Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/18/1945 and FTS/HPC/CV/18/1946

Re: Property at 2 Herald Avenue, Arbroath, DD11 4JJ ("the Property")

Parties:

Mrs Gayle Langlands, 54 Dreelside, Anstruther, KY10 3EF ("the Applicant")

Miss Sarah Roberts, 2 Herald Avenue, Arbroath, DD11 4JJ ("the First Respondent")
Mr Robert Whittet, 2 Herald Avenue, Arbroath, DD11 4JJ ("the Second Respondent")

Tribunal Members:

Andrew Upton (Legal Member) and Helen Barclay (Ordinary Member)

Decision

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

(i) both Applications, insofar as raised against the First Respondent, should be dismissed;
(ii) on the Applicant's motion, there being no opposition, the sum claimed in Application number CV/18/1946 should be increased to the sum of £6,930.00;
(iii) the Second Respondent was entitled to withhold rent in the sum of £750.00;
(iv) the Second Respondent is liable to make payment to the Applicant in the sum of £6,180.00; and
(v) the Application number EV/18/1945 should be dismissed insofar as directed against the Second Respondent;

THEREFORE the Tribunal orders that the Second Respondent make payment to the Applicant in the sum of £6,180.00; the Tribunal dismisses Application number CV/18/1946 insofar as directed against the First Respondent; the Tribunal dismisses Application number EV/18/1945.

A. Upton

FINDINGS IN FACT

The Tribunal makes the following findings in fact:-

1 The Applicant is the heritable proprietor of the Property.

2 The Respondent is the tenant of the Property.

3 The tenancy agreement between the parties commenced on 1 December 2012.

4 The rent under the tenancy agreement is £800 per calendar month.

5 The Applicant formerly lived in the Property as her only or principal home.

6 In or around Summer 2017, the Respondent fell into rent arrears. He reached an agreement with the Applicant regarding repayment over time.

7 In or around December 2017, the lock to the external front door of the Property ceased to work. The Respondent withheld rent for a time to require the Applicant to repair the lock. Following payment of some of the arrears on 28 February 2018, the lock was repaired on 6 March 2018.

8 The Applicant gave Notice to Quit and Notice in Form AT6, both dated 26 January 2018, to the Respondent.

9 During the period February 2018 until 28 January 2019, the Respondent's arrears increased.

10 At 28 January 2019, the total amount of rent which had fallen due to the Applicant but had not been paid was the sum of £6,930.

11 In or around 2016, contractors instructed by the Applicant replaced the shower unit in the Shower Room. The new unit was smaller than the previous unit. Its fixing left exposed an area of wall tiles which had not been grouted, and a screw hole. Use of the shower would likely have resulted in water entering those gaps in the tiles and soaking into the plasterboard panels behind them, causing damage. The said gaps were sealed in December 2018.

12 There is a draught coming from an open balanced flue behind a disused gas fire in the living room.

13 In or around 2017, the fridge-freezer was replaced by the Applicant. The unit is capable of integration with the rest of the kitchen units. The integrated doors have not been reaffixed. As a consequence of the removal and damage of the kickplate beneath the kitchen cabinets, the laminate floor tiles are not secure such that they occasionally move when stepped on.

14 There is a television aerial wire hanging down outside the Property. The aerial ports in the first floor rooms of the Property do not work.

15 There is extensive damage in the En-suite bathroom at the Property caused by condensation. The cause of this damage is the Respondent's use of the En-suite.

FINDINGS IN FACT AND LAW

The Tribunal makes the following findings in fact and law:-

1 The tenancy agreement between the parties has an implied term of one year, and has continued on an annual basis by tacit relocation since 1 December 2013.

2 The Gas Safety Check is overdue.

3 From the date when the Gas Safety Check fell due, the Respondent was entitled to withhold the sum of £350 from subsequent rent falling due to force the Applicant to carry out the Gas Safety Check.

4 From the date of installation of the fridge-freezer, the Respondent was lawfully withholding the sum of £100 from subsequent rent falling due in an effort to force the Applicant to complete the replacement of the fridge-freezer by attaching the integrated doors.

5 From 6 October 2018, the Respondent was lawfully withholding the sum of £300 from subsequent rent falling due in an effort to force the Applicant to repair the Shower Room by sealing gaps in the wall tiles adjacent to the shower unit.

6 From 6 October 2018, the Respondent was lawfully withholding the sum of £50 per month from subsequent rents falling due in an effort to force the Applicant to resolve the issue with draughts coming down the flue behind the gas fire.

7 From 6 October 2018, the Respondent was lawfully withholding the sum of £100 from subsequent rent falling due in an effort to force the Applicant to secure the kitchen floor tiles and replace the kickplate under the kitchen cabinets.

8 From 6 October 2018, the Respondent was lawfully withholding the sum of £50 from subsequent rent falling due in an effort to force the Applicant to investigate and repair the issue with the television aerial.

9 The Respondent required to pay to the Applicant the £300 withheld from rent when the Shower Room repair was completed in December 2018.

A.Upton

10 Rent in the total sum of £6,180 is outstanding and due by the Respondent to the Applicant.

11 The Notice to Quit dated 26 January 2018 and served by the Applicant on the Respondent does not expire on an ish date, and is therefore invalid.

12 The terms of the tenancy agreement are insufficient to give the Respondent notice that the tenancy may be brought to an end early under Grounds 2, 8, 11, 12, 13, 14 or 16.

13 The requirements of section 18(6) of the Housing (Scotland) Act 1988 not being met, the Tribunal cannot grant an eviction order.

STATEMENT OF REASONS

1 These Applications called for a Hearing on 28 January 2019 at 10.00am. The Applicant is the Landlord of the Second Respondent. The Applicant claims that the Second Respondent has not paid rent, and has accrued substantial arrears. The Applicant seeks an order for payment of the arrears, together with an order for the eviction of the Second Respondent and his family. The Second Respondent accepts that rent has not been paid. His defence is that he is exercising his common law remedy of withholding rent in order to force the Applicant to carry out necessary repairs to the Property.

2 The Applications were also raised against the First Respondent, who is the partner of the Second Respondent. It was accepted at an earlier hearing that the Applications were raised against the First Respondent in error. She is not, and has never been, the tenant of the Applicant. Accordingly, the Applicant was no longer insisting upon the Applications insofar as directed against the First Respondent. The Tribunal therefore dismisses the Applications insofar as directed against the First Respondent.

