Repairing Standard Enforcement Order

Ordered by the Private Rented Housing Committee

Case Reference Number: PRHP/RP/15/0079

Re: All and Whole the subjects known as and forming Ardchyline House, St Catherine's, Cairndow PA25 8AZ; part of the lands of Ardchyline, Arinagowan and Hafton (otherwise Halftown), in the parish of Strachur, being part of the subjects comprising 4.52 acres all as more particularly described in and shown coloured red on the plan annexed and signed as relative to Disposition by Robert Erskine Lindsay in favour of Callum Denis O'Brien Lindsay dated 8th and recorded in the Division of the General Register of Sasines for the county of Argyll on 12th, both days of May 2009 ("the property")

The Parties:-

Miss Charmaine White, formerly residing at the property ("the tenant")

Mr Callum Denis O'Brien Lindsay, residing at 2 Taxal Close, Carine, Western Australia 6020 ("the landlord")

Committee members: – Sarah O'Neill (Chairperson); Alex Carmichael (Surveyor Member); Christopher Harvey (Housing Member)

NOTICE TO: Mr Callum Denis O'Brien Lindsay ('the landlord")

Whereas in terms of its decision dated 17th November 2015, the Private Rented Housing Committee determined that the landlord has failed to comply with the duty imposed by Section 14 (1) (b) of the Act, and in particular that the landlord has failed to ensure that the house meets the repairing standard in that the property is not wind and watertight and in all other respects reasonably fit for human habitation.

The Private Rented Housing Committee now requires the landlord to carry out such work as is necessary for the purpose of ensuring that the property meets the

repairing standard, and that any damage caused by the carrying out of any work in terms of this order is made good before the date specified in this order.

In particular the Private Rented Housing Committee requires the landlord to:

1) obtain a timber and dampness report in respect of the dampness and timber decay in the property from a reputable firm of timber and dampness specialists who will subsequently issue a 30 year guarantee.

2) carry out any works identified in the reports mentioned at 1) above which are necessary to eradicate the dampness, mould and timber decay in the property to ensure that the property is fit for human habitation.

The Private Rented Housing Committee orders that the works specified in this order must be carried out and completed within the period of **one calendar year** from the date of service of this notice.

Rights of Appeal

A landlord or tenant aggrieved by the decision of the committee may appeal to the sheriff by summary application within 21 days of being notified of that decision.

Where such an appeal is made, the effect of the decision and of any order made in consequence of it is suspended until the appeal is abandoned or finally determined. Where the appeal is abandoned or finally determined by confirming the decision, the decision and the order made in consequence of it are to be treated as having effect from the day on which the appeal is abandoned or so determined.

Please note that in terms of section 28(1) of the Act, a landlord who, without reasonable excuse, fails to comply with a RSEO commits an offence liable on summary conviction to a fine not exceeding level 3 on the standard scale. A landlord (and that includes any landlord's successor in title) also commits an offence if he or she enters into a tenancy or occupancy arrangement in relation to a house at any time during which a RSEO has effect in relation to the house. This is in terms of Section 28(5) of the Act.

IN WITNESS WHEREOF these presents typewritten on this and the preceding page are signed by Sarah Frances O'Neill, solicitor, Chairperson of the Private Rented Housing Committee, at Glasgow on the seventeenth day of November, Two Thousand and Fifteen before this witness -

E BARCLAY ______ witness

S O'NEILL ______ chairperson

EUAN BARCLAY. ______ name in full

EUROPA BUILDING. Address
450 ARGYLE STREET
GLASGOW G2 8LH

Determination by Private Rented Housing Committee

Statement of Decision of the Private Rented Housing Committee

(Hereinafter referred to as "the committee")

Under Section 24(1) of the Housing (Scotland) Act 2006 ("the Act")

Case Reference Number: PRHP/RP/15/0079

Re: All and Whole the subjects known as and forming Ardchyline House, St Catherine's, Cairndow PA25 8AZ; part of the lands of Ardchyline, Arinagowan and Hafton (otherwise Halftown), in the parish of Strachur, being part of the subjects comprising 4.52 acres all as more particularly described in and shown coloured red on the plan annexed and signed as relative to Disposition by Robert Erskine Lindsay in favour of Callum Denis O'Brien Lindsay dated 8th and recorded in the Division of the General Register of Sasines for the county of Argyll on 12th, both days of May 2009 ("the property")

The Parties:-

Miss Charmaine White, formerly residing at the property ("the tenant")

Mr Callum Denis O'Brien Lindsay, residing at 2 Taxal Close, Carine, Western Australia 6020 ("the landlord")

Committee members: – Sarah O'Neill (Chairperson); Alex Carmichael (Surveyor Member); Christopher Harvey (Housing Member)

Decision

The committee determines, taking account of all the available evidence, that:

1) it has jurisdiction to determine the substantive issues before it; and

2) having made such enquiries as it saw fit for the purposes of determining whether the landlord has complied with the duty imposed by Section 14 (1) (b) of the Housing (Scotland) Act 2006 ("the Act") in relation to the property, that the landlord has failed to comply with the duty imposed on him by Section 14 (1) (b) of the Act.

The committee therefore issues a Repairing Standard Enforcement Order.

The committee's decision is unanimous.

Background

1. By application dated 19 February 2015, the tenant applied to the Private Rented Housing Panel ("the panel") for a determination that the landlord had failed to comply with his duties under Section 14(1) of the Act.

2. In her application, the tenant stated that she believed the landlord had failed to comply with his duty to ensure that the property met the repairing standard as set out in sections 13(1) (a) (b) and (c) of the Act. Her application stated that the landlord had failed to ensure that:

    - the property is wind and watertight and in all other respects reasonably fit for human habitation
    - the structure and exterior of the house (including drains, gutters and external pipes) is in a reasonable state of repair and in proper working order
    - the installations in the property for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order

3. The tenant made the following complaints in her application:

    i. The house has leaks and dampness, which has led to bad condensation and mould.
    ii. There is rising and penetrating damp.
    iii. All cupboards have damp and mould.
    iv. Rain drips through in two places a lot and other places sometimes. One leak comes through a light fitting.
    v. The supplied heaters do not heat the rooms and are extremely expensive to run.
    vi. The woodburner is unsafe because of bad installation and there is no carbon monoxide detector.
    vii. Wind blows through the whole house from draughts.
    viii. The roof gutters and downpipes are in very poor condition.

ix. A ceiling collapsed and was left for seven weeks before repair.

4. The tenant stated in her application that the following work required to be carried out at the property:

- The windows need renewed or secondary glazing.
- Damp-proofing needs done
- The roof, gutters and downpipes need fixing or replacing.
- An adequate heating system is needed.

5. The committee was, however, only able to consider the complaints which the tenant had notified to the landlord, in terms of sections 14 (3) and 22 (3) of the Act. On 22 January 2015, the tenant wrote to the landlord's father and representative, Mr Robert Lindsay, by email notifying him that the house was not wind and watertight; that there was damp and condensation; that there was mould growth in all bedrooms and the kitchen, and that a bedroom ceiling had collapsed. Despite being asked by the panel to provide evidence that she had notified the landlord of the other issues contained in her application, the tenant did not do so. The committee could only therefore consider the complaints which had been notified to the landlord's representative.

6. On 28 May 2015, the President of the panel issued a minute of decision stating that she considered that in terms of section 23 (3) of the Act, there was no longer a reasonable prospect of the dispute being resolved between the parties at a later date; that she had considered the application paperwork submitted by the tenant, comprising documents received in the period 2 March to 31 March 2015; and intimating her decision to refer the application to a panel committee for determination.

7. The President of the panel wrote to the parties and to the landlord's solicitor on 22 June 2015, notifying them under and in terms of the 2006 Act of her decision to refer the application under Section 22(1) of the Act to a private rented housing committee and that an inspection and a hearing would take place on 18 August 2015. Written representations were requested by 13 July 2015.

