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/18/3196

Re: Property at 3 Wilson Avenue, Kirkcaldy, Fife, KY2 5EQ

Parties:

Kingdom Properties Limited, Dean House, 191 Nicol Street, Kirkcaldy, Fife, KY1 1PF ("the Applicant")

Charles Wood and Son Ltd, 37 Kirk Wynd, Kirkcaldy, Fife, KY1 1EN ("the Applicant's Agent")

Mr Pawel Kwiatkowski and Ms Danuta Jedlinska, both residing at 3 Wilson Avenue, Kirkcaldy, Fife, KY2 5EQ ("the Respondents")

Tribunal Members:

Ruth O'Hare (Legal Member)
Helen Barclay (Housing Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined to make an order for repossession of the Property against the Respondents

Background

1 By application dated 27th November 2018 under Rule 65 of the First-tier Tribunal (Housing and Property Chamber) Procedural Rules 2017 as amended the Applicant sought an order for repossession of the Property against the Respondents. In support of the application, the Applicant submitted the following documentation:-

a. Copy Tenancy Agreement between David Smart and the Respondents dated 26th September 2017;
b. Form AT5 dated 26th September 2017;

c. Copy AT6 dated 12th October 2018;
d. Copy Letter from the Applicant's Agent dated 12th October 2018;
e. Email from the First Named Respondent dated 16th October 2018;
f. Notice under Section 11 of the Homelessness etc (Scotland) Act 2003 to Fife Council.

2 In response to a request from the Tribunal the Applicant subsequently provided a copy of the Notice to Quit and Notice under section 33 of the Housing (Scotland) Act 1988, both dated 12th October 2018.

3 By Notice of Acceptance of Application dated 13th December 2018, the Convener with delegated powers of the Chamber President intimated that there were no grounds to reject the application and referred the application to a Case Management Discussion.

The Case Management Discussion

4 The Case Management Discussion took place on 4th February 2019. Dawn Muir, a Director of the Applicant attended together with Graham Reid, Solicitor from the Applicant's Agent. The Respondents were both present together with a Polish interpreter. The Respondents accepted that no rent had been paid since June 2018. However it was their position that they were exercising their common law remedy of withholding rent in order to force the Applicant to carry out repairs to the property. They stated that the previous landlord of the property had agreed that they would not require to pay rent pending renovations to the property. In particular the Respondents advised the Tribunal of the following disrepair issues:-

- Dampness causing mould growth and damage to wall paper;
- Missing skirting boards;
- Floor boards in poor repair;
- Gaps around the window frames;
- The bath cannot be used as it causes leaks in the kitchen;
- The attic cannot be used.

5 The Respondents were directed to lodge a written note setting out in detail their defence to the application. They were also directed to provide details of when they had made the Applicant aware of the repairs and the level of the reduction of rent sought on the basis of the disrepair. Both parties were directed to lodge a List of Witnesses and copies of any documents they wished to rely upon in advance of the hearing by 28th February 2019.

6 By email dated 26th February 2018, the Respondents submitted a copy letter to Mrs Muir dated 17th December 2018 together with a further copy letter dated 21st February 2019. Both listed repairs which the Respondents alleged were required. By email dated 5th March 2019, the Respondents submitted further email correspondence between them and Mrs Muir dated 8th and 9th December 2018.

7 By email dated 5th March 2019 the Applicant submitted a List of Documents and a List of Witnesses.

The Hearing

8 The Hearing took place over two days on 13th March 2019 and 12th April 2019. Mrs Muir and Mr Reid appeared again on behalf of the Applicant together with three witnesses. The Respondents were both present. A Polish interpreter was in attendance and translated the proceedings to enable the Respondents to fully participate.

9 Preliminary Matters

As a preliminary point, the Mr Reid advised that the primary ground the Applicant sought to rely upon was ground 8. He further advised that he had intimated a further document shortly prior to the hearing, which consisted of text messages between David Smart and the Respondents. He also sought to lodge a copy of the rent account which had previously been referred to at the Case Management Discussion but had not been formally lodged with the Applicant's List of Documents. He requested that these be accepted by the Tribunal. The Tribunal considered there would be no prejudice to the Respondents in accepting the documents, in view of the fact that they would have the opportunity to challenge both documents, the rent account had already been discussed at the Case Management Discussion and the Respondents accepted the texts had been sent by them to David Smart.

The Tribunal noted that parties had lodged documents on 5th March 2019 which was beyond the time period directed at the Case Management Discussion. The Tribunal was however content to accept the documents lodged in advance of the hearing on the basis that both parties had been given sufficient notice.