3 At the Hearing, the Applicant was represented by Mr Murphy, solicitor. The Second Respondent was represented by the First Respondent.

4 The Applicant moved the Tribunal to increase the sum claimed in Application number CV/18/1946 to the sum of £6,930.00. This was not opposed, and the Tribunal allowed the Application to be amended by increasing the sum claimed.

5 The parties were agreed that the sum of £6,930.00 due to the Applicant in terms of a tenancy agreement between the Applicant and the Second Respondent dated 15 October 2012 (Applicant's Production Number 11) had not been paid. The Applicant produced a Rent Schedule at the Hearing showing payments falling due and payments received. The First Respondent confirmed that it was accurate. The question for the Tribunal was whether the sum outstanding could properly be considered as withheld by the Second Respondent in exercise of his common law remedy. That was a matter for the

Second Respondent to prove, and we therefore determined that he should lead at the Hearing.

Evidence

Miss Sarah Roberts

6 Miss Roberts was the only witness for the Second Respondent. She spoke of what had initially been a very positive relationship between the parties. Her description of the Respondents' interactions with the Applicant appeared very positive. From the commencement of the tenancy until in or around December 2017, any repairing issues that arose were quickly attended to. She said that the Second Respondent had fallen into rent arrears previously, and that the Applicant had been helpful at that time, allowing the Second Respondent additional time to pay his rent. That included a period of arrears which accrued in Summer 2017. However, from in or around December 2017, Miss Roberts said that the Applicant's approach to the tenancy changed. Miss Roberts said that the Applicant had indicated in 2016 that she wanted to sell the Property. Miss Roberts said that she believed that the Applicant had stopped carrying out necessary repairs because she wanted the Respondents to remove from the Property in order that it could be sold.

7 Miss Roberts spoke of various issues that the Respondents were experiencing at the Property. The first issue was with the lock on the external front door. This, Miss Roberts said, was the first issue that led to rent being withheld. She said that in or around December 2017, the lock on the external front door failed. It required to be replaced. The external front door could not be locked over the Christmas 2017 period. The Second Respondent took legal advice from Dundee North Law Centre. He was already in arrears of rent at that time. Miss Roberts was taken to items of correspondence passing between Dundee North Law Centre and the solicitors for the Applicant (Applicant's Productions Numbers 3, 4, 5, 6, 7, 8 and 9). In terms thereof, it was said that the Second Respondent was withholding rent until the lock was fixed and a damp issue in a bathroom was attended to (we will come back to the damp issue). The Second Respondent agreed to make payment of the sum of £1,570.00 to the Applicant on the basis that the lock was fixed. The lock was her primary concern. That sum was paid on 28 February 2018. The lock was replaced on 6 March 2018. However, the replacement lock was different to the original lock. It did not line up with the existing holes in the door. As such, there was a hole immediately adjacent to the lock on the external face of the door and approximately the size of a fifty pence coin. It can be seen in Respondent's Photographs 1 and 2. Miss Roberts spoke of concern that a burglar could get a screwdriver into the opening and prise the lock to gain entry. The Property faces onto a main road. The hole had been filled with some form of sealant on the inside face of the door. Immediately behind the external front door was an entrance vestibule and then a further door. This interior door was a glass paned door with its own lock. Throughout the period that the external door could not lock, the lock on the internal door would lock. The Respondents, due to the special needs of two of their children, keep the internal door locked at all times for their safety and security.

In cross-examination, Miss Roberts said that she had not initially complained about the repair to the lock because she had understood that the tradesmen were returning to repair it further. However, after approximately one week, she raised the issue with the Applicant.

8 Miss Roberts spoke of a damp issue in one of the bathrooms at the Property. The Property is served by three bathrooms: (i) the family bathroom on the first floor ("the Family Bathroom); (ii) the en-suite bathroom attached to the Respondents' bedroom on the first floor ("the En-suite"); and (iii) the shower room on the ground floor ("the Shower Room"). The damp issue was in the En-suite. It was an internal room in that it had no windows. It was served by a small extractor fan in the ceiling. The problem with damp started about the same time as the lock, but did not cause the Respondents the same concern at that time as the lock did. They tried to keep on top of the problem by sanding down the walls and cleaning them. However, the problem got progressively worse during the course of 2018. Miss Roberts said that she had asked the Applicant to look at the En-suite, but that she had not come out to inspect it. Miss Roberts said that the En-suite was the main bathroom for the family. The whole family used the shower in it. The Shower Room could not be used because it had not been properly sealed. Miss Roberts said that the damp had become so bad that the landing smells of damp. Two of the Respondents' children have severe asthma, and it is a hazard for them. Miss Roberts said that the Applicant finally inspected the En-suite in December 2018. Miss Roberts said that the problem was with the extractor fan, which was not strong enough to pull the water vapour from the room. Miss Roberts referred to Respondents' photographs 3, 5, 6, 7 and 8, which appeared to show signs of mould. Miss Roberts also said that there was a leak from the shower cubicle, and that this had caused the carpet in the En-suite to turn mouldy. We were referred to the Respondents' photograph 9 in that respect. In cross-examination, Miss Roberts was referred to the letter from Dundee North Law Centre dated 23 February 2018 which confirmed that the damp issue was not being pursued at that time. Miss Roberts said that the problem got worse in the months that followed. She rejected the suggestion that she had not raised this with the Applicant, and said that she had done so by Summer 2018.

9 Miss Roberts spoke about the Shower Room. The electric shower had, during the tenancy, been replaced. Alan Donaldson carried out the work. However, there were gaps between the tiles where they had not been grouted. The shower could not be used in case water got in behind the tiles. Miss Roberts said that she had been told that it was dangerous to use. She assumed that was because of the electrical cabling serving the shower unit. Miss Roberts said that Mr Donaldson told her that he would return to finish sealing the area around the shower unit, but he did not do so. The area of concern can be seen in the Applicant's Production 27. The gaps were sealed by Mr Donaldson in December 2018. The same area after those works can be seen in Production 28. In cross-examination, Miss Roberts denied that she had told the Applicant that the Second Respondent would seal the shower area himself.