8. On 24 June, the tenant confirmed to the panel by email that she was no longer living at the property, and that the keys had been handed back on 30 March. On 1 July, the committee issued a minute of continuation to a determination under Schedule 2 Paragraph 7(3) of the Act. This stated that, having received confirmation from the tenant that the tenancy had been lawfully terminated, the tenant was to be treated as having withdrawn her application in terms of Schedule 2 paragraph 7 (1) of the Act. It then stated that the committee considered that the application should be determined on

health and safety grounds, due to the nature of the alleged repairs and the potential effects on any future tenants/occupiers if those allegations were substantiated.

9. Written representations were received from the landlord's solicitor on 7 July. Further detailed written representations were received from Mr Robert Lindsay, the landlord's father, on 13 July. In these representations, Mr Lindsay raised a number of jurisdictional issues with regard to the decision of the committee to continue to determine the tenant's application. These issues, and the committee's determination on these, are discussed in more detail later in this decision. Of particular note at this stage was the landlord's argument that the tenancy had not been' lawfully terminated' in terms of Schedule 2 paragraph 7(1) of the Act.

10. In order to allow time to consider these representations, and to ascertain whether the tenant was still to be treated as a party to the application and should therefore be notified of the inspection and hearing, the committee decided to postpone the inspection date until 14 September. In response to a letter from the panel administration dated 14 August regarding various administrative issues raised by Mr Lindsay and his solicitor in their respective representations, a further email was received from Mr Lindsay on 19 August. In this email, he raised a number of further administrative issues and requested sight of communications between the panel and the tenant after 31 March 2015.He also indicated that he believed that communications had been occurring between the panel and the local authority, which he had had no opportunity to address in his submissions.

11. The committee issued a direction to the landlord on 25 August 2015. In this direction, the committee dealt with a number of issues raised by him. Firstly, it amended a typographical error in its minute of continuation which had been raised by his solicitor. The direction also stated that the committee could only consider the issues which had been notified to the landlord by the tenant in her email of 22 January 2015; invited the landlord to submit any further evidence of repairs which had been carried out, and any further written representations, within 14 days; and attached correspondence between the tenant and the panel after 31 March 2015. This correspondence comprised: 1) an email from the panel to the tenant dated 13 April; 2) a letter from the panel to the tenant dated 1 May; 3) an email from the panel to the tenant dated 22 June; 4) an email from the tenant received by the Panel on 24 June and 5) a reply to the tenant from the Panel dated 25 June.

12. The direction also advised that a hearing would be arranged by teleconference following the committee's inspection, given that the landlord and his father, who wished to give evidence to the committee, were resident in

Australia, and that photographs taken at the inspection would be sent to the landlord and Mr Lindsay prior to the hearing. The direction stated that the committee would consider the various jurisdictional points which the landlord had raised in its final determination.

13. With regard to the landlord's argument that the tenancy had not been 'lawfully terminated', the direction noted that it appeared to the committee that if this argument was correct, the committee would have had no discretion to abandon the application, but would have had to continue with it, unless the tenant had actually withdrawn her application. As this did not appear to be the case, it appeared to the committee that if the tenancy had not been 'lawfully terminated', the tenant continued to be a party to the application, and was therefore entitled to receive copies of all case papers, and to be present or represented at the inspection and hearing. The committee therefore invited the landlord to clarify and confirm whether his position remained that the tenancy has not been' lawfully terminated', within 14 days of receipt of the direction.

14. In a covering email sent with the direction, the panel administration confirmed that the only correspondence to date between the panel and Argyll and Bute Council had been 1) a standard notification email sent to the council's landlord registration team on 22 June, with a copy of the tenant's application and 2) a response from that team confirming the registration details held by it for the property.

15. A response to the committee's direction, enclosing further written representations, was received from Mr Lindsay on 4 September 2015. These representations are considered in more detail later in this decision. With regard to the issue of whether the tenancy had been 'lawfully terminated', he set out some detailed legal arguments as discussed later in this decision, but ultimately his conclusion was that the tenancy had been lawfully terminated on or around 30 March 2015, albeit by the landlord. Following this confirmation, the committee was content that the tenant was no longer to be treated as a party to the application, and it arranged a hearing date of 14 October.

The inspection

16. The committee inspected the property on the morning of 14 September 2015. The weather conditions at the time of the committee's inspection were dry and sunny. Mr and Mrs Clayton, who live near to the property, provided access to the committee at the request of Mr Lindsay, and were present at the property during the inspection. Neither the landlord nor his representative was present at the inspection. Photographs were taken during the inspection and are attached as a schedule to this decision. All photographs were sent to the landlord and to Mr Lindsay in advance of the hearing.

The property

17. The property comprises an eight apartment detached stone built villa estimated to be in the region of 105 years old. The subjects are located on the outskirts of the village of Strachur in a rural location, somewhat removed from other residential property.

18. The property appears to be of traditional construction with brick solid outer walling with inner lath lining and outer roughcast finish. The floors throughout appear to be both timber boarded on suspended joists and solid. The roofs are predominately timber pitched and finished with slates with the exception of the small rear entrance porch which is flat.

19. The subjects comprise all on the ground floor: Side entrance leading to Kitchen with fitted units, Dining Room, Pantry, Lounge 1, Lounge 2, Lounge 3, rear Study, Utility Room with sink unit, understairs w.c. and Bathroom with Stores off and bath and wash hand basin. The upper floor comprises: three Bedrooms and Bathroom. Mains supplies of water and electricity are supplied to the subjects and drainage is assumed to be to a private septic tank. There is a bottled gas supply to the gas cooker in the kitchen. Heating of the subjects is by means of 'off peak' electric storage wall panel radiators.

The hearing

20. The committee held a hearing at the offices of the Private Rented Housing Panel, Europa Building, 450 Argyle Street, Glasgow on 14 October 2015 by teleconference. The landlord was represented by his father, Mr Robert Lindsay, who participated in the hearing from Australia by teleconference and gave evidence to the committee. He called Mr Andreas Michler, a former tenant at the property, as a witness. Mr Michler also gave evidence to the committee by teleconference.

The evidence

21. The evidence before the committee consisted of:

    - The application form completed by the tenant.
    - Sasine search sheet (Number: 408) showing the owner of the property to be Calum Denis O'Brien Lindsay.

- Short assured tenancy agreement between the landlord and the tenant and Derek White dated 13 August 2013 for the rental of property from 25 August 2013 until 31 March 2018.
- Email notification dated 22 January 2015 from the tenant to Mr Lindsay, setting out the repairs alleged to be required, together with response emails from Mr Lindsay dated 10 and 11 February 2015.
- Email from Karen McAllister of Messrs D M MacKinnon, the landlord solicitor, to the panel dated 29 June 2015.
- Written representations from Karen McAllister to the panel dated 6 July 2015. Written representations from Mr Robert Lindsay on behalf of the landlord dated 13 July 2015, together with chronology of events and 54 supporting documents.
- Email from Robert Lindsay to the panel dated 19 August 2015.
- Email from Robert Lindsay dated 20 August, enclosing email of 13 August to Mr Lindsay from Mr Alex Tickell.
- Written representations from Mr Lindsay dated 4 September, together with enclosures.
- Email dated 2 September from Mr Andreas Michler, a former tenant at the property, advising that he was willing to give evidence to the committee on behalf of the landlord.
- The committee's inspection of the property.
- The oral representations of the landlord and his witness, Mr Michler.

