Housing and Property Chamber
First-tier Tribunal for Scotland

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

Chamber Ref: FTS/HPC/CV/21/0416

Re: Property at 14 John Morton Crescent, Darvel, KA17 0JJ ("the Property")

Parties:

Mr Ragulan Sriskanthan, c/o Chesnutt Skeoch Ltd, 30 East Main Street, Darvel, KA17 0HP ("the Applicant")

Ms Alicja Potoniec, 14 John Morton Crescent, Darvel, KA17 0JJ ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

1) This was an application by the Applicant for civil proceedings in relation to an assured tenancy in terms of rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended ("the Procedure Rules"), namely an order for payment of rent arrears and payment of two further small amounts arising from damages under the lease. The tenancy in question was a Private Residential Tenancy of the Property by the Applicant to the Respondent commencing on 18 July 2020.

2) The application was dated 22 February 2021 and lodged with the Tribunal on around that date. The application was accompanied by a rent statement setting out arrears of £825, being sums said to be due for two months' rent due on 18 January and 18 February 2021, along with £50 for a visit from a gas engineer (said to be abortive) and £75 being a half share of gardening costs undertaken on behalf of the Applicant in October 2020. The lease for the tenancy

accompanied the application and detailed a rental payment of £350 payable in advance on the 18th of each month. Invoices on the gas engineer and gardening costs were also included.

3) Through the application process, the Applicant had lodged a number of rental statements updating the sum sought. Formal amendment was sought at the Case Management Discussion ("CMD") of 30 April 2021 but, by the date of the Hearing, a further increase in the sum sought was put before us of £2,225. This was made up of the sums of £50 and £75 plus unpaid rental due on the 6 payment dates from 18 January to 18 June 2021.

4) Also subsequent to the CMD a Notice of Direction was issued of 30 April 2021 seeking further papers from both parties with a deadline of 7 June 2021. The Applicant had provided responses by the deadline but the Respondent did not. Prior to the hearing, the Tribunal's clerk informed us that an email had been received from the Respondent on 20 June 2021 purporting to be responses to the Directions but that an attempt made to recall the email (though it was still viewable on the Tribunal's email system). Subsequent attempts to contact the Respondent by the Tribunal's clerk, to ask whether the email was to be held as lodged and whether it was to be circulated to the Applicant, had not been responded to.

The Hearing

5) On 24 June 2021, at a hearing of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote conference call at 10:00, we were addressed by Ken Johnstone of Chesnutt Skeoch Ltd, the Applicant's letting agent, and the Respondent. Alice Seggie of Chesnutt Skeoch Ltd was further in attendance as a witness. The Applicant's agent confirmed that, despite discussion at the CMD that he may be a witness, their gas engineer David Crawford (who had written two emails lodged as evidence) would not be called as a witness.

Procedural matter: amendment of sum sought

6) The Applicant's representative confirmed that the order for payment was sought in the amended amount of £2,225. The Respondent, though maintaining her disputes (subject to the clarifications she made at the start of the hearing; below) did not object to the amendment.

Procedural matter: Respondent's response to Directions

7) The Respondent accepted that she had not attempted to provide a response to the Directions until her email of 20 June 2021. She said that this arose due to pressures of work and personal matters that had resulted in her missing the deadline of 7 June 2021.

8) In regard to the recall of the email, she explained that she had sent the email omitting a photograph and sought to recall it and include it with a further version of the email. (It was not clear to us whether the copy that the Tribunal had

received included all the photographs. The Respondent made no reference to any photograph that appeared absent from the email that we were shown.)

9) In regard to her failure to respond to the Tribunal, the Respondent said that she could not see any email from the Tribunal's clerks asking for confirmation that she did wish the documents lodged and circulated to the Applicant.

10) The Respondent's position was effectively that she wanted the email and attachments of 20 June to be treated as lodged, though late. In considering that motion, we were concerned that though we had seen the email and attachments (albeit only in the hour preceding the hearing) the Applicant had not. In considering the email and its attachments, we regarded its contents as either explaining what the Respondent did not have by way of evidence, or providing evidence that had not been requested in the Notice of Direction and was not relevant to the hearing. We thus rejected the motion to have the documents allowed late.