10 Miss Roberts spoke of a plumbing issue with the toilets on the first floor. She said that the toilets blocked frequently. She had previously had a friend of the Second Respondent's father look at the issue, and had been told that it was the pipework design that was the problem. Miss Roberts said that the waste pipes leading from the toilets meet, and that is where the blockage occurs. She requires to plunge the toilets at least weekly. In cross-examination, Miss Roberts said that the first blockage happened the week that the Respondents moved in. She denied that the cause of the blockage was that she had flushed a nappy down the toilet. She recalled that there had once been a blockage in the street caused by a nappy, but said that she was not the cause of that. Miss Roberts said that the issue with the toilets was well known to the Applicant. Miss Roberts had been warned by the previous tenants that the toilets blocked.

11 Miss Roberts spoke of vegetation growing in the gutters above the front and back doors. She said that the gutters were broken and leaking in those areas. She said that the Second Respondent ultimately cleaned the gutters himself, at which time the leak lessened. (Respondents' Photographs 10, 11, 12, 13, 14 and 15). In cross-examination, Miss Roberts insisted that there was a crack in the gutter, but that it could not be seen in the photographs.

12 Miss Roberts said that there was a disconnected gas fire in the lounge of the Property. However, the flue remained open, and this caused a draught. She said that the heating had to be kept on to combat the draught. In cross-examination, Miss Roberts accepted that she had been told that the gas fire had been disconnected, but insisted that she had been told that either the fire would be fixed or the flue would be sealed up.

13 Miss Roberts said that the integrated fridge-freezer in the Property had stopped working. It was replaced by the Applicant, but that the facia doors had not been fitted to the new fridge-freezer. The doors were still at the Property, and were in a cupboard in the Utility Room.

14 Miss Roberts said that the dishwasher in the Property did not work properly. On occasion, it would not complete the cycle. On other occasions, the dishes did not appear to wash properly, and required a further cycle. In cross-examination, Miss Roberts accepted that she knew that the dishwasher was insured and that she had not submitted a claim to the insurer. Miss Roberts said that she did not have details of the insurer to do so, but that it was the Applicant's policy in any event.

15 Miss Roberts said that there were multiple electricity sockets in the Property where plugs would not go into the socket. Those sockets were: (i) one side of a double socket in the master bedroom; (ii) one side of a double socket in the dining room; (iii) a socket in the living room; (iv) a socket in a bedroom; and (v) a socket in another bedroom. In cross-examination, Miss Roberts said that neither the Applicant nor Mr Donaldson had checked the sockets during their inspection in December 2018. She said that she had wanted them to leave quickly. Miss Roberts claimed that Mr Donaldson had behaved abusively towards her, and was swearing.

16 Miss Roberts said that the Gas Safety Check was outstanding. The existing Gas Safety Certificate was over a year old. She said that the pressure in the boiler was "up and down". She said that two radiators were not working properly, in that they were hot at the bottom and cold at the top. She believed that they required to be bled, but that she did not have a radiator bleeding key. In cross-examination, Miss Roberts denied that she had previously arranged the Gas Safety Checks at the Property. She said that, in the past, the Applicant had sent her a text message with details of the appointment for the Gas Safety Check. Miss Roberts denied that she had received notice that an appointment had been made for March 2019.

17 Miss Roberts said that there was a draught at her son's bedroom window. She complained that the curtains moved when it was windy. She said that it was not obvious what the issue was. She said that there were vents on the window, but that it made no difference whether they were open or closed. In cross-examination, she denied that she could not remember which window the draught was coming from when the Applicant and Mr Donaldson attended at the Property in December 2018.

18 Miss Roberts spoke of the edging bricks of the monoblock paving stones being loose. She said that they rocked when stepped on. She said that she herself had nearly fallen having stepped on one. She complained that they were a trip hazard.

19 Miss Roberts spoke of two trees in the rear garden being in a dangerous condition. One was broken and seriously overgrown to the point that it touched her washing line. The other was overgrown and hanging over the neighbour's garden. She said that the neighbour had complained about this to her. In cross-examination, Miss Roberts accepted that the Second Respondent tended the back garden.

20 Miss Roberts said that the light fitting in the utility room was faulty. She said that it emitted a loud buzzing noise. In cross-examination, she claimed that she first notified the Applicant of this issue in April 2018.

21 Miss Roberts complained that the kitchen in the Property was falling into disrepair. She said that the hinges on the cupboard doors were no longer functioning. She said that one of the doors had come off, and had so many holes in it that it would not be re-hung. In cross-examination, Miss Roberts was shown the Applicant's Productions Numbers 21, 22, 23 and 24, which were photographs of the kitchen. She rejected the suggestion that the kitchen was in an acceptable condition.

22 Miss Roberts complained that the front garden was overgrown and in poor condition. She said that the front garden was the Applicant's responsibility. Miss Roberts referred to the Respondents' Photographs 17, 18, 19 and 20. She said that there was wooden edging to the front that was rotting. Pieces of wood with nails sticking out were being found in the garden. She spoke of a conversation that she allegedly had with the Applicant at the commencement

of the tenancy. Miss Roberts claimed that the Applicant told her that her mother, who lived locally, instructed gardeners and that they would tend the front garden at the Property.

23 Miss Roberts said that there was a bee's nest found in the attic at some time during 2016 or 2017. It had been removed by Mr Donaldson in December 2018. In cross-examination, Miss Roberts said that she had not contacted the local authority to discuss the finding of the bee's nest, and was not aware that the local authority would deal with such matters.

24 Miss Roberts said that the sealant around the window in the master bedroom was peeling away. She believed that this was being caused by condensation caused by the moist air leaving the En-suite.

25 Miss Roberts said that the floor tiles in the kitchen were loose. She said that the kickplates under the kitchen units had previously been removed, and that this had caused the tiles to slide. She complained that this was a slip risk. In cross-examination, she denied that the tiles were laminate flooring, and reasserted that they were prone to move.

26 Miss Roberts spoke of the grout in the floor tiles of the Shower Room crumbling and coming away when she was cleaning the floor.

27 Miss Roberts said that the cable for the television aerial was hanging down outside the Property. She said no television that was plugged into the upstairs aerial ports worked. She did not know if the problem was also downstairs because the Respondents have Sky television, and do not use terrestrial television downstairs.