Findings of fact

22. The committee made the following findings in fact:

a. The owner of the property is Callum Denis O'Brien Lindsay, who is the registered landlord for the property. The landlord was aged 15 at the time of the hearing. The property was transferred to him by his father, Robert Erskine Lindsay, in 2009.
b. The tenant and Mr Derek White entered into a short assured tenancy agreement with the landlord to rent the property from 25 August 2013 until 31 March 2023. The tenancy agreement provided that the tenancy was terminable on 31 March 2018 by either party giving three months' formal written notice of termination. Otherwise, the tenancy would continue until 31 March 2023.
c. The lease provided, at clause 6, that the tenants were responsible, within four years of the date of entry, for the following: 1) ensuring that the chimney at the west end of the house was reconstituted so as to enable the fireplaces in the west of the house to be used; 2) carrying out any works as were necessary to ensure that water did not pool near or under the house and that the drainage enabled the water to flow away from the house and the driveway' and 3) *'to*

ascertain the cause of and have rectified any dampness to be found in the ceilings of the dwellinghouse forming part of the subjects of let…'

d. The lease also stated, at clause 12, that the landlord was *'responsible for keeping the subjects of let wind and watertight, for structural repairs and for ensuring that the subjects meet the repairing standard at the commencement of and throughout the tenancy in terms of Chapter 4, Part 1 of the Housing (Scotland) Act 2006, in so far as external repairs are concerned. Our client [i.e. the landlord] will not be responsible for internal maintenance and repairs and to this extent by your signature hereof, you accept that our client has specifically contracted out in terms of Chapter 4, Part 1 of the Housing (Scotland) Act 2006. You will be responsible for all other maintenance including normal day to day plumbing , electrical and other repairs and will take all reasonable steps to keep the temperature within the subjects of let sufficiently high so as to prevent the freezing of water pipes and conduits…'*

e. As no evidence was presented to the committee that an order in terms of section 18 of the Act permitting the landlord to contract out of the repairing standard in respect of the property had been sought or obtained from the sheriff, the committee finds that such an order has not been obtained by the landlord.

f. The property was being marketed for sale at the time of the committee's inspection.

g. The tenant moved out of the property on or around 30 March 2015. This date was accepted by Mr Lindsay as the date on which the tenancy was lawfully terminated by the landlord.

h. The committee in its inspection carefully checked the items which were the subject of the complaint. The committee observed the following:

Internally –

1. Excessively high damp meter readings were obtained and the effects of rising dampness were noted to the lower walls to the ground floor front elevation and to the rear elevation hallway
2. Penetrating dampness was noted at various locations through the external walling, particularly to the east gable – ***see photographs 3,4,5 & 6***;
3. Mould growth was noted at various locations throughout the property including external walling and cupboards – ***see photograph 7***;
4. The electrical installation does not conform with the current building regulations with surface mounted sockets, etc noted;
5. There is no adequate smoke alarm system;
6. The rear ground floor bathroom is uninhabitable and does not meet the tolerable standard – ***see photograph 8***.

Externally –

7. The single skin timber frame ground floor bathroom outshoot is not wind and watertight – ***see photograph 9***
8. The roof element of the property has numerous loose, missing and broken slates;
9. Defective apron flashings noted – ***see photograph 10***;
10. Repair rusted, leaking, cracked, broken and missing gutters and downpipes – ***see photograph 11***;
11. Weathered/rotted timbers to windows noted at various locations thereby making the property susceptible to drafts and not in a wind and watertight condition – ***see photographs 12 & 13***.

Summary of the issues

23. The issues to be determined were: 1) whether the committee had jurisdiction to determine the tenant's application and 2) if the committee considered that it did have such jurisdiction, whether the property met the repairing standard as set out in Section 13 of the Act, and whether the landlord had complied with the duty imposed on him by section 14 (1) (b).

1. <u>Jurisdictional issues raised by the landlord and reasons for decision</u>

24. Mr Lindsay, who is a barrister, and his solicitor, had raised a number of points in their respective written representations of 6 and 13 July and 4 September, challenging the committee's jurisdiction to continue the tenant's application. Mr Lindsay indicated to the committee at the hearing that he did not wish to appear to be overly reliant on technical points, and that he was content for the committee to make a determination on these issues on the basis of the written submissions before the committee from him, and from his solicitor. The committee decided to reserve its consideration of the jurisdictional issues until after the hearing, and to hear the arguments on the substantive issues before the committee i.e. whether the property met the repairing standard as set out in Section 13 of the Act, and whether the landlord had complied with the duty imposed on him by section 14 (1) (b).

25. The committee therefore sets out below each of the jurisdictional issues raised by the landlord's representatives below, followed by its statement of reasons for its decision on each of these issues in turn.

1. ***Whether the decision to continue should have been taken by the Panel President***

26. Firstly, Mr Lindsay and his solicitor argued that the tenancy had ended (and the application was therefore deemed to be withdrawn), in terms of Schedule 2 paragraph 7 (1) of the 2006 Act, on or around 30 March 2015, when the tenant

had left the property. This date was before the President of the panel referred the application to a committee, which occurred on 22 June 2015. They argued that the decision as to whether to abandon the application or refer it to a committee should therefore have been made by the President, in terms of her power under Schedule 2 paragraph 7 (2) of the Act, and not by the committee in terms of Schedule 2 paragraph 7(3), as set out in the minute of continuation. They argued that the power of the committee to continue an application under paragraph 7 (3) (b) was dependent upon the application being withdrawn after referral to a committee, which was not the situation here.

27. Mr Lindsay argued that the President had purported to refer the application to a committee on 28 May, but there was in fact no 'application' to refer as at that date, because it had been deemed to be withdrawn, due to the lawful termination of the tenancy. As section 22 (5) of the Act states that Schedule 2 governs the procedure for making and determining an application under section 22 (1), the President should have exercised her power in terms of Schedule 2 paragraph 7(2), and not under section 23 (3) as she had done, because she had treated the application as a current application at the date of referral. She should therefore have instead exercised her discretion under Schedule 2 paragraph 7(2) to determine whether or not to refer the application to a committee, despite its having been withdrawn, or to abandon the application.

28. In exercising her powers under Schedule 2 paragraph 7(2), the President would have had an unfettered discretion, rather than a discretion compelling a referral under section 23 (1), unless the restrictive grounds for rejection under section 23 (2) could be applied. He therefore argued that the subsequent Minute of Continuation of 1 July, in both its original and amended form, should have no validity, as the committee did not have jurisdiction to make a decision to continue the application under Schedule 2 Paragraph 7 (3).

29. In his representations of 4 September, Mr Lindsay argued that the deemed withdrawal under Schedule 2 Paragraph 7(1) occurs not when there is written notification to the panel that the tenant has ended the tenancy, but on the date when the tenancy is actually terminated, in this case on or around 30 March 2015.He argued that this could produce an absurd consequence, for example, where an application would continue indefinitely simply because no notification of termination has been supplied to the panel by an absconding tenant. He argued that *'such a contention also predicates termination is defined by tenant notification only, since the landlord's representatives had no notification of an investigation by the Panel at all until 29 June 2015'*. He stated that, had the landlord been made aware of the investigation at the outset, the panel would have received immediate notification at the time that the tenant had terminated the lease, enabling the landlord to put a case for abandonment of the application to the Panel before any referral to a committee occurred.

30. Mr Lindsay therefore submitted that on both this ground and the lack of a lawful termination of the tenancy, as discussed below, the procedural requirements of the Act and regulations had not been met, and therefore the legal criteria required for a continuation of the proceedings were not fulfilled.
31. Having considered the landlord's representations on this issue, the committee takes the view that the President properly made a decision to refer the application to a private rented housing committee on 28 May 2015 in terms of section 23 (1) of the Act. While it later became apparent that the tenant had left the property on or around 30 March, that information was not available to the President at the date when she made the referral. The President cannot be reasonably expected to be aware of the up to date position regarding every tenancy of every property which is the subject of an application to the panel at all times. She can only rely on the evidence and information which is before her at any given time.

32. The committee does not accept Mr Lindsay's argument that the deemed withdrawal under Schedule 2 Paragraph 7(1) occurs not when the panel receives written notification that the tenant has ended the tenancy, but on the date when the tenancy actually terminated. The committee considers that this cannot have been the intention behind the legislation, which is intended to protect both current and future tenants, by ensuring that properties which are the subject of an application to the panel meet, or are brought up to, the repairing standard. This is the reasoning behind the provisions of Schedule 2 Paragraph 7, which allow the President or the committee to continue to determine an application where the tenant has moved out.

33. The committee does not accept the argument that this could lead to a situation where an application would continue indefinitely due to an absence of notification of termination from the tenant. This would not happen, because a hearing and inspection date would be fixed and notice of these would be served on both parties in terms of Schedule 2 Paragraph 1.