11) The only material point we identified within the email of 20 June 2021 was that the Respondent narrowed the period that she said she was without a working boiler. She said it was 30 December 2020 to 5 January 2021. She confirmed to the hearing that this was her position.

Matters in dispute

12) Prior to hearing evidence, we sought to clarify the matters in dispute. At the CMD the following issues were identified:

    a) Rent:
        i) The Respondent did not dispute the arithmetic but:
        ii) Sought a reduction of £165, being equivalent in her view to two weeks of rent, due to a period in January when she was without gas heating and required to make alternative arrangements with electric heaters; and
        iii) She was withholding the remainder of rent until she received an updated Electrical Installation Condition Report (EICR) certificate on the electrics at the Property as she said this was necessary both following the start of her Tenancy as well as after a flood into the Property from the upstairs flat that she said believed had damaged the electrics.

    The Applicant disputed a new EICR was needed in law, and disputed the retention regarding any lack of heat or hot water.

    b) The Respondent disputed the entirety of the gas engineer charge. The Applicant lodged an email from the gas engineer (dated 22 February 2021) which described him attending at the Property on 25 January 2021 and finding no issue with the heating or hot water systems, and the tenant laughing at him and saying that she "had no idea" why he was there. He regarded it as an abortive and wasted visit, and the Applicant sought to pass the cost onto the Respondent.

The Respondent disputed the details in the engineer's email and explained that the engineer had attended on that date to insulate an external pipe to the boiler, which repair he had suggested to her was necessary on a previous repair visit.

c) The Respondent disputed the entirety of the gardening charge. The CMD had allowed only one issue to come to the hearing, being whether it was reasonable of the Applicant to have instructed his own gardener when he did. The Respondent held that she had been given no notification that a gardener would be sent out, all at a cost to her, and that she had been intending to do the gardening once she had time and tools to do so.

(The CMD thus did not allow evidence to be heard on liability in general for maintaining the garden, as it was deemed a clear condition of the Tenancy Agreement, despite initial attempts by the Respondent to dispute same. Further the Respondent claimed that the gardener had attended to more than the area she rented, and that she had been told to expect a charge of around £60. The Applicant's invoice was for £150 and the Applicant's agent said that the claim for £75 addressed any dubiety over what area the contractor worked on. Given the *de minimis* issues, quantification for the claim was fixed at £75 and the hearing was to determine only the issue as to whether the Applicant had been pre-emptive in sending out a gardener when he did.)

13) The Applicant had lodged further productions and submissions on all these issues, as requested by the Notice of Directions. The Applicant had further attempted to schedule an electrician to visit the Property but access had not been obtained. It was clear from the papers lodged that there was a dispute between the parties as to the reason for the lack of access. We thus sought, prior to hearing evidence, to clarify what remained at issue and whether any of the Applicant's further productions and submissions resolved issues.

14) The Respondent readily volunteered that she was happy to pay £1,820 to the Applicant, which she said was the rent, not including the gardening and gas engineer costs, and less £175 for the period she said she was without gas central heating and water in December/January (which she now accepted was only 6 days, and not two weeks). We sought her confirmation that she was thus no longer seeking retention in general, pending receipt of a new EICR, nor arguing that a new EICR was needed. She confirmed that these positions were no longer insisted on and she sought only to retain £175 and dispute the gas engineer and gardening costs. We pressed her on the arithmetic and she confirmed that she agreed she had not paid the last 6 months of rent, totalling £2,100. We proposed to her that, on her figures, the undisputed sum should be £1,925 (£2,100 less £175 retention). She agreed that the figure due was thus £1,925 (not £1,820) and confirmed that she had not yet paid this amount to the Applicant.

15) The Applicant's agent confirmed that his instructions were to seek the full £2,225 and thus we continued to hear evidence, notwithstanding the material narrowing of matters in dispute. Given the Respondent's concessions, we thought the issues in dispute would best be addressed by us eliciting responses and

clarifications from the witnesses ourselves, rather than any of them providing examination in chief or undergoing cross-examination.