28 Miss Roberts said that each of these issues (other than the lock, which was notified to the Applicant in December 2017) was notified to the Applicant over the course of 2018. She was unable to be more specific about that. Her view was that the Applicant wanted to sell the Property, and was ignoring the repairing issues. Miss Roberts confirmed that the withheld rent had not been retained at first. However, rent had been paid in October and November 2018, but withheld and retained thereafter. She said that the Applicant had told her in December 2018 that nothing further would be done to the Property until the Respondents were evicted. That is why the rent was now being withheld.

29 In cross-examination, Miss Roberts said that she did not remember receiving the Form AT6 upon which the Applicant relies. She was referred to the letter from Dundee North Law Centre dated 7 February 2018 which appeared to confirm that they had received copies of the Forms AT6 served on the Respondents from Miss Roberts. She was also directed to the Notice to Quit dated 26 January 2018, which states, "A Notice under Section 19 of the Housing (Scotland) Act 1988 (Form AT6) is also enclosed". Miss Roberts confirmed that she had passed a copy of all paperwork received from the Applicant's solicitors to the solicitor at Dundee North Law Centre. She accepted that she might have received a copy of the Form AT6, but maintained that she did not remember receiving one.

30 Miss Roberts confirmed that there had been a number of historic repair issues that the Applicant had attended to, including several during the course of 2017. She had no explanation as to why the Applicant's desire to sell the Property in 2016 would lead to her refusing to repair the Property now when she had carried out repairs during 2017, but Miss Roberts reaffirmed her belief that the desire to sell was the reason for the Applicant's change in attitude. She refused to accept that the reason that the Applicant had not carried out certain repairs was that she was unaware of them until recently.

31 Miss Roberts was asked when she felt that enough rent had been withheld to cover the required repairs. Miss Roberts asserted that she was simply withholding all rent until the repairs were complete.

Gayle Langlands

32 Mrs Langlands confirmed that she was the owner of the Property. She and her husband had built the Property in 2003. She had lived in the Property with her husbands and two children. They had moved out of the Property in August 2009, at which time the Property was first let. Between 2009 and 2012 there were two separate tenants. The Second Respondent became the tenant of the Property in December 2012.

33 Mrs Langlands said that, other than initial snagging, she had not had any problems with the Property during her occupancy of it. She had never had any problems with the plumbing, nor had any of the other tenants raised issues with the plumbing.

34 Mrs Langlands said that she had not received any notification of the repairs allegedly required to the Property until after the Applications had been raised. The first time that she knew that the Second Respondent was claiming to be withholding rent was at the Case Management Discussion in October 2018. Since then, Mrs Langlands said that she had taken steps to inspect the Property and attend to repairs.

35 In respect of the lock, Mrs Langlands said that the initial problem was fixed on 6 March 2018. The hole in the door had been sealed by Mr Donaldson in December 2018.

36 Mrs Landlands spoke of the shower units being replaced in the Property. She said that, in or around 2016, Miss Roberts had contacted her to say that the shower in the En-suite was not working. Mrs Langlands had said that she would attend to it but that the Shower Room should be used in the meantime. Miss Roberts then said that the shower in the Shower Room was not working either. Mrs Langlands then arranged for both units to be replaced as a matter of urgency. In the Shower Room, the new shower unit was smaller than the original one. She had not seen the original shower unit being fitted, and did not know whether the tiles had been grouted before that unit was fitted.

37 In relation to the damp issue in the En-suite, Mrs Langlands said that the extractor fan stops when the light is turned off. If the light is left on for a period, the fan will keep running and that ought to help the room dry out.

38 Mrs Langlands advised that historically Miss Roberts had made the arrangements for the Gas Safety Check directly with Valiant, who were the engineers contracted by Mrs Langlands to service the boiler. In fact, Mrs Langlands said that Valiant initially refused to speak with Mrs Langlands about the outstanding check because their account details were in the name of Miss Roberts.

39 In relation to the gutters, Mrs Langlands said that she would not have been aware of the vegetation in the gutters unless she drove past the Property or received a text message from Miss Roberts. She said that the gutters had been cleaned in October 2017, and more recently at the December 2018 inspection. On both occasions, Mr Donaldson cleaned the gutters.

40 Mrs Langlands denied that she had ever agreed to look after any part of the garden at the Property. She advised that there was a service strip to the front of the Property that was owned by the local authority, but said that she herself had tended that area when she lived in the Property to keep it looking nice.

41 Mrs Langlands said that the monoblock paving was overgrown, and had been overgrown in October 2017. However, she denied that any of the blocks were loose or presented a trip hazard.

42 Mrs Langlands advised that the gas fire had been disconnected since August 2009. The pipework was capped off by Corgi engineers (as they would have been at the time). She said that there was a balanced flue at the back of the gas fire that remained open.

43 In relation to the bee nest, Mrs Langlands said that this was a wasp dyke about the size of an Easter egg. It was removed by Mr Donaldson in December 2018. Mrs Langlands said that she did not know about its existence until the Case Management Discussion in October 2018. She said that the local authority will deal with wasp dykes by spraying them with pesticide. She said that it was her understanding that dead nests are usually left in situ to deter the formation of new nests in the area.

44 Mrs Langlands spoke of two occasions during the Second Respondent's tenancy on which she had instructed Dynorod to attend at the Property to deal with toilet blockages. The first was in 2013, when she was told by Dynorod that the cause had been a nappy flushed down one of the toilets in the Property. On the second occasion, no blockage was found by Dynorod in the house or the street.

45 In relation to the suggestion that the toilets on the first floor blocked frequently, Mrs Langlands said that this was the first time that she had heard that they required weekly plunging.

46 Mrs Langlands said that she had seen the utility room light during her inspection in December 2018. It had been switched on. It did not emit a buzzing noise.

47 In respect of the trees, Mrs Langlands accepted that the trees were very overgrown. She said that the tree overhanging the neighbour's garden had been lopped by the neighbour up to the boundary line. Mrs Langlands retained a good relationship with that neighbour. Mrs Langlands denied that either tree was in an unsafe condition.

48 In respect of the kitchen, Mrs Langlands said that it was in good condition except insofar as some of the cupboard doors were missing. Her position was that the doors could be rehung. The kitchen was fitted in 2003. The dishwasher was insured and Miss Roberts had details to make claims on that policy.

Alan Wilson Donaldson

49 Mr Donaldson described himself as a builder. He said that typically carried out property renovations, new build construction, plastering and roughcasting work. He was a friend of the Applicant. They had met years ago through a mutual friend.