34. The committee takes the view that the President made a valid referral under section 23 (1) of the Act of an application which she had no reason to believe had been withdrawn as at the date of referral. In terms of regulation 17(1), a tenant may withdraw an application only orally at a hearing or in writing at any time by serving notice of withdrawal upon the landlord and his or her representative (if any), and upon the committee. There was no evidence that any such notice of withdrawal had been served by the tenant.

35. Given that the application had already been referred to a committee by the time the panel became aware that the tenant had left the property, it was not possible for the President to then make a decision about whether to continue or

abandon the application at that stage, as the landlord's representatives argued she should have done. When asked about this at the hearing, Mr Lindsay accepted that the President would not have known at the time the referral was made that the tenant had moved out.

36. The committee does not agree with Mr Lindsay's contention that, had the landlord been made aware of the investigation at the outset, the panel would have received immediate notification that the tenant had terminated the lease, enabling the landlord to put a case for abandonment of the application to the panel before the case was referred to a committee. This would never have been the case, even if the President had been aware that the tenant had left at the end of the March before she referred the application to a committee. In that situation, she would have then considered under Schedule 2 Paragraph 7 (2) whether to abandon the application or continue to refer it to a committee. She would not have notified or contacted the landlord at that stage, regardless of whether she had made the decision to abandon the application or to refer it to a committee. This is not part of the panel's standard process.

37. There is no requirement on the panel under the Act to notify the landlord that an application has been made by the tenant until the application has been referred to a committee for determination, and a date for submitting written representations is fixed, in terms of Schedule 2 Paragraph 1. This is the point at which the panel first notifies the landlord of an application, as part of its standard process. Moreover, section 23 (4) of the Act provides that where the President rejects an application, she must give notice of the rejection to the tenant. There is no requirement to give notice of this to the landlord, which supports the conclusion that it was not the intention of the legislation that the landlord should be made aware that an application had been made before the point when it was referred to a committee. Finally, in terms of section 64 (5) of the Act, only a tenant, and not a landlord, may appeal against a decision by the President under section 23 (1) of the Act to refer an application to a committee or to reject it. It cannot therefore have been the intention of parliament that a landlord should have the right to appeal a decision to refer an application to a committee.

2. *Whether the committee's decision to continue the application was competent*

38. Given that the committee takes the view that the application was properly referred to it on 28 May, when it became apparent on 24 June, almost one month after the application was referred to a committee, that the tenant had left the property, it was therefore competent for the committee to make a decision as to whether to abandon consideration of the application or continue to determine it, all in terms of Schedule 2 Paragraph 7 (3). The committee

therefore had jurisdiction to make the decision to continue the application, for the reasons set out in its minute of continuation of 1 July.

39. Mr Lindsay and his solicitor also argued that the minute of continuation, in both its original form as served on 1 July, and as amended by the chairperson on 25 August 2015, was invalid, and that the committee did not therefore have jurisdiction to continue with the application. The original minute had made reference to the tenant being treated by the committee as having withdrawn her application under Schedule 7(1) of the Act. The reference should have been to Schedule 2 Paragraph 7 (1) of the Act, and the chairperson amended the minute to correct this clerical error in terms of regulation 16 of the Private Rented Housing Panel (Applications and Determinations) (Scotland) Regulations 2007 ('the regulations') on 25 August 2015. Unfortunately, the reference to Schedule 7(1) was incorrectly amended by the chairperson to read 'Schedule 7(3)'. The committee takes the view that, while this error was unfortunate, it was a clerical error of a minor nature, which could be corrected by the chairperson under regulation 16.

40. It was also quite clear from the submissions by Mr Lindsay and his solicitor that they were well aware that the minute of continuation was being issued by the committee in terms of its powers under Schedule 2 Paragraph 7 (3). The committee therefore takes the view, following the approach taken by the House of Lords in *R v Sonjei and another [2005] 3WLR 303,* that Parliament cannot have intended that a failure to state the correct paragraph of Schedule 7 would have the effect of invalidating the continuation or determination of the tenant's application, or any order issued by the committee as a consequence of this.

3. Whether the tenancy was 'lawfully terminated'

41. Related to points (1) and (2) above, Mr Lindsay initially argued that the exercise by the committee of its powers under schedule 2 paragraph 7(3) was conditional upon 'lawful termination' by the tenant of the tenancy, which he submitted was not the case here. He argued that the tenancy had been unlawfully terminated by the tenant, as the termination date in the lease was 31 March 2023, with a first break clause date of 31 March 2018. Nor had the tenant given three months' written notice as required in the case of early termination under paragraph 1 of the lease, and she had left owing two months' rent. He pointed out that there did not appear to be any provision in the Act or the regulations providing for the continuation of an application in the event of unlawful termination by a tenant.

42. Further to the committee's direction of 25 August, Mr Lindsay further addressed this issue in his written representations of 4 September. He argued that the reference to a tenancy being 'lawfully terminated' in Schedule 2 Paragraph 7(1)

does not identify by whom the lawful termination of the tenancy is made, and that it would be a mistake to presume that this refers only to a tenancy lawfully terminated by the tenant. He argued that the reference to 'lawful termination' relates objectively to lawful termination of a tenancy by either party. He argued that where the tenancy is terminated, and not unlawfully so, by the landlord, the condition for lawful termination is fulfilled. He argued that in this case, the tenancy should be treated as having been lawfully terminated by the landlord, and that the tenant should not therefore be treated as a party to the application.

43. With regard to this issue, the committee takes the view that its role is to determine whether the landlord has complied with his duties under section 14(1) of the Housing (Scotland) Act 2006. It is not the committee's role to determine whether the tenancy was lawfully terminated. The committee was informed by the tenant on 24 June 2015 that she had moved out of the property, and had handed back the keys. On the basis of this information, the committee took the view that the tenancy had been lawfully terminated in terms of Schedule 2 paragraph 7(1) of the Act. In terms of that provision, the committee deemed the tenant to have withdrawn her application. It then took the decision to continue to determine the application, in terms of Schedule 2 paragraph 7(3) (b).

44. In light of the landlord's written representations of 4 September, however, it became clear that he now considered that the tenancy had been lawfully terminated on or around 30 March, albeit by the landlord rather than the tenant. The committee accepts the landlord's argument that the reference to 'lawfully terminated' in Schedule 2 Paragraph 7(1) does not state by whom the lawful termination of the tenancy is made, and that it could therefore include a lawful termination by the landlord, and not only by the tenant.

45. The committee also observes that the legislation as drafted is unclear as to what happens in the situation where one party argues that there has been an 'unlawful termination' of the tenancy, as the landlord initially argued in this case. In terms of schedule 2 paragraphs 7(2) and 7 (3) of the Act, the President and the committee respectively have power to abandon an application only where the application has been withdrawn (including where the tenancy has been 'lawfully terminated'). If the application has not been withdrawn (or the tenancy 'lawfully terminated'), the committee must continue to determine it. Therefore, if the landlord and his representatives had been correct in their initial argument that the tenancy was not lawfully terminated, the committee would have had no discretion to abandon the application, but would have had to continue it, unless the tenant had in fact withdrawn it.

4. Whether the committee had power to continue the application on public interest grounds

46. In her letter of 6 July, the landlord's solicitor noted that the minute of continuation issued by the committee on 1 July stated: *'the committee considers that the application should be determined on public interest grounds due to the nature of the alleged repairs'*. She questioned where in the Act there is provision for determination of an application on 'public interest' grounds, and stated that, aside from the absence of specificity, the committee made no acknowledgement of the defences open to the landlord under sections 14 (3) and 14 (4) of the Act. She stated that, if the committee did have power to decide that an application should be determined on public interest grounds due to the nature of the repairs and potential effects on any future tenants/occupiers if the allegations were substantiated, it should be noted that the committee was advised prior to making its decision that the property was being marketed for sale, and that there were no current tenants or occupiers.