Evidence on retention of rent

16) Given the Respondent's concessions, evidence on the rent was now restricted to whether there had been a period of lack of heating and hot water between 30 December 2020 and 5 January 2021 and, if so, whether retention of rent was reasonable and, if so, in what sum.

17) The Respondent was asked to break down her claim of £175. She said it was for one week's rent, the costs of obtaining electric heaters, and excessive electricity consumption for that week.

18) We put to her that one week's rent (on the basis of rent of £4,200/yr divided by 52 weeks) was £80.77. The Respondent accepted that figure and adopted it as part of her £175 calculation, leaving £94.23 attributed to the other costs. She said that she could no longer find the invoices for the costs of buying electrical heaters. In regard to excess electricity costs, she said that her utility provider was not able to provide a breakdown of consumption for those 6 days, but she said that a usual winter's week would have incurred £10 for electricity and £10 for gas, and instead she recalled that she incurred around £90 for electricity (and £nil for gas). She said the Property was a one-bedroom flat.

19) The Respondent accepted that the gas boiler was fixed by the gas engineer who was sent by the Applicant's agent and attended on 5 January 2021. She said that he spent around 20 minutes at the Property, identified that there was a leak at a radiator in the bedroom, and that this was causing pressure to drop in the system. She accepted that she and the engineer discussed appropriate pressure in the boiler and how to top up the boiler. She accepted that she did know how to top up the boiler. She said, however, that she had tried to do so on a number of occasions during the 6 days and the pressure had always immediately dropped and heat and hot water was not therefore restored for any period. She said that she had an electric shower at the Property but had to boil kettles for hot water, and use electric heaters for warmth (saying that the flat had never felt warm during this time). She accepted the problem was fixed by the gas engineer during the 20 minute visit but she did not know the full extent of the work carried out by him. She described him as doing work at the boiler and the radiator in the bedroom and described his work as "bleeding the radiator".

20) In regard to contact with the Applicant's agent, the Respondent said that she had emailed on 31 December 2020 when she became aware that the problem was continuing but heard nothing in response. (No copy of the email was provided to us.) She said she had made repeated calls to the Applicant's agent but they had rung out and she knew of no emergency number. She said that she had not made any calls at the weekends or on the public holidays as she expected the Applicant's agent's office would have been closed. Contact was not made with the Applicant's agent until a call she made on 5 January 2021 (which she said was one of a number of calls made that day) was answered.

21) The Applicant's evidence came from Mr Johnstone and Ms Seggie but reference was also made to the email from the gas engineer, David Crawford of Crawford & Sons Gas Services Ltd of Carnbroe, dated 22 February 2021 and lodged with the application papers.

22) Mr Johnstone referred to the email from Mr Crawford where he described a conversation with the Respondent at the Property on 5 January 2021. Mr Crawford's email said that the Respondent confirmed that she knew how to top up a boiler but that she had decided not to do it, and instead leave it for the Applicant's contractor to do. Mr Johnstone said that he had also spoken with Mr Crawford and his view had been that, though the leak at the radiator would have caused the pressure to drop, if the boiler had been topped up, it would have taken 2-3 days for the pressure to drop sufficiently again to turn off the system. Mr Johnstone's conclusion was that the Respondent, had she topped up the boiler, could have retained heat and hot water during the period 30 December to 5 January, albeit with the need to keep topping up the boiler. Mr Johnstone also said that Mr Crawford had reported to him that, on visiting the Property on 5 January 2021, he had seen no evidence of electric heaters being used by the Respondent.

23) Mr Johnstone accepted that his business had suffered an email failure on 30 December 2020 that was not picked up for a few days. Any email of 31 December 2020 from the Respondent would not have been picked up timeously. He did not, however, see the Applicant's agent as responsible for any delay as he said that they maintained an emergency contact number. This was handled by Ms Seggie.