50 Mr Donaldson was familiar with the Property. He had previously attended at the Property in or around September or October 2017 to clean the gutters. He recalled that he had stopped at the Applicant's home on his way home from watching his eldest son play football. Whilst there, the Applicant received a text message from Miss Roberts to say that the gutters required cleaning. He recalled that the Applicant was unhappy about cleaning the gutters because the tenant was in rent arrears. However, Mr Donaldson offered to go home, drop off his motorcycle, and go to the Property in his van to clean the gutters. The Applicant agreed that he do so. Mr Donaldson said that it took him approximately an hour to clean the gutters on that occasion, and that he nearly filled an entire wheelie bin with the contents of the gutters. He explained that the Property is adjacent to grassland and woodland, and that vegetation seems to collect and grow in the roof valleys. He said that there was no leak or hole in the gutters. He said that the vegetation growth in the gutters was preventing water from flowing, such that it would collect and ultimately overflow. Mr Donaldson recalled that the Second Respondent arrived whilst he was up the ladder cleaning the gutters. The Second Respondent did not suggest that there was any problem with the gutters, beyond a need to clean them.

51 Mr Donaldson advised that he had visited the Property more recently, in December 2018. He had inspected the Shower Room and found grout to be missing from the tiles. He filled the gaps (including a screw hole) with silicone. When asked whether the shower could have been used, Mr Donaldson said that it could have been, but that water would have likely soaked in behind the

tiles into the plasterboard behind the tiles. As such, it was not advisable to use the shower before it was properly sealed.

52 Asked about the condition of the En-suite, Mr Donaldson described it as terrible. He suggested that the smell of the mould was so strong that it caught in his throat. He said that the condensation was so severe that water droplets were falling from the ceiling. His view was that the cause of the mould was condensation due to overuse. He explained that the En-suite was designed for use by two or three persons on a daily basis. His understanding was that the Respondents' entire family, comprising seven individuals, were using the En-suite. He said that it was not designed to facilitate that much use.

53 Mr Donaldson said that he turned on the shower in the En-suite and left it running for seven minutes with the door to the bedroom closed. When he returned, he said that the atmosphere was not humid. He formed the view that the extractor fan could cope with ordinary usage. However, when he went into the attic, he found that the extractor fan had been disconnected from the ducting. There was evidence of water damage in the attic around the fan where he believed humid air had been drawn up and then settled around the fan. Mr Donaldson said that Miss Roberts had told him that the Second Respondent and his father had taken the fan down from the ceiling to check it. It was Mr Donaldson's belief that when the fan was taken down, it was removed from the ducting. When it was replaced, the ducting was not reattached. Mr Donaldson said that new fans had been ordered and were ready to be installed.

54 Mr Donaldson was clear that the En-suite should not be used until the new fans were installed. However, he also said that the mould in the En-suite was sitting on the surface of the walls, not penetrating into them. He said that he had taken some tissue paper and rubbed the walls. When he did so, the mould came off. He believed that with a thorough clean the En-suite would be fine to use again. He said that the chemicals that would be required to sufficiently clean the En-suite would be industrial strength. Thereafter, the En-suite would need to be used more sparingly. He said that there was not much that could be done to prevent the build up of condensation. He said that the proper use of ventilation would help, but that when he attended the Property in December 2018 all of the trickle vents in the windows at the Property were closed. Mr Donaldson said that Miss Roberts had said that they were causing draughts.

55 With regards to the carpet in the En-suite, Mr Donaldson said that he could find no evidence of a leak in the shower cubicle. His belief was that the mould on the carpet was caused by condensation running down the walls and soaking into the carpet.

56 Mr Donaldson checked one of the sockets that allegedly would not allow a plug to be inserted into it. He checked the socket using the charger for his cordless drill. He said that the socket was tight, but was working. He believed that the other sockets would also be tight from prolonged non-use.

57 Mr Donaldson said that, at the inspection in December 2018, he asked Miss Roberts which window was causing the draught. She could not remember.

58 Mr Donald said that he checked the utility room light fitting at the inspection in December 2018. He said that it did not emit a buzzing noise.

59 Mr Donaldson said that the kitchen was in good condition. He said that the fridge-freezer required the integrated door facings to be fixed on, but that could be done easily. The fixings were on the back of the fridge already. As for the cupboard doors, he said that the doors could be rehung. The holes in the doors were for the hinges. The problem, he said, was that one of the cupboard doors was removed because the hinges had been snapped in half.

60 Mr Donaldson confirmed that there were loose laminate floor tiles in the kitchen. His view was that the laminate tiles required to be snapped back together and a new kickplate fitted beneath the kitchen cabinets.

61 Mr Donaldson confirmed that he removed a wasp dyke from the attic. The nest was dead already, and about the size of two tennis balls.

62 Mr Donaldson was asked to estimate the cost of some of the required works at the Property. His view was that the Property was in generally good condition. He estimated that the cost of supplying and installing the new bathroom fans was in the region of £350. The cost of refitting the doors in the kitchen was in the region of £300. The cost of cleaning the En-suite would be in the region of £200-£300. Thereafter, the Property only needs decoration throughout.

Assessment of Evidence

63 In his submissions, Mr Murphy asked the Tribunal to prefer the evidence of the Applicant to that of Miss Roberts. He said that Mrs Langlands was candid as to what had and had not been done in the Property and why. He said that Miss Roberts' evidence was vague and unconvincing. She offered no credible explanation as to why Mrs Langlands would stop attending to repairs when she had done so previously with considerable diligence. He suggested that Miss Roberts' evidence exaggerated the issues requiring attention.

64 In many respects, we tend to agree with Mr Murphy. The lock on the external door was fixed. The size of the hole adjacent to the lock does not appear, from the photographs, to be as large as Miss Roberts suggested and, in any event, the Property is served by a further locking door after the external door. The evidence regarding the alleged blocking of the toilets was not convincing. Nor were we persuaded that there was any issue with the dishwasher. Miss Roberts' evidence regarding the alleged draught at her son's bedroom window, the loose monoblocking, the utility room light and the condition of the garden were so lacking in detail, even when questioned expressly on it, that the Tribunal formed a negative impression of her evidence. We were not persuaded that those issues exist at all. As for the wasp's nest, the Tribunal's view is that this was not the Applicant's responsibility to remove.