10 Evidence

The Applicant led four witnesses. The Respondents were given the opportunity after each witness gave their evidence to ask questions by way of cross-examination. The Respondents had no witnesses but gave evidence on their own behalf. The evidence can be summarised as follows:-

Mr David Smart

11 Mr Smart spoke of his history with the Respondents. He had leased a property in Nicol Street, Kirkcaldy in April 2015. In 2017 they had given notice to leave that property, explaining that they were seeking a house with a garden. Mr Smart had indicated that he did not have a house to lease but could possibly acquire one. The Respondents had then brought the house at Wilson Avenue to the attention of Mr Smart. He had viewed it along with the Respondents and subsequently purchased it. Mr Smart was referred to

Productions 1 and 2 of the Applicant's List of Documents, namely the Extract from the Home Report dated 12th June 2017 and the Sales Particulars for the property. He advised that he considered the house to be in good condition upon purchase, which was supported by these two documents. There was some torn linoleum downstairs which he had offered to fix for the Respondents. However they had stated that they would fix it and reimburse him. As far as he was aware that was never done. He had also offered to reimburse the Respondents for paint if they wished to redecorate. With regard to the attic, Mr Smart stated that he had received advice that the staircase was unlikely to comply with regulations therefore it couldn't be used as accommodation, only storage. The Respondents had been advised of this.

12 Mr Smart advised that the Respondents had signed a lease for the Property which commenced on 26th September 2017. The rent was agreed at £500 per month. Mr Smart had provided the Respondents with furniture under the lease for Nicol Street. He had agreed to transfer that furniture to the property at Wilson Avenue minus a bed that had been given to the Second Named Respondent's daughter. Mr Smart stated that he had not agreed to any further repairs or refurbishment and had not agreed to waive the rent for the property. The Respondents did not notify him of any repairs required until June 2018 when the texts forming Production 18 of the Applicant's List of Documents were exchanged. Mr Smart advised that there had been some issues with unpaid rent at that time. The First Named Respondent was trying to make payment but did not have the funds. He had blamed the bank for the unpaid rent. Mr Smart highlighted one text where the First Named Respondent had described the property as being "like new".

13 Mr Smart advised that he had given consent for the Respondents to have a dog within the property, subject to them erecting a fence to contain the dog within the garden. Mr Smart had not however appreciated the size of the dog. He was reluctant to enter the property when it was present due to its size and nature. Mr Smart had noted shortly before he had sold the property to the Applicant that there had been damage caused to the settees in the property. Mr Smart advised that he had sold the property in October 2018. He referred to the Rent Account lodged by the Applicant which confirmed that there were arrears of £1894.52 at the time of the sale.

14 In response to cross-examination from the Respondents, Mr Smart advised that he had bought a fridge freezer for the property to replace a defective unit. He further advised that the deposit had been transferred to the Applicant when the property was sold.

Mr Anthony Sweeney

15 Mr Sweeney is a Building Standards Surveyor within the Building Standards Section at Fife Council. In his current role he deals with tenant complaints regarding disrepair in private rented properties and the regulation of HMOs. He became involved with the property at Wilson Avenue following a complaint from the Respondents on or around September 2018. He had carried out an inspection of the property and assessed its condition against the Repairing Standard. He had subsequently sent a letter to Mr Smart who was the owner at the time, identifying various matters which required to be addressed. The letter formed Production 3 of the Applicant's List of Documents. Mr Sweeney had then been contacted by the Applicant to advise that they had purchased the property. Mr Sweeney advised that matters of decoration would not ordinarily form part of his assessment unless these indicated a potential defect, for example water damage or potential electrical issues.

16 Mr Sweeney spoke to emails between himself and both the Applicant and the Respondents which formed Productions 4, 12, 13 and 16. Mr Sweeney confirmed that he had been out to inspect the property with Mrs Muir on 12th October 2018 and again on 31st October 2018. He had suspicions that the Respondent had tampered with the electrics following works carried out by the Applicant. There had been an electrical installation condition report ("EICR") carried out by an electrician and everything had been signed off as okay. However the Respondents had shortly after been in touch to advise that the electrical sockets were not working. It was very unusual for a fault to manifest itself so soon after an EICR. Electrical safety was a major concern therefore Mr Sweeney had returned to the property on 31st October 2018 to ensure the electrical checks had been completed. Mr Sweeney also had suspicions that the Respondents may be cultivating cannabis in the property due to the presence of buckets of soil in the attic space.