24) Ms Seggie explained that, during the pandemic, their office has principally been unmanned and working remotely. She holds a mobile phone that receives diverted calls from the office. She believes that the calls divert after around 3 rings. She said that she receives notification if any call is missed, or is placed while she is on another call. This system continued during the winter vacation period December 2020/January 2021 as their out-of-hours emergency number. She said that other tenants called through successfully with similar plumbing issues. She said that she had no missed calls from the Respondent and only one call from her on 5 January 2021 after which she had sent out the gas engineer that same day.

25) Ms Seggie further recounted that, earlier in the Tenancy, she had directed the Respondent that she should call the office number and that it would be diverted as necessary. She said that, up to that point, the Respondent had called Mr Johnstone direct on his private number and Ms Seggie wanted the Respondent to have the correct contact details.

26) In response to this evidence, the Respondent was insistent that she had called the Applicant's agent more than once and received no reply nor had the call diverted within a reasonable time before she had hung up. She disputed the version of the conversation of 5 January 2021 in Mr Crawford's email.

Evidence on gas engineer costs of 25 January 2021

27) In response to the Directions, the Applicant had lodged a further email from Mr Crawford dated 3 June 2021 where he said: "I can confirm we attended the above property on 15th January 2021 to carry out the pipe insulation on the outside of the property."

28) We asked the Respondent whether she accepted such a visit had occurred. She did not. She said that there were not three visits by the gas engineer in January 2021, only 5 January 2021 (to restore heat and hot water) and 25 January 2021 (which she said was to install the insulation and which the Applicant said was abortive).

29) We pressed Mr Johnstone on the two emails from Mr Crawford as the email of 22 February 2021 said: "As per our two recent visits to the above property" and, after recounting Mr Crawford's recollections of the 5 January 2021 visit, has him starting his recollection of the 25 January 2021 visit with the words: "Our next visit was on the 25th January again for a report of no heating and hot water". Mr Johnstone said he believed that on 15 January 2021 Mr Crawford had attended only the outside of the Property and fitted the insulation in a few minutes, before attending another job. He posited that the Respondent may not have noticed Mr Crawford visiting the Property as she always had her curtains closed. He explained the apparent inconsistencies in Mr Crawford's emails as suggesting that Mr Crawford was, in the email of 22 February 2021, only listing his visits where he stepped inside the Property.

30) We asked the Respondent to comment on this and she remained adamant that no visit occurred on 15 January 2021, and that it was not accurate in her mind that the gas engineer could have attended outside, fitted the insulation on 15 January, and left without her knowing. She said that she recalled that the gas engineer knocked on her door on 25 January 2021 and expressly said that he had fitted the insulation, and they had then discussed that and the boiler. She said that the insulation on the pipe was not present before 25 January 2021. She continued to dispute Mr Crawford's recollection of the visit of 25 January 2021 in his email of 22 February 2021, and the suggestion that she had laughed at him or gave him any reason to hold that it had been a wasted visit. She was certain that 25 January 2021 was not a wasted visit because he had visited to fit the insulation, as he had previously said he was going to do.

Evidence regarding gardening costs

31) In response to the Directions, Mr Johnstone had lodged an email on 14 May 2021 where he stated, amongst other things, that he had cause to speak to the Respondent on 30 September 2020 on another matter and, at that time, "advise[d] that the garden had to be maintained including the hedges and that was [the Respondent's] responsibility" and that "if she did not cut the grass and hedges or organise someone else to do so, then within 2-3 weeks, a landscaper would come on behalf of the client to undertake the work at her expenses". His email continued to explain that, when the Respondent had not advanced

maintenance, he instructed a contractor to carry out the work which they did on 19 October 2020.

32) We asked the Respondent for her position on this. She recalled a conversation on 30 September 2020 with Mr Johnstone and confirmed that it had mentioned the gardening but that no time-limit was stated, nor that work would be carried out at her own expense. She said that she told Mr Johnstone during the conversation that she would be doing the work. She recalled that she had said: "I am just gathering the tools up to do it myself". She could not recall whether the work was done on 19 October but accepted it could be an accurate date for the work. (We noted that the invoice from the contractor is dated 22 October 2020.)