65 With regards to the gutter, the kitchen doors, the sockets and the kitchen floor tiles, we prefer and accept the evidence of Mr Donaldson. In doing so, we find that the gutter is in working order, but that water overflows from it when blocked. The kitchen doors are capable of being rehung. The sockets are working, albeit tight when a plug is inserted. The kitchen floor tiles can be re-secured and a new kickplate fitted.

66 The Tribunal also prefers Mr Donaldson's evidence insofar as the En-suite is concerned. We are satisfied that the damp has been caused by the formation of condensation within the En-suite due to excessive use. Condensation could have been mitigated against by allowing the extractor fan to run for a period after the shower in the En-suite had been used. Its current condition has been caused by the Respondents' use of the En-suite, and failure to ventilate or dry up the En-suite after use.

67 However, the Tribunal is satisfied that there are certain matters that the Applicant ought to have addressed. Those matters are: (i) the failure to seal the tiles in the Shower Room after the shower unit was replaced in 2016; (ii) the failure to address the draught from the flue behind the gas fire; (iii) the failure to attach the doors to the integrated fridge-freezer; (iv) the failure to arrange a Gas Safety Check; (v) the failure to secure the kitchen floor tiles and fit a new kickplate; and (vi) the failure to address the hanging aerial cable. In respect of the Shower Room, that issue was within the Applicant's knowledge since 2016, when the shower unit was replaced. With regards to the Gas Safety Check, that is the Applicant's responsibility to arrange. It does not matter, in our opinion, how the arrangements were made historically. The obligation on a landlord to arrange for a Gas Safety Inspection is a statutory obligation, and it is for the Applicant to ensure it takes place. However, in respect of the other issues, the Tribunal accepts the Applicant's evidence that these were first notified to her on 10 October 2018 at the Case Management Discussion.

68 The final issue relates to the front and rear garden. The tenancy agreement is silent on who is responsible for the upkeep of the garden, although responsibility for the repair of "the structure and exterior of the Property" lies with the Applicant, in terms of clause 3.4 of the Tenancy Agreement. Miss Roberts accepted that the rear garden was tended by the Respondents. The Tribunal has therefore determined that there was an agreement between the parties, which is not referred to in the tenancy agreement, that the rear garden was the Second Respondent's responsibility. That would include the two trees that are overgrown and, according to Miss Roberts, dangerous.

69 With regards to the front garden, Mr Murphy invited the Tribunal to find that this was also the Second Respondent's responsibility. He suggested that it was custom and practice that a tenant assumes responsibility for the upkeep of all that is let, and that it was therefore an implied term of the contract that the Second Respondent was responsible for tending the garden. That implied term was provided for expressly in a later version of the standard form tenancy agreement used by the Applicant in this case.

70 The Tribunal does not accept this argument. It is well settled in law that the tenant under a lease is only liable for repair or maintenance of the subjects let insofar as the landlord expressly confers such liability on him within the lease. It is a contractual term. Absent an express term to the contrary, a residential landlord will remain responsible for the upkeep of the garden. The Tribunal suspects that this is the reason for the update to the standard form tenancy agreement that we were referred to.

71 Insofar as Mr Murphy sought to argue that the term was implied, we similarly do not find favour with that argument. No evidence was sought to be adduced that there was a custom and practice in residential lets that the tenant would assume responsibility for the garden. Absent any evidence of there being a custom and practice to the contrary, we cannot find that it is reasonable to imply such a term into this tenancy agreement.

72 Accordingly, we find that the Applicant was responsible for tending the front garden at the Property. However, given that the issues complained of by the Applicant appear to relate to the service strip area owned by the local authority rather than the front garden, we do not consider that the Applicant has failed to meet her obligations in respect of the front garden.

73 Having reached those views in respect of the evidence that we heard, the Tribunal now requires to determine whether the Second Respondent was entitled to withhold rent and, if so, to what extent.

Submissions: Withholding Rent

74 Miss Roberts advised the Tribunal that the Second Respondent withheld rent to force the Applicant to comply with her repairing obligations. It was a matter for the Tribunal to determine whether he was entitled to do so.

75 Mr Murphy submitted that the Second Respondent was not truly withholding rent. Rather, he suggested that the Second Respondent was in arrears of rent and was seeking to retrospectively explain the arrears by suggesting that rent was being withheld. The repairing issues were at best exaggerated. However, if the Tribunal were not with him, Mr Murphy submitted that the sum withheld was excessive. A tenant who withholds rent is only permitted to withhold such sum as is reasonably proportionate to the issue.

76 It is the Tribunal's view that Mr Murphy's primary submission is largely correct. A landlord cannot have failed to remedy a repair that he was not aware of. Accordingly, since most of the repairs that the Tribunal has determined were the Applicants' responsibility had not been within her knowledge prior to 10 October 2018, the Second Respondent could not have been withholding rent in respect of those items. However, in respect of both the Shower Room missing grout and the Gas Safety Check issues, those were both within the Applicant's knowledge prior to the raising of the Applications. Further, insofar as the sum claimed for included sums which fell due after 10 October 2018, it

could be that the sum claimed for after 10 October 2018 included sums properly withheld.

77 We consider that Mr Murphy's submission regarding the appropriate level of rent withheld is well made. In *Taghi v Reville*, 2003 Hous. L.R. 110, a tenant withheld rent because a leakage over the side of a bath required that he bathe elsewhere. His landlord successfully pursued him for repossession of the property and payment of arrears. At page 113, the Sheriff Principal stated: *"the appropriate remedy in less serious disrepair cases is to seek a modest abatement of rent, in other words argue that because the landlord is in breach of contract a reasonable proportion of rent should be deducted*".

78 Having considered the evidence, the Tribunal determined that the Second Respondent was entitled to withhold:-

a. the sum of £300 until satisfactory repairs had been carried out to the Shower Room by sealing the gaps in the tiles;
b. the sum of £50 per month from 10 October 2018 until the issue with the flue behind the gas fire had been attended to;
c. the sum of £100 until the integrated doors had been fitted to the fridge-freezer;
d. the sum of £350 until the Gas Safety Check had been carried out;
e. the sum of £100 until the kitchen floor tiles had been secured and the kickplate fitted; and
f. the sum of £50 until the television aerial cable had been fixed.

79 However, the difficulty that the Second Respondent now faces is that the remedy of withholding rent is designed to force compliance by the landlord. Once a landlord complies, the rent becomes immediately payable. The tenant may have an action for damages, but that requires to be separately raised. Thus, whilst the Second Respondent may have been entitled to withhold £300 from his rent until the Shower Room issue was remedied, it has now been remedied. That sum is due for payment.