17 Mr Sweeney advised that he had been accompanied by a colleague Stephen Gibb who was investigating the works to the attic, namely the creation of a staircase and installation of velux window. From the council records no building warrant had been obtained for these works. Mr Gibb had not had the opportunity to complete his investigations due to the pressures of work. However he had no immediate concerns. It was clear that the works had been completed several years ago. There were no serious structural defects therefore it would be low on his priority list.

18 Mr Sweeney spoke to an email dated 20th December 2018 to the First Named Respondent confirming that he was satisfied that the property met the Repairing Standard. The First Named Respondent had raised some new issues regarding décor and floor coverings, however in Mr Sweeney's view

these were not relevant to his considerations. Everything he had highlighted to Mr Smart in his initial letter had been addressed. Mr Sweeney had pointed the Respondents in the direction of Frontline Fife to assist them in resolving any issues with the Applicant.

19 Mr Sweeney concluded by stating that he had not seen much evidence of damage caused by the Respondents' dog. He had noted damage to the settees, where stuffing had been ripped out.

Mr Gary Edward Charles

20 Mr Charles is a qualified supervisor electrician employed by Kilmaron Electrical Company. He was instructed by the Applicant to carry out works to the property in October 2018. He installed mains smoke detector and heat detector systems and carried out a full EICR to address the items highlighted by Mr Sweeney. There had been remedial defects that required to be addressed before the EICR could be signed off. He had carried out an initial inspection then had gone back at a later date to complete the works.

21 Mr Charles had then been called back to the property by Mrs Muir following reports from the Respondents that some sockets weren't working and there was a large hole on the upstairs floor. He had attended the property in late October 2018. The electrical sockets weren't working and it appeared that the upstairs carpets had been lifted. Mr Charles had returned to the property shortly after to carry out repairs. He had checked behind the oven which had previously been replaced on Mrs Muir's instructions and had noticed an electrical joint box. It was clear that the oven had been moved. The cable had been split by a round plastic joint. This had caused the problems with the sockets. Mr Charles explained the process of checking sockets when signing off the EICR which assured him that every socket would have been working when the EICR was issued. It therefore appeared that the electrics had been tampered with. He did not know why. With regard to the hole in the floor, Mr Charles found no evidence of that.

22 Mr Charles had taken photographs during his visits which had been lodged as part of the List of Documents for the Applicant. Mr Charles indicated his suspicions that the Respondents were cultivating cannabis in the property. He had experience in such matters having previously carried out work for the Fife constabulary. He had noted CCTV installed with cameras looking over the front of the property. Further he had noted pots of earth in the kitchen and the attic together with fertiliser.

23 Mr Charles stated that he considered the condition of the property to be structurally fine although it was clear that some substandard work had been

carried out in the attic. However the property appeared in his view to be in good condition. He had not had any further dealings with the property since October 2018.

Mrs Dawn Muir

24 Mrs Muir gave evidence on behalf of the Applicant. She confirmed that the Applicant had bought the property on 5th October 2018. Since taking over the tenancy there had been no rent payments received. The Respondents had advised her that they would not be making any payments and that the rent was being held by a friend. Accordingly the Applicant had commenced repossession proceedings. The arrears were now approximately £4,894.52.

25 Mrs Muir had attended the property with Mr Sweeney in October 2018 shortly after taking on the management of the property. Mr Sweeney had confirmed that the property was compliant with the Repairing Standard. Mrs Muir had then sent an email to the Respondents requesting payment of the rent. She had then received a response with a list of items the Respondents stated were still outstanding. This included the purchase of an electric kettle and microwave. There had been no further communication with the Respondents.

26 Mrs Muir advised that she had noted damage had been done by the presence of a dog within the property. It was a large dog. There was apparent damage to the settees in the property where stuffing had been ripped out. She advised that the Applicant would not be prepared to carry out redecoration whilst the dog remained in the property.

27 Mrs Muir stated that she had responded timeously when notified of any repairs required. She had organised for contractors to attend. She had arranged for a plumber to investigate the allegations of water ingress. He had found no evidence of the bath leaking. She had arranged for Mr Charles to carry out the necessary electrical works. He had completed those works. She had liaised with Mr Sweeney to ensure he was satisfied with the condition of the property. She could see no cause for the Respondents to withhold rent.

The Respondents

28 The Respondents both gave evidence. The Tribunal took the opportunity to ask questions of the Respondents throughout in order to assist them in addressing the matters relevant to the issues in dispute.