33) We asked Mr Johnstone to confirm that he relied on the terms of his email of 14 May 2021 and whether he had anything further to add, or whether there were any emails or texts on the subject. He confirmed the email of 14 May 2021 set out his full position. He added that the Respondent had again failed to maintain the garden ground and it needed done at this time. To this the Respondent interjected: "I won't do the garden. I've moved out."

Interest and expenses

34) After considering matters and providing our decision orally, we sought submissions on interest and expenses.

35) There was no interest rate in the Tenancy Agreement. The Applicant's agent sought interest on the sum sought under Procedure Rule 41A at 8% per annum from the date of Decision as an appropriate rate. On consideration, and after seeking clarification of the interest sought, the Respondent confirmed she had no opposition to this.

36) The Applicant's agent sought expenses for a restricted part of the process being the work arising from the Respondent's disputes regarding the electrical installation at the Property, her submission that a new EICR was needed, and her retention of rent regarding these matters. This was sought only from the Notice of Direction being issued on 30 April (where paragraphs 4-6 covered these issues) until the concession of this morning's hearing. The Applicant's agent's submission was that it was unreasonable for the Respondent to have raised these issues, putting the Applicant and his agents to time and trouble, only to drop it at the morning of the hearing without prior warning. This incurred unnecessary and unreasonable expense. Further, as the retention argument put forward at the CMD was predicated on these issues, substantial rent has been withheld to date, but as of this morning only a retention of £175 was argued for. This was further evidence of unreasonable behaviour by the Respondent.

37) The Respondent opposed the motion for expenses but we did not follow many of her points. She appeared to seek to relitigate issues, indicate that the EICR was still significant, and that she still insisted on retention until a new EICR was produced. In regard to why she had dropped the point belatedly, she explained that she "just want it [ie the dispute] over and done with" and that she is now "out

of the property". She regarded the motion as the Applicant's agent "trying to milk me".

Findings in Fact

38) On 15 and 19 June 2020, the Applicant let the Property to the Respondent by lease with a start date of 18 July 2020 under a Private Residential Tenancy ("the Tenancy").

39) In terms of clause 7 of the Tenancy Agreement, the Respondent was to make payment of £350 per month in rent to the Applicant in advance, being a payment by the 18th of each month to cover the month to follow.

40) In terms of clause 17 of the Tenancy Agreement, sub-clause "Repair Timetable", the parties agreed that: "The Tenant undertakes to notify the Landlord as soon as is reasonably practicable of the need for any repair or emergency. The Landlord is responsible for carrying out necessary repairs as soon as is reasonably practicable after having been notified of the need to do so."

41) In terms of clause 17 of the Tenancy Agreement, sub-clause "Payment for Repairs", the Respondent is "liable for the cost of repairs where the need for them is attributable to his or her fault or negligence…".

42) In terms of clause 29 of the Tenancy Agreement, the Respondent is liable to "maintain the garden in a reasonable manner".

43) As of 24 June 2021, there was unpaid rent of £2,100 being made up of unpaid rent due on 18 January, 18 February, 18 March, 18 April, 18 May and 18 June 2021 (each of £350).

44) The Respondent provided no evidence of payment of any part of the said unpaid rent of £2,100 due at 24 June 2021.

45) The Respondent emailed the Applicant's agent on or about 31 December 2020 to report a problem with heat and hot water at the Property.

46) The Respondent telephoned the Applicant's agent on 5 January 2021 to report a problem with heat and hot water at the Property.

47) The Applicant's agent operated an out-of-hours emergency line through the period 31 December 2020 to 4 January 2021 by way of a phone divert to a mobile telephone operated by Alice Seggie.

48) The Applicant's agent engaged a gas engineer, Crawford & Sons Gas Services Ltd, whom attended at the Property on 5 January 2021 and found that, at the time of the visit, the Property was without heat and hot water. The gas engineer attended to repairs, including investigating a leak at a radiator in the bedroom of the Property and topping up the pressure of the boiler, and this restored heat and hot water.

49) The Applicant's said gas engineer, in or around January 2021, *inter alia*, attended at the Property to fit insulation on an exterior pipe associated with the boiler.