47. In the same letter, the landlord's solicitor noted that Schedule 2 paragraph 7 (3) (b) provides that a committee may (i) *continue to determine whether to withdraw an application and (ii) if they do so by deciding that the landlord has failed to comply with the duty imposed by Section 14(1), make and enforce a repairing standard enforcement order.* She suggested that this was open to the construction that the committee may continue an application to obtain such an order where they have <u>already</u> decided that there is at least a prima facie failure to comply with section 14 (1). She asked if this interpretation was correct, what material, in addition to the tenant's assertions, the committee relied on to decide that there was such prima facie evidence.

48. With regard to the first point, the committee notes that Schedule 2 paragraph 7 (3) states that where an application has been withdrawn (including where the tenancy has been lawfully terminated), after it has been referred to a private rented housing committee, the committee may continue to determine the application. There is no requirement for the committee to state a reason for continuing to determine the application, and equally there is no provision which prevents the committee from giving a reason for this. In this case, the committee decided to continue the case on public interest grounds, due to the nature of the alleged repairs required, and the potential effects of these on any future tenant or occupier, if the allegations were substantiated, and the committee chose to state this in the minute of continuation.

49. In any case, the committee takes the view that the provisions of Schedule 2 Paragraph 7 were included in the Act for public interest reasons, with the aim of ensuring that private housing standards are maintained, and that allegations of serious disrepair can be investigated by the private rented housing panel and its committees when they consider that there are good reasons to do so,

regardless of whether the tenant who made the application is still living in the property.

50. In relation to the second point, the committee does not agree with the interpretation of Schedule 2 Paragraph 7 (3) (b) suggested by the landlord's solicitor. The committee had not taken a prima facie view that there was a failure to comply with section 14 (1); it simply took the view that the repairs issues alleged in the tenant's application raised sufficiently serious health and safety concerns that the application should be continued and evidence heard on the merits of the application at a hearing. A decision would then be made by the committee on the basis of all of the evidence before it, following a fair process which allowed the parties to lead evidence at a hearing before the committee, as required in terms of Article 6 of the European Convention on Human Rights.

51. While the wording of Paragraph 7 (3) (b) (i) is not as clear as it might be, the committee takes the view that the correct interpretation of this provision is that where, following the withdrawal or deemed withdrawal of the tenant's application, the committee decides to continue to determine the application **and** if the committee so continues to determine the application, and *having done so*, (i.e. following an inspection and hearing) decides that the landlord has failed to comply with the duties imposed by section 14 (1), it may make a repairing standard enforcement order. The reasons why the committee continued to determine the application are set out in the minute of continuation.

52. It was open to the landlord to put forward any defences available to him in terms of the Act, and it would then be for the committee to consider any evidence put forward by the landlord in this regard as part of its deliberations. The purpose of the committee's inspection and hearing is to determine whether the landlord has complied with his duties in terms of section 14(1) of the Act. The committee makes its determination on the basis of all of the evidence before it, including that submitted by both parties and its inspection. The landlord was invited to submit written representations on the tenant's application, and his extensive representations formed part of the evidence before the committee.

53. The fact that the property was on the market for sale was not a relevant consideration for the committee, as its role was to determine whether the landlord had complied with his duty under section 14 (1) (b). While the property may be on the market, there was no guarantee that it would be sold, and even if it were to be sold, there was nothing to stop any new owner from letting it out again. 'Landlord' is defined in section 194 of the Act as including the landlord's successors in title. The committee therefore had an obligation to ensure that

the property meets the repairing standard, in order to ensure that any potential future tenants are protected.

5. *Whether the application was referred to the committee within a reasonable timescale*

54. Mr Lindsay argued that, if the committee found, contrary to his submissions on the matters outlined above, that the Panel President had properly exercised her powers under section 23 (1) of the Act in referring the application to a committee, it was unreasonable for the President to defer the decision to make the referral until 28 May 2015, when the application had been received on 2 March 2015.

55. He pointed out in his representations of 4 September that it is a requirement of Regulation 6 (c) of the 2007 regulations that the tenant is informed in writing that a decision will ordinarily be made within 14 days of receipt of the application as to whether the application is to be referred immediately to the committee, or rejected, or deferred to allow the parties to attempt to resolve the dispute. He said that he could see no such notification in the papers which had been sent to him.

56. In her letter of 6 July, his solicitor pointed out that in terms of section 23 (3) of the Act, the President must make a decision whether to refer an application made under section 22 (1) or reject it within 14 days of the panel's receipt of the application or where she considers that (i) the decision cannot be made without further information or (ii) there is a reasonable prospect of the dispute being resolved by the parties, by such later date as the President considers reasonable. She stated that there was no indication that the President had sought any further information, as the application paperwork was dated between 2 and 31 March 2015.Mr Lindsay also pointed to regulation 6 (d), which states that, where a decision cannot be made within 14 days because further information is required, the tenant shall be informed of that and given a date by which time a decision shall be made. He noted that the papers did not show any subsequent notification to the tenant that further information was required.

57. In her letter of 6 July, the landlord's solicitor also argued that, as the tenant had vacated the property around 26 March and certainly before 31 March 2015, the question of whether there was a reasonable prospect of the dispute being resolved between the parties had been irrelevant for almost two months before the President made the decision to refer the application to a committee.

58. In these circumstances, Mr Lindsay challenged the President's consideration that 28 May 2015 was a reasonable date by which to reach a decision. He

argued that on the basis of the information before him, the date on which the referral was made was unreasonable, and that the delay had caused prejudice to the landlord.

59. The committee notes that there was a period of almost three months between receipt of the application and the referral by the President to a committee. It is important to note here that any correspondence sent to the tenant prior to referral to a committee is not sent to the landlord as a matter of course. It was, however, apparent from the case papers before the committee that a letter was sent to the tenant on 2 March 2015, acknowledging receipt of her application and asking her to send proof of notification of the repairs to her landlord by 16 March 2015. This appears to the committee to be in compliance with regulation 6(d).

60. A further reminder letter was sent to the tenant on 24 March, again requesting proof of notification. The tenant responded by email on 31 March, forwarding an email which she had sent to Mr Lindsay on 22 January regarding repairs which required to be done. An email responding to this was sent by the panel on 13 April, noting that while the tenant had notified the landlord of some of the issues set out in her application form, she had not sent evidence of the other issues which she had complained about. The emails asked her to provide evidence to confirm that these further issues had been notified to the landlord. A further letter was sent to the tenant by the panel on 1 May, noting that no response to the email had been received, and requesting the information provided by 20 May. On 28 May, the President referred the application to the present committee.

61. The committee considers that the various letters mentioned above which were sent to the tenant, all of which stated a date by which the further information was requested, fulfil the requirements of both section 23 (3) and regulation 6(d). The President considered that further information was required - initially, proof that the landlord had been notified of the issues contained in the tenant's application form, and then proof of notification of those matters not included in her email of 11 February - before a decision on referral could be made. In terms of section 22(3) of the Act, an application may not be made to the panel unless the tenant has notified the landlord that work requires to be carried out for the purposes of complying with the repairing standard duty.

62. The President of the panel takes the view that for the purposes of section 22 (3), an application is not considered to have been made until the panel has all of the information which is necessary in order to consider whether or not the application should be referred to a committee. In line with this approach, if, once an application has been received, the President does not consider that there has been adequate notification, the panel will write back to the homeowner

advising them that their application will not be progressed until they provide proof of notification to the landlord.

63. It may be inferred from the correspondence referred to that no further response was received from the tenant following the panel's letter of 20 May, and that the President took the decision to refer the application to a committee for determination of the issues which had been notified to the landlord. This decision appears to the committee to have been made having regard to fairness to both parties.

64. On the basis of the information before it, the committee determines that there were good reasons for the delay between receipt of the application and the referral to a committee, and that in the circumstances, the application was referred within a reasonable timescale.

6. Whether the parties should have been made aware of the availability of mediation

65. Mr Lindsay also pointed out that under regulation 7 of the regulations '*the Panel Secretary must bring to the attention of the parties the availability of mediation as an alternative procedure for the resolution of the dispute and explain and, if the parties consent to mediation, facilitate that mediation*'. He pointed out that the tenant had indicated on her initial application form that she would be agreeable to attending mediation to resolve the matter. He had, however, received no notification at all from the panel about mediation and it did not appear that mediation was offered to the tenant either, despite the fact that this appeared to be a condition precedent to the subsequent power under the Act.