29 The Respondents agreed that no rent had been paid since June 2018. In response to cross-examination from Mr Reid, the Respondents did not agree

with the up to date figure quoted of £5894.82 but it was accepted that more than three months arrears of rent was outstanding both when the AT6 notice was served and at the date of the hearing.

30 The Respondents stated that they were not paying rent because of the condition of the house. They were withholding the rent as a result. They had initially passed approximately £1500 to a friend in this regard. However they had not been putting the rent aside for some time now because neither of them had been working.

31 The Respondents advised that they had moved into the property in September 2017. When referred to the Sales Particulars, the Respondents confirmed that the photos were accurate but were not detailed enough to show the issues of disrepair. They pointed out damaged wallpaper which Mr Smart had blamed their dog for.

32 The Respondents confirmed that they had found the property for Mr Smart and he had agreed to purchase it with a view to leasing it to them. It was agreed by Mr Smart that repairs would be carried out to the property. However these had not been done therefore the Respondents had stopped paying rent in June 2018. The Respondents had agreed with Mr Smart that they would carry out repair work themselves and he would provide the materials and reimburse them however he had changed his mind. The whole property required repairs but nothing had been done. Apart from the cooker and the gas hob nothing in the property could be used. The Respondents had regularly advised Mr Smart of the repairs required. This was all done verbally. They thought they had some text messages but were unable to provide these.

33 The Respondents had been referred to Dundee City Council in September 2018 after seeking advice regarding the repairs required. Mr Sweeney had come out to the property and carried out an inspection. He had then prepared the report that was sent to David Smart. The Respondents initially stated that nothing had been done by the Applicant. However in response to further questions, they explained that a cooker had been installed, smoke alarms had been installed the kitchen had been installed and a plug socket from the bedroom was removed. A plumber had also come out but he hadn't done anything. The boiler had been checked. Nothing else had been done. After the repair works had been carried out Mr Sweeney hadn't come back to do a final check. He had been lying in his evidence.

34 The Respondents referred to the Home Report. They didn't know there was asbestos in the house. They had been investigating it. They were intending on making a claim against the Landlord for damages. They had sought advice from a lawyer and were going to lodge the paperwork that day.

35 The Respondents stated that someone had maliciously dropped off cannabis leaves and soil in the property on 11th June 2018 which had been seized by Police Scotland at a later date. It was not true that they had fertilisers at in the Property. The pots of soil were for plants and had to be kept inside. The Respondents were growing tomatoes, paprika and flowers. The attic was locked so they couldn't use it. They stated that they had not received any electrical safety certificate, however when questioned by the Tribunal they agreed that they had received it by email. In response to questions the Respondents advised that Mr Smart had provided them with a fridge freezer but they had paid for it.

36 The Respondents stated that the testimonies from the Applicant's witnesses were all fraudulent. The company Mr Charles worked for did not exist. They did not expect the documents lodged by the Applicant which they considered were lodged late. The Respondents sought further time to submit photographs as evidence of the condition of the property. The Respondents considered that a 100% rent reduction was due from the commencement date of the tenancy in September 2017, up until such date as the repairs are all addressed.

Findings in Fact and Law

37 The parties entered into a Tenancy Agreement in respect of the Property dated 26th September 2017.

38 The tenancy is a short assured tenancy as defined by section 32 of the Housing (Scotland) Act 1988.

39 In terms of the said tenancy agreement the Respondents undertook to make payment of rent in the sum of £500 per month.

40 The said tenancy agreement makes provision for the tenancy to be terminated on ground 8 of Schedule 5 of the Housing (Scotland) Act 1988.

41 On 12 October 2018 the Applicant served a Form AT6 (Notice of Intention to Raise Proceedings for Recovery of Possession) upon the Respondent in terms of section 19 of the Housing (Scotland) Act 1988. In terms of the said AT6, repossession would sought on grounds 8, 11, 12, 13 and 14 of Schedule 5 of the said Act.

42 Both at the date of the service of the Form AT6 and as at 12th April 2019 at least three months rent lawfully due from the Respondents is in arrears.

43 The failure by the Respondents to make payment of rent is not a result of any failure or delay in the payment of housing benefit or its equivalent.

44 The Applicant has complied with its statutory obligations and contractual obligations regarding the repair of the property.

45 The Respondents are liable to make payment of the rent due from June 2018 to present.

Reasons for Decision

46 Having considered the evidence before it the Tribunal was satisfied that it was able to make sufficient findings to determine the case.