50) The Applicant's agent engaged a gas engineer, Crawford & Sons Gas Services Ltd, whom attended at the Property on 25 January 2021.

51) Crawford & Sons Gas Services Ltd invoiced the Applicant for £50 for a visit to the Property on 25 January 2021 to "examine heating system" (*sic*).

52) As of 30 September 2020, the Respondent had failed to "maintain the garden in a reasonable manner".

53) On 30 September 2020, the Applicant's agent Ken Johnstone spoke with the Respondent to remind her of her obligation under the Tenancy Agreement to maintain the garden and to inform her that he did not regard it as properly maintained as at that date.

54) As of 19 October 2020, the Respondent had still failed to undertake works to "maintain the garden in a reasonable manner".

55) On or about 19 October 2020, Garden & Home Care Ltd, gardening contractors engaged on behalf of the Applicant, attended at the Property and carried out works to ensure that the leased garden area was brought up to a reasonable standard under the Tenancy Agreement.

56) On 22 October 2020, Garden & Home Care Ltd invoiced the Applicant for £150 for work to the grass, hedges, and beds, and other gardening works, at the garden area external to the Property.

Reasons for Decision on Order

57) We found Mr Johnstone to be a credible witness. In regard to his reliability, where he was relating the conversation of 30 September 2020, we had no reason to doubt his reliability. The majority of his evidence, however, related to points that had been recounted to him by David Crawford, whose reliability we could not test.

58) We found Ms Seggie to be a credible and reliable witness. She provided her evidence in a straight-forward manner and, when challenged, provided clear explanation and clarification.

59) We did not find the Respondent's evidence to be as credible and reliable as the Applicant's witnesses. It was particularly hard to follow her evidence on what steps she took between 30 December 2020 and 5 January 2021 in regard to contacting the Applicant's agent. When pressed on matters, she would concede points and then seek to focus on a different point. For instance, in regarding topping up the boiler, she disparaged the idea that she should be expected to "bleed" radiators. When we pointed out that this was not the issue being raised,

she quickly conceded that she had topped up the boiler on many occasions during the period but it had no effect on the boiler pressure. This was a new claim that she had not mentioned at any earlier point in proceedings.

60) We do not, however, found our decision materially based on credibility or reliability but on sufficiency of evidence and the terms of the Tenancy Agreement.

Retention of Rent

61) It was a matter of agreement that contact had been made with the Applicant's agent on 5 January 2021 and that a gas engineer attended on that date and restored heat and hot water through work that involved restoring pressure to the gas central heating system.

62) It was further conceded by the Respondent that, after her email of 31 December 2021, she had taken few steps to contact the Applicant's agent before she and Ms Seggie spoke on 5 January 2021. It was unclear what steps the Respondent said she had taken and, following her evidence, we did not understand her to claim to have made any calls on 31 December 2020 to follow up the email, or any further contact between 1 and 4 January 2021 inclusive (because of her view that the Applicant's agent would be closed on the public holidays of 1 and 2 January and the weekend of 3 and 4 January). Her evidence appeared to be that she only sought to make fresh contact on 5 January 2021. On that date she claimed to have made multiple calls, and Ms Seggie said only one was received. Nonetheless, contact was made and a gas engineer sent out that day. We thus think the dispute on how many calls were made on 5 January 2021 is immaterial.

63) In regard to liability, the issues related to whether the Applicant (through his agent) had complied with the requirements to carry out "necessary repairs as soon as is reasonably practicable after having been notified of the need to do so" under clause 17 of the Tenancy Agreement. We hold that the Applicant did. Notwithstanding whether or not an email was sent on 31 December 2020 and not read, due to an IT issue, we think that a reasonable tenant, during winter and a period of public holidays, would seek to telephone their landlord or landlord's agent to report matters rather than send an email on a day when many offices are shutting early for Hogmanay and a long-weekend. It is within the Tribunal's knowledge that a responsible letting agent should have an emergency out-of-hours telephone contact. We accepted the evidence of Ms Seggie that this was in place and that the Respondent knew or ought to have known how to access this emergency contact number (as it was the same manner in which she made contact with Ms Seggie on 5 January 2021). The Respondent having failed to take reasonable steps to report the alleged problem until a telephone call on 5 January 2021, we do not find that she has any entitlement to retain rent.