66. Following the initial written representations from Mr Lindsay and his solicitor of 6 and 13 July, the panel administration wrote to the landlord and his representatives on 14 August 2015, advising that mediation is only offered in cases which are considered to be suitable. The letter stated that this case was not deemed suitable for mediation, and so mediation was not offered, and was not brought to the parties' attention. It also stated that the fact that the tenant was not responding to correspondence from the panel and the landlord was in Australia were factors in deciding not to offer mediation.

67. Mr Lindsay submitted that there was an imperative requirement to notify the parties about the availability of mediation in terms of regulation 7. In failing to do so, the panel left the landlord in ignorance of its investigation and deprived him of any opportunity to put a case for abandonment of the application to the panel President. He stated that he did not believe the regulations authorised the President to make a unilateral decision with regard to mediation without notifying the parties of her decision, even if she considered she was fully justified in

deeming mediation unsuitable. He stated that he had made efforts to conciliate the matter, and that the Panel's failure to alert the landlord to the application was contrary to regulation 7, which had it been complied with would have allowed the landlord to make representations that the matter should not be referred to a committee.

68. The committee notes that regulation 7 does require the Panel Secretary to bring to the parties' attention the availability of mediation. It appears to the committee that it was brought to the attention of the tenant by means of the question on the panel's application form, which asked the tenant whether she would agree to attend mediation to resolve the issue, and also made reference to the panel's leaflet about the mediation process. The use of the term 'parties' implies, however, that the availability of mediation should also be brought to the attention of the landlord.

69. The committee notes, however, that regulation 7 does not specify *when* or at what stage of the proceedings mediation should be bought to the attention of the parties. While it might be assumed that this would best be done before an application is referred to a committee, this is not stated to be a requirement. It might therefore be inferred that the parties could be made aware of the availability of mediation at any stage of the proceedings.

70. While it might therefore have been possible to offer mediation to the parties in this case following referral to a committee, it became apparent shortly after referral that the tenant had left the property. Mediation requires both parties to take part, and mediation would not therefore have been possible in this case. While it is arguable, therefore, that the landlord should have been made aware of the availability of mediation at an earlier stage, even if this is correct, it would have made little difference to the outcome of the case, or to the committee's decision to continue to determine the case.

71. It appears from his submissions that Mr Lindsay's primary concern here was that he felt that had the landlord been made aware of the application at an earlier stage, he would have been able to make representations to the President that it should be abandoned, and not referred to a committee. He argued that the process should be procedurally fair and that it was a matter of natural justice that the landlord should have been given an opportunity to prevent the application reaching referral stage by putting forward submissions to the President. As noted above, in relation to the first jurisdictional point, however, there is no requirement on the panel to notify the landlord that an application has been made by the tenant until the application has been referred to a committee for determination, and a date for submitting written representations is fixed, in terms of Schedule 2 Paragraph 1.

72. The committee therefore determines that while regulation 7 requires that both parties are made aware of the availability of mediation, the tenant was made aware of this. While the landlord should have been made aware of this, regulation 7 does not specify *when* this should have happened. In any case, mediation would not have been possible once the tenant left the property, and the fact that the landlord was not made aware of this at an earlier stage had no bearing on the committee's decision to continue to determine the application. Moreover, it is not stated anywhere in either the Act or the regulations that the parties must be made aware of the availability of mediation as a condition precedent to either the referral of an application to a committee, or the continuation of an application by that committee, as suggested by Mr Lindsay.

Summary of decision

73. For the reasons set out above, the committee determines that it has jurisdiction to determine the substantive issues before it i.e. whether the property meets the repairing standard as set out in Section 13 of the Act, and whether the landlord has complied with the duty imposed on him by section 14 (1) (b).

2. Compliance by the landlord with the section 14 (1) (b) duty

74. The matter to be determined by the committee, in terms of section 22 (1) of the Act, was whether the landlord had complied with his duty under section 14 (1) (b) to ensure that the house met the repairing standard at all times during the tenancy. While the lease between the parties provided that the tenancy was to run until at least 31 March 2018, the tenant had moved out of the property on or around 30 March 2015, and the tenancy had been terminated as at that date.

75. In his written submissions of 13 July, Mr Lindsay stated that:
   i. Insofar as repairs were required following notification by the tenant, these were dealt with properly and within a reasonable timeframe
   ii. Insofar as repairs needed to be done to the property to meet the repairing standard, these have been done.
   iii. The property does meet the repairing standard taking into account the repairs promptly done and the criteria in section 13 (3) of the Act.

76. As outlined earlier in this decision, the committee was only able to consider the complaints which the tenant had notified to the landlord, in terms of sections 14 (3) and 22 (3) of the Act. On 22 January 2015, the tenant wrote to Mr Lindsay by email notifying him that the house was not wind and watertight; that there was damp and condensation; that there was mould growth in all bedrooms and the kitchen, and that a bedroom ceiling had collapsed. Despite being asked by the panel to provide evidence that she had notified the landlord of the other issues contained in her application, the tenant did not do so.

The property is not 'wind and watertight'

77. Mr Lindsay pointed out in his submissions that the tenant's complaint on this matter was very general and lacked specificity, which in a large house with fourteen rooms made it difficult for the landlord to identify what in particular was being complained about, and consequently what required to be done to remedy this. He pointed to an email which he had sent in response to the tenant's email of 22 January the following day, asking her to be more specific about this. There was no evidence before the committee of any response from the tenant on this point.

78. Mr Lindsay told the committee that he did not see how he could have done more than he had done, and that he had dealt with the tenant's concerns promptly. The committee accepted his evidence that he had taken action promptly in response to the tenant's email of 22 January. He had contacted Alex Tickell, a local builder, within a week of receiving the tenant's email, and Mr Tickell had gone to inspect the property shortly afterwards. On 1 February, he sent an email to Mr Lindsay, stating that there were several issues which required attention at the property within the short term, primarily water ingress through the roof in several areas. He also noted that a large room at the end of the house was very cold, and suggested that it would benefit from the installation of a wood burning stove and flue liner. He sent an estimate for the roof repairs on 3 February, and Mr Lindsay had asked him to proceed with these immediately. There was a delay in starting the work, due to the need to order materials and poor weather, but the works began while the tenant was still at the property, and were completed at around the time she moved out. Mr Tickell's invoice for the work was dated 28 March 2015. An email from Mr Tickell dated 12 June submitted to the committee by Mr Lindsay confirmed that the house was now wind and watertight, and had been since 17 March 2015.

79. It was clear from Mr Lindsay's written representations and his oral evidence to the committee that he believed that, as a result of the roof repairs which had been carried out, the property was now wind and watertight. His position was that he had carried out the work required within a reasonable time of being notified by the tenant that it was required, and that he had therefore complied with his section 14 (1) (b) duty, in terms of section 14 (4) of the Act.

80. The committee notes that, as at the time of its inspection, the property was not wind and watertight, as discussed further in its observations below. It accepts the landlord's argument, however, that the notification provided by the tenant was lacking in specification as to what her complaints in this respect related to. It also accepts, on the basis of the evidence before it, that Mr Lindsay took prompt action to deal with the matter, instructing roof repairs and having these carried

out within a reasonable time. It does not therefore include any actions in this regard within its repairing standard enforcement order.

The collapsed ceiling

81. With regard to the plaster fall in one of the bedrooms, the committee noted at its inspection that the ceiling had been repaired (see photograph 4). Mr Lindsay's position was that this was a matter of internal repair and maintenance, which was for the tenants in terms of the lease, but he had agreed to repair it despite this. He stated that he had been advised by the insurer that the collapse was not related to an external issue which was the landlord's responsibility. He had also had advice from the builder who carried out the work that the ceiling was dry at the time he inspected it, although he had said that he could not exclude leakage at some other date as a possible cause.