47 The Tribunal accepted that the Respondents had been served with a Form AT6 by virtue of the email response lodged by the Applicant dated 16th October 2018. The Tribunal further accepted that the Tenancy Agreement made provision for the tenancy to be terminated on the grounds stated in the Form AT6, namely ground 8, 11, 12, 13 and 14 of Schedule 5 of the 1988 Act thereby satisfying the provisions of section 18(6) of the said Act. The Tribunal noted however that the Applicant wished to focus on ground 8 as the primary ground for seeking repossession.

48 Ground 8 is a mandatory ground. It provides that where a tenant is in arrears of more than three months rent lawfully due the Tribunal must grant an order for repossession.

49 In this case the Respondents allege that the rent is not lawfully due as a result of disrepair. They are relying upon the common law remedy of withholding rent, albeit as disclosed during their evidence they have only put the sum of £1500 aside. Their position is that a 100% reduction of rent is justified as a result of the condition of the property.

50 It was a matter of agreement between the parties that rent arrears are outstanding. Whilst there was some dispute over the exact figure, the Tribunal accepted that arrears of at least £4894.82 were due. Accordingly the Tribunal accepted that the Applicant had *prima facie* established the ground for repossession. The onus was therefore on the Respondents to prove otherwise.

51 In his submissions, Mr Reid on behalf of the Applicant submitted that the Respondents had failed to lead any cogent evidence that would entitle the Tribunal to find that there was any material disrepair, and even if such material had been led by the Respondents the weight of evidence put forward by the Applicant would far outweigh such material. The Tribunal would agree with that view. The Respondents had not presented any material at the hearing that the Tribunal could found upon in concluding that rent was not lawfully due.

52 During their submissions the Respondents had asked for further time to lodge photographs as proof of the condition of the property. The Respondents explained that they weren't aware until they received the Applicant's documents what it was they needed to submit. However the Tribunal did not accept that position. The Tribunal was conscious of the clear directions the Respondents had been given at the Case Management Discussion. They had been asked to lodge a written note of their defence, setting out the level of reduction of rent sought, the nature of the disrepair in the tenancy and their notification of repairs to the landlord. They had also been asked to lodge copies of any documents they wanted to rely on at the hearing. They would have had the opportunity to take independent advice if they were unclear as to what they could submit. The Tribunal therefore considered that the Respondents had been given the necessary assistance from the Tribunal to enable them to participate in the proceedings. Furthermore the request for further time had been made during the Respondents' closing submissions. The Tribunal would have expected such a request to be made at the start of the hearing at which point the Respondents would have been aware of the Applicant's List of Documents. The Tribunal therefore had to determine the application on the basis of the evidence before it.

53 The Tribunal found the Respondent's evidence at the hearing to be vague and inconsistent in parts. At times the Respondents had given an affirmative response to a question from the Tribunal, only to then change the position when questioned further. One example was stating that no works had been carried out by the Applicant following Mr Sweeney's report when in fact there had been a number of contractors who had attended the address. This gave cause for the Tribunal to question the credibility of the account of events put forward by the Respondents. The Tribunal further noted that in their letter of 17th December 2018 to the Applicant the Respondents had referred to it being the "17th time" they had written regarding the repairs and the "third official letter" since 26th September 2017, however they had not sought to lodge any of this previous correspondence as evidence nor had they given specific detail. There had been reference to text messages with Mr Smart but the Respondents were unable to produce these.

54 It was further noted that the Respondents did not seek to challenge the majority of the evidence put forward by the Applicant when given the opportunity to ask questions of the witnesses. When questioned on this by the Applicant's Agent, they explained that they thought this would prejudice their defence. In any event the Tribunal preferred the evidence of the Applicant's witnesses with regard to the history of the tenancy, the present condition of the property and the actions of the Applicant. The Tribunal did not accept the Respondents' position that these accounts were fraudulent or lies. All four witnesses came across as credible and gave clear accounts of their involvement with the property.

55 With regard to the condition of the property at the commencement of the tenancy, the Tribunal accepted from consideration of the Home Report and Sales Particulars, and the evidence of Mr Smart, that it was in a reasonable state of repair and therefore that rent was lawfully due. The Tribunal preferred

the evidence of Mr Smart to that of the Respondents on that point. If the condition of the property had been as stated by the Respondents when they took up occupation, the Tribunal had to question why rent was paid by them from September 2017 up until June 2018 when payments stopped.