64) Having come to this decision, we do not need to come to a decision on whether it was reasonable to expect the Respondent to effect herself a series of temporary repairs between 30 December 2020 and 5 January 2021 (by repeatedly topping up the boiler) or whether these would have been effective. The absence of evidence direct from Mr Crawford would render this difficult in

any case. Further, we do not need to come to a decision on whether or not the Respondent did require to seek electrical heating for those days. The absence of evidence direct from Mr Crawford and the Respondent's failure to lodge invoices for the heaters she claimed to have purchased (or even give evidence on her recollection of their price) also would render such a decision difficult.

65) Had we decided in the Respondent's favour on this point, the Respondent also provided no material evidence in regard to quantification. The sum of £175 was more than she sought at the CMD. At the CMD, the £165 was said to be the equivalent of 2 week's rent (though the arithmetic is hard to follow). The sum of £175 also seemed a very rough estimate. The Respondent said it included the costs of replacement electric heaters but, in breaking down the figure of £175, included no estimate for such costs. She broke it down only between one week's rent and excessive utility costs. If there were only six days without heat and hot water, the rent would only be £69.04. The Respondent's estimate of usual utility costs of £20/w during the winter (£10 each for gas and electricity) and her recollection of £90 for electricity that single week were entirely unvouched but, even on her figures, amounted only to additional costs of £70. At their highest, the Respondent's figures add up to £139.04. On consideration of all the evidence, we cannot determine quantification of the alleged damages and, in the circumstances, decline to do so as it is unnecessary.

66) In the circumstances, the full rental of £2,100 being admitted as due by the Respondent, and no set-off being found appropriate, we award a sum of £2,100 to the Applicant in regard to rent arrears.

Gas engineer visit of 25 January 2021

67) Parties were agreed that insulation was installed on the pipe in January; and that a visit by the gas engineer occurred on 25 January 2021. The dispute was whether the insulation was installed on 25 January 2021 (being the purpose of the visit) or whether the 25 January visit was entirely abortive.

68) Though we have generally found the Respondent lacking in credibility and reliability, the lack of evidence from Mr Crawford is a more significant issue for our determination on this point. We cannot assess whether or not his emails include inconsistencies and he cannot be examined on his description of the Respondent's comments and behaviour.

69) We are not determining that the Respondent's statement of event as more accurate but, in the circumstances, we are not satisfied on the balance of probabilities that the Applicant's case is accurate. We do not find that there was an abortive visit on 25 January 2021 and we do not award any sum for wasted costs.

70) How such a sum would be recoverable need not be considered, but it would appear to us implicit in the Tenant's obligation under clause 17 of the Tenancy Agreement (to make payment for repairs that arise due to the Tenant's negligence) that a cost arises to the Tenant if the Tenant makes a materially inaccurate request for a contractor to visit and an abortive visit occurs.

Gardening costs

71) Again, though we have generally found the Respondent lacking in credibility and reliability, we do not make our determination based on an assessment of the competing recollections of the discussion of 30 September 2020.

72) The parties are agreed that mention of the need for maintenance of the garden grounds was made on 30 September 2020 and that this was not undertaken by the Respondent prior to the contractor's visit. We do not require to determine whether the Respondent was even required to be informed of her breach, but she accepts she was. We do hold that she need not have been given an express ultimatum with a specific time for remediation during the call of 30 September 2020 (though the Applicant's agent says that she was). The Respondent has a clear obligation to maintain the garden area under the Tenancy Agreement and, as with many breaches of the Tenancy Agreement, if the Applicant chooses to remedy it himself then damages fall against the Respondent.

73) It was held at the CMD that quantification of this claim was not for dispute at the hearing, so we hold £75 is a reasonable sum in damages in regard to this breach of clause 29 of the Tenancy Agreement.

