9-day period was not paid back to the Applicants by the Respondent until September 2021.

69. The Applicants claimed that they had sustained losses as a result of this failure to refund the sum which was due to be returned to them. In anticipation of the refund of £192.33, the Applicants spent this sum, and they were in overdraft over the period after the Rent Penalty Notice was in force and the payment of the sum back to them in September 2021. They suggested that the retention of this sum and the failure to pay it back caused them losses in the form of overdraft interest.

70. In order to succeed in such a claim, the Applicants would have to establish a factual and legal causal link between the suggested wrong done by the Respondent and any

loss suffered by the Applicants and any such losses must not be too remote. As a matter of law, it would have to be reasonably foreseeable by the Respondent that in delaying paying a refund of rent to the Applicants that this would cause them financial loss. The Tribunal did not consider that such loss would have been reasonably foreseeable in the circumstances of this application as the Respondent could not have foreseen that the Applicants would spend the sum due before they received it thereby affecting their overdraft and potentially increasing the interest due on the amount of the overdraft. Any loss incurred here by the Applicants appeared to be as a result of them spending the refund before they had received it. The Tribunal considered the duty to mitigate losses and considered that in the event that any loss sustained by the Applicants had been due to the failure on the part of the Respondent, the Applicants had not mitigated their losses. They could easily have requested the refund from the Applicant as soon as they became aware it was due as they were in regular contact with her as their landlord. Instead, a period in excess of three years after the Rent Penalty Notice was in force passed before they intimated to the Respondent that they were seeking this sum to be returned. This approach appears to the Tribunal to be unreasonable, even having regard to the fact that they may have been keen not to cause any issues in the tenancy between the parties. As far as any losses were concerned, on the information lodged, the Tribunal would also have been unable to quantify any such loss as it was not clear how much of the overdraft balance on the Applicants' bank account was linked to the sum spent by them in anticipation of the refund and what overdraft interest would have accrued as a result. For all of these reasons, the Tribunal rejected this part of the claim as having no factual or legal basis to allow it to succeed.

Decision.

71. The Tribunal made a payment order in the sum of One Thousand One Hundred and Seventeen pounds and Fifteen Pence only (£1,117.15) in favour of the Applicants and against the Respondent together with interest at the rate of 3% per annum from the date of the order until payment.

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.

V Bremner

____________________________ __14.10.22__________________________

Legal Member/Chair **Date**