80 It follows that the Tribunal finds that the Second Respondent is liable to the Applicant for payment of the sum of £6,930 under deduction of £750 properly withheld. The Second Respondent is accordingly liable to make payment to the Applicant in the sum of £6,180.00.

81 Having found that the Second Respondent is in arrears of rent, the Tribunal now requires to consider whether an order for eviction ought to be granted in terms of Application EV/18/1945.

Submissions: Eviction

82 It was a matter of agreement that, the tenancy agreement being silent as to duration, the law would infer a duration of one year where there was agreement as to the parties, the property and the rent (*Gray v Edinburgh University*, 1962 S.C. 157, per the Lord Justice-Clerk at pp162-163). It was also a matter of agreement that the Notice to Quit dated 26 January 2018 that

served on the Second Respondent was invalid, in that it did not seek to terminate the contractual tenancy on an ish date.

83 The tenancy is an Assured Tenancy. The Applicant seeks repossession under section 18 of the Housing (Scotland) Act 1988 ("the Act").

84 In terms of the Act:-

"18.— Orders for possession.

(1) The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.

(2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3) If the First-tier Tribunal is satisfied that any of the grounds in Part I of Schedule 5 to this Act is established then, subject to subsections (3A) and (6) below, the Tribunal shall make an order for possession.

(3A) If the First-tier Tribunal is satisfied—

(a) that Ground 8 in Part I of Schedule 5 to this Act is established; and

(b) that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4) If the First-tier Tribunal is satisfied that any of the grounds in Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit.

(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

(6) The First-tier Tribunal shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless—

(a) the ground for possession is Ground 2 or Ground 8 in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9, Ground 10, Ground 15 or Ground 17; and

(b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.

(6A) Nothing in subsection (6) above affects the First-tier Tribunal's power to make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.

(7) Subject to the preceding provisions of this section, the First-tier Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

(8) In subsections (3A) and (4A) above—

(a) *"relevant housing benefit"* means—

(i) any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or

(ii) any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;

(aa) *"relevant universal credit"* means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;

(b) references to delay or failure in the payment of relevant housing benefit [or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant.

...

19.— Notice of proceedings for possession.

(1) The First-tier Tribunal shall not entertain proceedings for possession of a house let on an assured tenancy unless—

(a) the landlord (or, where there are joint landlords, any of them) has served on the tenant a notice in accordance with this section; or

(b) the Tribunal considers it reasonable to dispense with the requirement of such a notice.

(2) The First-tier Tribunal shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the Tribunal.

(3) A notice under this section is one in the prescribed form informing the tenant that—

(a) the landlord intends to raise proceedings for possession of the house on one or more of the grounds specified in the notice; and

(b) those proceedings will not be raised earlier than the expiry of the period of two weeks or two months (whichever is appropriate under subsection (4) below) from the date of service of the notice.

(4) The minimum period to be specified in a notice as mentioned in subsection (3)(b) above is—

(a) two months if the notice specifies any of Grounds 1, 2 , 5, 6, 7 , 9 and 17 in Schedule 5 to this Act (whether with or without other grounds); and
(b) in any other case, two weeks.

(5) The First-tier Tribunal may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on Ground 8 in Schedule 5 to this Act.

(6) Where a notice under this section relating to a contractual tenancy—
(a) is served during the tenancy; or
(b) is served after the tenancy has been terminated but relates (in whole or in part) to events occurring during the tenancy,
the notice shall have effect notwithstanding that the tenant becomes or has become tenant under a statutory assured tenancy arising on the termination of the contractual tenancy.

(7) A notice under this section shall cease to have effect 6 months after the date on or after which the proceedings for possession to which it relates could have been raised."

85 Mr Murphy correctly submitted that, given that the Notice to Quit was invalid and the contractual tenancy was continuing, the Tribunal may only grant the order for eviction in the event that the criteria in section 18(6) of the Act are met. That is that (i) the Grounds for possession are Grounds 2, 8, 11, 12, 13, 14 or 16, and (ii) the terms of the tenancy make provision for it to be brought to an end on the ground in question. In respect of the first criterion, the Grounds for possession in this case are 8, 11 and 12. The Tribunal is therefore satisfied that the requirement in section 18(6)(a) is satisfied.

86 Clause 1 of the Tenancy Agreement is in the following terms:-

"This Agreement is intended to create a Short Assured Tenancy as defined in Section 32 of the Housing (Scotland) Act 1988 and the Tenant acknowledges that he has received prior to the creation of the Tenancy notice to that effect in Form AT5 that the tenancy may be brought to an end by an order for possession granted by the Sheriff on the application of the Landlord or of the heritable creditor of the Landlord in any of the circumstances set out in Grounds 2, 8 or 9 to 17 inclusive in Schedule 5 to the Housing (Scotland) Act 1988 provided always that the Landlord has complied with Section 19 of that Act."

87 What is required by section 18(6)(b) was considered in *Royal Bank of Scotland v Boyle,* 1999 Hous. L.R. 63. In that case, the tenancy agreement contained a generic irritancy clause in the following terms:-

"If the rent or any instalment or part thereof is in arrears and the tenant has failed to make payment of such arrears for a period of fourteen days after he has been required by notice from the landlord to do so the landlord may terminate this Lease and resume possession of the Premises."

88 At paragraph 12-11, the Sheriff Principal stated that, "The terms of s.18(6)(b) are reasonably precise; what is required is that the terms of the tenancy must

make provision for it to be brought to an end on the grounds relied upon by the landlord in terms of Sched 5 to the Act. In my opinion this means that the essential ingredients of those conditions must be referred to in the tenancy agreement. An exact citation of these grounds would clearly suffice, as both counsel for the tenant and the agent for the landlord agreed. I am not however satisfied that necessarily in all cases incorporation by reference would be sufficient or indeed appropriate. It is also doubtful whether such a device is good drafting practice. The statutory references may change, and in any event I do not think it is reasonable to expect tenants to require access to the relevant legislation in order to understand their contract. It may also be appropriate to provide an outline or summary of the clauses to be relied upon in the agreement, but as I have indicated above such an exercise would require to guarantee that the essential ingredients of the clause or clauses in question were included in the lease."