82. The committee's surveyor member was of the opinion, based on his many years of professional experience, that such plaster falls are almost exclusively the result of water penetration. This suggests that at the time the ceiling fell, the property was not wind and watertight. However, the cause of this may have been addressed by the roof repairs which had subsequently been carried out, and in any case, the ceiling had been repaired. The committee is therefore satisfied that the ceiling in question is now in a reasonable state of repair and proper working order.

Damp, condensation and mould growth

83. Mr Lindsay did not dispute that there had been mould and damp present in the property during the time the tenant was living there. His primary argument with regard to this complaint was that any damp and mildew within the property was the result of the tenant's failure to keep the property adequately and consistently heated. He told the committee that in his view, there were no fundamental defects with the property, provided that it was treated well and maintained.

84. Mr Lindsay told the committee that internal repairs and maintenance were not the landlord's responsibility in terms of the lease, which placed the responsibility for these onto the tenant. The terms of clauses 6 and 12 of the lease are set out earlier in this decision as findings of fact. Among other things, these required the tenants to ascertain the cause of and rectify dampness in the walls or ceilings of the property, and to adequately heat the subjects.

85. Mr Lindsay pointed to Section 16(1) of the 2006 Act, which states that the landlord's duty under section 14 (1) (b) does not require any work to be carried out which (a) the tenant is required by the terms of the tenancy to carry out or (b)

the tenant is liable by virtue of the tenant's duty to use the house in a proper manner. He therefore argued that, given 1) the terms of the lease, and 2) that the lease was for a period of more than three years, which was a pre-requisite in terms of section 16 (2) for section 16(1) to apply, the landlord did not have responsibility for internal maintenance and repairs.

86. At the hearing, the committee chairperson noted that Section 16 (2) provides that the exception to the repairing standard duty under section 16 (1) applies only if the tenancy concerned is:
    a) for a period of not less than 3 years, and
    a) not determinable at the option of either party within 3 years of the start of the tenancy.

87. She asked Mr Lindsay whether he considered that the lease met the criteria in section 16 (1) (b). While the lease was clearly for a period of more than 3 years, there was a question as to whether the lease was determinable at the option of either party within 3 years of the start of the tenancy. He told the committee that he was unsure as to whether section 16 (1) (a) or 16 (1) (b) was applicable here.

88. The chairperson suggested to Mr Lindsay that, while the lease was clearly for a period of more than 3 years, it was determinable at the option of the landlord within 3 years of the start of the tenancy, as (a) it was a short assured tenancy and was therefore capable of being terminated by the landlord on the usual statutory grounds which applied under Schedule 5 of the Housing (Scotland) Act 1988 and (b) Clause 21 of the lease provided that the landlord may serve a notice to quit on the tenant '*to terminate the tenancy where you have broken or not performed any of your obligations under this agreement*'. It appeared to the committee that Mr Lindsay had not previously considered whether the criteria in section 16(2) (b) had been met. He said that, in his view, the phrase 'at the option of either party' required the contract itself to make provision for termination, rather than termination being available as a result of the operation of the general law.

89. The committee does not agree with the interpretation of section 16(2) suggested by Mr Lindsay. The Oxford English online dictionary defines 'determinable' in these circumstances as *'capable of being brought to an end under certain conditions'*. It was clear that this was the case here, as it could be brought to an end by the landlord if any of the grounds under the 1988 Act applied. In any case, the lease agreement itself provided for early termination on the breach of any of the tenant's obligations under the lease. The same dictionary defines 'option' as *'the 'freedom or right to choose something'*. In both cases, the landlord would have the right to choose to serve a notice to quit and if necessary raise court proceedings against the tenant, and equally he could choose not to do so.

90. The committee notes that there is reference in the lease and in some of the correspondence to the landlord having 'contracted out' of the repairing standard, and further notes that contracting out of the section 14(1) duty is prohibited by section 17 of the Act, and is only permissible with the consent of the sheriff, in terms of section 18 of the Act. No evidence was presented to the committee that an order in terms of section 18 had been sought or obtained from the sheriff, so the committee therefore infers that this is a reference to section 16. The committee therefore determines that the exception to the landlord's repairing duty under section 16 (1) (a) does not apply in this case.

91. The committee then considered whether there was an exception to the landlord's repairing duty in terms of section 16 (1) (b), because the work to be carried out was the responsibility of the tenant, by virtue of her duty to use the house in a proper manner. It was Mr Lindsay's position that the dampness within the property was the result of the tenant's failure to keep the property adequately heated. He said that he accepted that there was a significant cost involved in keeping the property heated, but that the tenants had been made aware of this when they moved in. He said that the tenants had not consistently had the electric heating on, and that they had not kept the wood burner replenished. He cited an email of 1 February from Mr Tickell, which stated that condensation was present throughout the house, the heating system was not being used to its full capacity due to the expense involved, and that many of the heaters had been switched off. Mr Tickell had also confirmed in an email of 12 June to Mr Lindsay that he had advised the tenants that the condensation and mildew were in all probability due to inadequate heating by them. Mr Lindsay stated that the tenants had not acknowledged this.

92. He told the committee that he had spent a considerable amount of time in the house when he was growing up, and there had been no problems with dampness then. There had been several previous tenants in the property since 1981, and there had no dampness problems during those tenancies.

93. Mr Michler told the committee in his oral evidence that he and his wife had lived at the property from September 2012 until September 2013, and that there had been no problems with damp or wetness during that time. He said that when they left the property in September 2013, all rooms within the property were watertight, and that there was no mildew, mould or dampness anywhere. He did, however, concede that there had been 'some spots' in the 'washing room'. He said that he had explained to the incoming tenants that the house required ongoing maintenance and repair, and that it needed to be adequately heated. He told the committee that in September 2014, he had visited the property, and that he had looked in all rooms, and saw no signs of wetness or damp.

94. The tenant had stated in her application form that the wood burner was not working properly, but Mr Michler told the committee that he had installed the wood burner during his tenancy, that it had been functioning correctly, and he had shown Mr Menzies how to use it. Mr Lindsay said that, following the receipt of the tenant's email of 22 January, he had invited the tenants to talk to Mr Michler about how to use the wood burner, and there were several emails before the committee from February and March 2015 which indicated that Mr Michler had tried to contact Mr Menzies about this. Mr Michler said that when he had visited the property in June 2015 while on holiday, the woodburner was in perfect condition.

95. Mr Lindsay again told the committee that the tenant had not been sufficiently specific in her notification of the dampness issue, and that it was therefore difficult for him to remedy the problem, given his lack of professional knowledge. He also stated that the tenant had not asked him to repair the dampness. The committee notes that, among the correspondence submitted by Mr Lindsay was an email sent to him by the tenant of 23 February, which said that the problem was not just one of mildew, but mould of varying types and degrees. She said that the walls were so wet from penetration and rising damp that they were contributing to the condensation which in turn contributed to the mould. She said she did keep the heating on, but had been advised by a builder that this could exacerbate the problem be causing the damp on the walls to turn to condensation.

96. The committee did not accept Mr Lindsay's arguments that the tenant had not been sufficiently specific in her notification of the dampness issues. In her email of 22 January, she had stated that there was damp and condensation; and that there was mould growth in all bedrooms and the kitchen. It should have been self-evident from the email correspondence that the tenant was asking for the dampness to be addressed. The tenant had also provided further detail on the problems in her email of 23 February, and Mr Lindsay had also been made aware of the problems by an environmental health officer from Argyll and Bute Council, who had sent him an email regarding the dampness problem on 16 February.

97. The committee takes the view that Mr Lindsay had made the assumption that the dampness referred to was a direct result of the tenant's failure to adequately heat the property, and that any necessary maintenance and repairs were an internal matter, which was the tenant's responsibility. In his email to the tenant of 11 February, he said that he was not responsible for any such repairs in terms of the lease, and that it was the tenant's responsibility to ascertain the cause of any wetness and dampness.

98. While the committee accepts that the tenant had a responsibility to keep the property adequately heated, the landlord also had a responsibility to ensure that the property was wind and watertight and in all other respects reasonably fit for habitation. At the time of its inspection, the committee found significant evidence of rising and penetrating dampness and mould growth. The property clearly suffers from extensive dampness when it is empty, which indicates that there is an ongoing and fundamental damp problem.