56 The Tribunal noted the terms of the letter from Mr Sweeney dated 20th September 2018 to Mr Smart which coincided with the sale of the property to the Applicant. It is clear that there were outstanding issues that required to be investigated by the landlord and action taken as appropriate. The Tribunal accepted that the Applicant had taken swift action to address these issues once made aware. Mrs Muir, as managing agent for the Applicant had outlined the steps taken in this regard. It was clear from Mr Sweeney's evidence that he was satisfied the property met the Repairing Standard and the Tribunal had no reason to doubt his professional opinion in this regard.

57 Even if the Respondents had been able to establish an entitlement to withhold rent, the difficulty they now face is that once the landlord has complied with their obligations the rent becomes immediately payable. The Tribunal was satisfied from the evidence put forward by the Applicant that it had complied with the obligations incumbent upon it both under the Repairing Standard and the terms of the Tenancy Agreement. Any rent that had been withheld by the Respondents in the past would therefore fall due to be paid.

58 The Tribunal noted that the withholding of rent appeared from the text messages between Mr Smart and the First Named Respondent to coincide with financial difficulties the Respondents were experiencing at the time. Having regard to the position put forward by the Respondents regarding the withheld rent, namely that only £1500 had been put aside, the Tribunal had cause to consider whether the ongoing allegations of disrepair were in fact linked to financial difficulties the Respondents were experiencing which had impacted on their ability to pay rent.

59 The Tribunal was therefore satisfied that at least three months rent was lawfully due both at the date when the Form AT6 was served and at the date of the hearing. There being no discretion where such a finding is made, the Tribunal was therefore obliged to make an order for repossession.

60 For the avoidance of doubt the Tribunal was in turn satisfied that the provisions of grounds 11 and 12 were met in that rent lawfully due by the Respondent was unpaid both at the time the AT6 was served and when the proceedings before the Tribunal were raised, and the Respondent had persistently failed to make payment of rent lawfully due. However the Tribunal was not satisfied that grounds 13 and 14 had been established by the Applicant. It was clear from Mr Smart's evidence that permission had been given for the Respondent's to keep a dog within the property, albeit Mr Smart had not appreciated the size and type of dog that was envisaged. Furthermore, the Tribunal was not persuaded that the condition of the house had deteriorated due to acts of waste or neglect by the Respondents. The Tribunal was however conscious of the preliminary submission from the

Applicant's Agent which cited ground 8 as the primary ground for repossession.

Ancillary Motions

61 The Applicant's Agent sought reduction of the period of extract of the order based on what he referred to as bad faith on the part of the Respondent's in their conduct of the proceedings. The Tribunal was however conscious of the provisions of the amended Procedural Rules, in particular Rule 41(2) which noted that the order could not be enforced until the appeal period has expired. In any event, the Tribunal did not consider that such a reduction would be reasonable or proportionate in the circumstances. Whilst the Applicant had cited the ongoing non-payment of rent, the Tribunal did not consider this warranted immediate, or a reduced period for, enforcement of the order.

62 The Applicant's Agent further sought an award of expenses, again on the grounds of the Respondents' alleged bad faith and desire to prolong matters.

63 Rule 10 of the Procedural Rules provides that *"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 or parties to unnecessary or unreasonable expense".* One of the aims of the Tribunal is that it should be "cost-free" in order not to discourage participation by parties. It is therefore accepted that expenses should be a rare exception and should only be made in clear cases where unreasonable behaviour has been made out to the satisfaction of the Tribunal.

64 In considering an application for expenses, the Tribunal must first consider whether the party in question has behaved unreasonably. Unreasonable in such context was defined by the Upper Tribunal in the case of Willow Court Management Company v Alexander [2016] L&TR 34:-

""The expression [unreasonable] aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

65 The Tribunal was not satisfied that the Respondents have behaved unreasonably in this case. Whilst it is acknowledged that they failed to establish an evidential basis for their defence, they were entitled to put that defence forward and for it to be tested by way of a hearing. Had they had the benefit of legal representation they may have received advice as to the

weaknesses in their defence, however a party without legal knowledge or support may often be unaware of the need for substantial evidence. The Tribunal took the view that this would equate to a reasonable explanation for their conduct of the proceedings. Accordingly having regard to the overriding objectives that underpin the Tribunal, it cannot conclude that the Respondent's conduct was so unreasonable in the context of these proceedings that it would merit an award of expenses against them.

66 The request for expenses was therefore refused.

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.

Ms Ruth O'Hare

16 April 2019

Legal Member/Chair **Date**