89 Mr Murphy sought to distinguish *Boyle* on the basis that it did not consider repossession on the basis of Ground 12. I would have thought that a better argument would have been that the tenancy agreement in *Boyle* made no reference to the Act at all, whereas in this case the tenancy agreement makes express reference to it. However, it is the Tribunal's view that the Sheriff Principal's comment goes beyond that. The Sheriff Principal's obiter comment was that incorporation of the Grounds by reference was likely insufficient. In this case, the grounds are incorporated by reference. The question is: is that sufficient?

90 In *Eastmoor LLP v Keith Bulman*, 2014 WL 4063091, the tenancy agreement contained a very similar clause to the one in this case. It was a clause that incorporated the Grounds by reference to the Act. At paragraph 29, Sheriff Jamieson reaches the conclusion that section 18(6) is essentially a statutory provision that restricts conventional irritancies that are available for Assured Tenancies. On that basis, he goes on to determine, in paragraph 30, that , "Since therefore a tenancy agreement may only be "brought to an end" prior to its ish on certain permitted conventional grounds, I am of the view, as with the sheriff principal in the Royal Bank case, that the parties must contract in such a way that the contract itself sets out the grounds for bringing to an end the lease prior to determination of its ish. It is not sufficient for the tenancy agreement merely to refer to the number of the ground in schedule 5. Best practice is to refer to its number and terms *ad longum*; if the ground is summarised, the summary must contain the "essential ingredients" of the ground in question".

91 The Tribunal agrees with his comments and those of the Sheriff Principal in *Boyle*. The Act requires that the tenancy agreement provides that the tenancy may be brought to an end on the ground in question. It is not sufficient that the tenancy agreement seeks to incorporate those Grounds by reference. A tenant should know by reading the four corners of the document what the grounds for terminating the tenancy are. He should not require to procure a copy of the Act in order to satisfy himself of the grounds on which the tenancy may be brought to a premature end. Accordingly, the Tribunal determines that the terms of clause 1 of the tenancy agreement are insufficient for the

purposes of s.18(6)(b). As such, the Tribunal is not permitted to grant the order for eviction, and must dismiss the Application EV/18/1945.

92 That is sufficient to dispose of the Applications in this case. However, given the careful consideration that was given to submissions by Mr Murphy, we will now nevertheless consider how we would have addressed matters had we found that s18(6) was satisfied.

93 The Form AT6 is a notice under section 19 of the Act which ordinarily requires to be served before the Tribunal may order repossession consequent upon an Application raised under s.18 of the Act. It is in standard form. It is split into four parts. Part 1 contains the name and address of the tenant. Part 2 contains the name, address and contact details for the landlord. It also sets out the grounds for recovery of possession that the landlord is relying on. It contains the following guidance note: "Give the ground number(s) and fully state ground(s) as set out in Schedule 5 to the Housing (Scotland) Act 1988". Part 3 requires that the landlord specify why the grounds in question apply. It contains the following guidance note: "State particulars of how you believe the ground(s) have arisen". Part 4 requires that the landlord specify the earliest date on which proceedings for repossession may be raised.

94 In the AT6 in this case, at Part 2, the Applicant specified the grounds for recovery, being grounds 8, 11 and 12. However, at Part 3, the Applicant restates the grounds for recovery. She does not specify how it is contended that those grounds apply. In the current case, the Tribunal would have expected to see reference to (i) the rent arrears then current, (ii) how many months' rent that sum equated to, and (iii) the number of occasions on which the Second Respondent was late in paying rent. That level of detail would have provided the Second Respondent with a clear explanation of why the Applicant was seeking to repossess the Property, and the case that he would be required to answer. For that reason, the Tribunal considered that the Form AT6 was invalid.

95 In the event that the Tribunal found the AT6 to be invalid, Mr Murphy made three submissions. Firstly, he submitted that the form AT6 had to be read with the Notice to Quit, which did make express reference to the arrears. The Tribunal does not find favour with that submission. The Notice to Quit and Form AT6 are completely separate notices served for different reasons. The function of the Notice to Quit is to stop tacit relocation from operating. The function of a Form AT6 is to give notice to the tenant that proceedings for repossession of the property are to be raised, as required by sections 18 and 19 of the Act. Those notices are not intertwined. They must be read in isolation. Accordingly, that submission must fail.

96 Secondly, Mr Murphy invited the Tribunal, under s.19(1)(b) of the Act, to dispense with the need to serve a Form AT6 on the Respondent. In making that submission, Mr Murphy conceded that the Applicant would be unable then to rely on Ground 8 for possession standing the terms of s.19(5) of the Act. Given that the Second Respondent was aware that he was not paying rent (notwithstanding his stated reasons for doing so) and the fact that the

notices in this case were served over one year ago, the Tribunal would have exercised its discretion and dispensed with the requirement to serve a Form AT6 on the Respondent. Further, in light of our decision on the arrears that are outstanding, the Tribunal would have found that the Second Respondent had persistently delayed to pay rent, that some rent was outstanding, and determined that it was reasonable to grant an eviction order under Grounds 11 and 12.

97 Thirdly, Mr Murphy submitted that the Tribunal has the power under section 19(2) of the Act to allow the grounds in the AT6 to be altered or added to. It was his submission that this power extended to allow the Tribunal to alter or add to both Part 2 of the AT6 (specifying the Grounds) and Part 3 of the AT6 (specifying the reasons why the Ground in question was being altered or added to). His submission was that it made no sense to grant a power to amend only Part 2 of a notice if one could not amend Part 3 to explain the basis upon which it was contended that the amended ground applied. There is a logic to that submission. If the landlord is seeking to add to or alter the grounds referred to in the AT6, then the tenant has the right to know the basis upon which it is said that the additional or altered ground applies. We therefore agree that both Parts 2 and 3 of the AT6 may be altered or added to under s.19(2) of the Act. In this case, given the passage of time and the fact that the Second Respondent knew that he had not paid substantial rent over a prolonged period of time, the Tribunal would have exercised its discretion and allowed the Applicant to alter the Form AT6 to specify the required information.

98 However, in all of the circumstances and for the reasons outlined above, the Tribunal cannot grant the order for eviction of the Second Respondent. Unfortunately for the Applicant, we must dismiss Application EV/18/1945.

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.

A. Upton

11 FEBRUARY 2019

Legal Member/Chair **Date**