Conclusion

74) The application was in terms of rule 111, being an order for civil proceedings in relation to a PRT. We are satisfied, on the basis of the application and supporting papers, and evidence heard, that rent arrears of £2,100 were outstanding as of 24 June 2021 along with a further £75 of damages. We are satisfied to award the amended sum of £2,175 against the Respondent with interest at 8% per annum from the date of Decision.

Reasons for Decision on Expenses

75) Rule 40 of the Procedure Rules states as follows:

> *40.- Expenses*
> *(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.*
> *(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made.*

76) The rule thus sets out a three stage process for the Tribunal, as commented upon by Stalker in *Evictions in Scotland* (2nd edition, p491):
    a) Determine whether there has been unreasonable behaviour in the conduct of a case;

b) Consider whether to award, under its discretion (in that the Tribunal "may award"); and
c) Consider what expenses are to be awarded (in that the award "must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made").

77) The Respondent's position on why she chose to drop the issue of retention and defence based on the electrics was said to be a pragmatic one that she has chosen to leave the Property and wished to bring matters to a conclusion. If accurate, it is entirely understandable for her to take that view but in doing so she still needs to act reasonably. She knew - from the CMD, the Notice of Direction, and the attempts to arrange a visit to the Property – that the Applicant was incurring time and cost dealing with this as a dispute in the case. Further she knew that she was undertaking the 'self-help' remedy of withholding rent pending a renewed EICR. Further she knew that she had not, despite ordered to do so in the Notice of Direction, produced any authority for her position that a renewed EICR was required in the circumstances. In short, she could not have been ignorant that: this was a significant part of the matters in dispute; the Applicant was incurring expense disputing her position; and that she was doing nothing to advance her position or make clear that she was no longer advancing it.

78) The Respondent provided us with nothing to suggest that she had a reasoned position to argue in regard to retention, or that she had sought one and then taken the view that it was no longer sustainable. Her conduct appears to have been to have put forward a reason why she was withholding all rent, then simply dropping it at the hearing. We think that this shows unreasonable behaviour.

79) In regard to application of our discretion, the Respondent's failure to pay any rent from December 2020 to date (despite starting the hearing by conceding that she accepted £1,820 was due), her attempt to restart her retention argument in the submissions on expenses, and the separate demonstration of her attitude to the Applicant when she said she had no intention of carrying out further garden maintenance, all show elements of bad faith. We think it appropriate to exercise our discretion in favour of making an award.

80) In regard to the amount of an award, the Applicant's motion was a restricted one and we think it correctly represents the unnecessary and unreasonable expense incurred. We have parsed the terms of the award more precisely in our decision below.

Decision

81) In all the circumstances, we were satisfied to make the decision to grant an order against the Respondent for payment of £2,175 with interest at 8% per annum running from today's date along with awarding expenses of the application as taxed by the Auditor of the Court of Session in favour of the Applicant against Respondent, on the basis that the Respondent through unreasonable behaviour in the conduct of the case, has put the Applicant to unnecessary or unreasonable

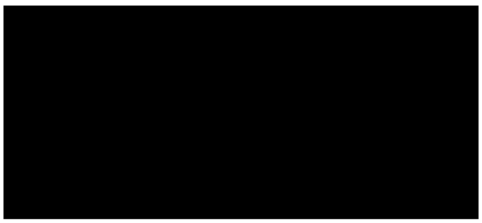
expense, in terms of Rule 40 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017; but restricted to any unnecessary or unreasonable expense incurred by the Applicant in connection with:

a) Any work undertaken or outlays incurred by the Applicant in addressing and responding to paragraphs 4, 5 and 6 of the Tribunal's Notice of Direction of 30 April 2021; and

b) Any further work undertaken or outlays incurred in regard to the Hearing of 24 June 2021 further to:
   i) the matters raised in the said paragraphs 4, 5 and 6 of the Notice of Direction;
   ii) the Respondent's request for an updated Electrical Installation Condition Report; and
   iii) the Respondent's retention of rental payments relating to electrical matters at the Property.

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.



24 June 2021

Legal Member/Chair **Date**