99. The committee is of the view, based on the expert opinion of its surveyor member, that the ultimate cause of any mildew, dampness and mould inside the property during the tenant's tenancy was almost certainly a result of dampness that had already penetrated the fabric of the building. While heating the property can allay the effects of this, the evidence from the committee's inspection suggests that moisture had already penetrated the fabric of the building before the tenants moved in to the property.

100. It was clear from the committee's inspection that the property did not meet the repairing standard as at the date of inspection. While the committee does not make a finding that the property is not wind and watertight for the reasons outlined above, it does determine that it is not in all other respects reasonably fit for human habitation, due to the extensive dampness. The committee's inspection was, however carried out more than 5 months after the tenant had moved out, and the landlord's duty under section 14 (1) (b) is to ensure that the house meets the repairing standard '*at all times during the tenancy*'.

101. The committee takes the view that there is adequate evidence before it to support a conclusion that the house did not meet the repairing standard during the tenancy. In addition to the tenant's application and correspondence with Mr Lindsay, there was before the committee an email sent to Mr Lindsay on 16 February 2015 by Mark Parry, an environmental health officer at Argyll and Bute Council, which was during the time when the tenant was at the property. In the email, Mr Parry stated that he had visited the property the previous week, and that he could confirm that the property was cold, mouldy and not wind/watertight, that the ceiling had fallen in a number of areas and that there were several areas which leak during rain. He stated that he was of the opinion that the property met neither the tolerable standard nor the repairing standard for housing.

102. Finally, it is the professional opinion of the surveyor member of the committee that the damp issues would have pre-dated the tenant moving into the property. The committee therefore determines on the basis of the evidence before it, that on the balance of probabilities, the property did not meet the repairing standard at all times during the tenancy.

103. The final point to be considered by the committee was whether the property met the repairing standard in light of section 13 (3) of the Act, as submitted by Mr Lindsay. This states that in determining whether a house meets the standard of repair mentioned in subsection 1(b), regard is to be had to:

a) The age, character and prospective life of the house; and
b) The locality in which the house is situated.

104. The committee does not consider that the levels of damp within the property can ever be acceptable, regardless of the age and character of the house. In any case, the committee notes that the criteria in section 13 (3) are only applicable in relation to section 13 (1) (b), which relates to the structure and exterior of the house. The committee's finding that the property does not meet the repairing standard is under section 13 (1) (a), namely that the house is not wind and watertight and in all other respects reasonably fit for human habitation.

105. The committee has considerable sympathy for Mr Lindsay and for the landlord, given the situation they now find themselves in. Firstly, it seemed that the tenant had financial difficulties, and was therefore unable to heat the property adequately, having left significant heating and other bills behind. She had also wrongly suggested that the landlord was not registered, and that she had not been provided with a tenant information pack. These were not, however, matters for the committee to deal with. It was also clear from the correspondence that Mr Lindsay was keen for the tenants to remain in the property, and wished to try to come to a resolution with them. It was equally clear that he cares about the long term future of the property, which has been in his family for over seventy years. He has spent a considerable amount of money on repairs to the property in recent years.

106. Secondly, Mr Lindsay has been overseas for many years, and is based in Australia. He has therefore been heavily reliant on other people on the other side of the world to advise him, and to maintain and carry out repairs to the property. The committee noted that it would have expected the letting agent, which was a firm of surveyors - to give advice to Mr Lindsay on the state of repair at the start of the tenancy. Mr Lindsay told the committee that the agent did go to the property before the tenancy, and made suggestions for work to be done, which was carried out. The committee is surprised that the dampness, which would have been present at that time, was not picked up by the letting agent at that point. Mr Lindsay had hoped to call a representative of the letting agent as a witness at the hearing, but she was unable to attend as she was on holiday. Mr Lindsay did indicate, however, that she had confirmed that in the agent's view, the property met the repairing standard at that time. He also appeared to rely heavily on the advice of Mr Michler and Mr Tickell, neither of whom are building surveyors.

107. Unfortunately, however, it appears that a lack of maintenance over many years has resulted in the present widespread dampness problem within the property, It appears to the committee that Mr Lindsay was so focused on organising the repairs, and on his belief that internal maintenance and repairs was the tenant's responsibility, that he had not addressed the dampness issue. Ultimately, however, if a landlord lets out a property, it is the landlord's responsibility to ensure that the property meets the repairing standard, unless the requirements of sections 16 and/or 18 are met.

108. As things stand, the property is not reasonably fit for human habitation. While the property is currently on the market, there is no guarantee that it would be sold, and even if it were to be sold, there is nothing to stop any new owner from letting it out again. The committee therefore had an obligation to ensure that the property meets the repairing standard, in order to ensure that any potential future tenants are protected. Mr Lindsay told the committee that he was currently considering letting the property out on a short/ holiday letting basis. While the law is not entirely clear, the committee considers that there is an argument that the repairing standard duty applies to holiday lettings.

109. In terms of section 14(1) of the Act, the repairing standard duty applies to a landlord in a tenancy, and the definition of a tenancy in section 194 excludes any occupation under an occupancy agreement. An 'occupancy agreement' is defined in section 194 as 'an arrangement other than a lease under which a person is entitled, by way of contract or otherwise, to occupy any land or premises'. While a short term holiday let could be seen to be an occupancy agreement, however, 'holiday lettings' are referred to in Schedule 4 of the Housing (Scotland) Act 1988 as 'a tenancy the purpose of which is to confer on the tenant the right to occupy the house for a holiday.' It could therefore be argued that a holiday let is a tenancy to which the repairing standard applies. In any case, whether or not the repairing standard applies to holiday lets, the committee is obliged to issue a repairing standard enforcement order in terms of section 24 (2) of the Act where it considers that the landlord has failed to comply with the duty under section 14 (1) (b).

Observations

110. The committee observes that, while it can only issue a repairing standard enforcement order in relation to issues which were adequately notified by the tenant, on the basis of its inspection, the property does not currently meet the repairing standard in various respects. In particular:

- The electrical installation does not conform with the current building regulations

- There is no adequate smoke alarm system
- The rear ground floor bathroom is uninhabitable and does not meet the tolerable standard – ***see photograph 8***.
- The single skin timber frame ground floor bathroom outshoot is not wind and watertight – ***see photograph 9***
- The roof element of the property has numerous loose, missing and broken slates;
- Defective apron flashings noted – ***see photograph 10***;
- Repair rusted, leaking, cracked, broken and missing gutters and downpipes – ***see photograph 11***;
- Weathered/rotted timbers to windows noted at various locations thereby making the property susceptible to drafts and not in a wind and watertight condition – ***see photographs 12 & 13***.

Summary of decision

111. The committee determines that the landlord has failed to comply with the duty imposed by Section 14 (1) (b) of the Act, and in particular that the landlord has failed to ensure that the house met the repairing standard at all times during the tenancy in that the property is not wind and watertight and in all other respects reasonably fit for human habitation.

112. Where a private rented housing committee decides that a landlord has failed to comply with the duty under section 14 (1) (b), it must issue a Repairing Standard Enforcement Order, in terms of section 24 (2) of the Act. The committee therefore makes a Repairing Standard Enforcement Order as required by section 24 (2) of the Act. Given the nature of the repairs to be carried out, and the likely costs involved, the committee considers that it is reasonable to allow an extended period for the repairs to be done.

Rights of Appeal

113. A landlord or tenant aggrieved by the decision of the committee may appeal to the sheriff by summary application within 21 days of being notified of that decision. The appropriate respondent in such appeal proceedings is the other party to the proceedings and not the panel or the committee which made the decision.

Effects of Section 63 of the 2006 Act

114. Where such an appeal is made, the effect of the decision and of any Order made in consequence of it is suspended until the appeal is abandoned or finally determined. Where the appeal is abandoned or finally determined by confirming the decision, the decision and the Order made in consequence of it are to be

treated as having effect from the day on which the appeal is abandoned or so determined.

S O'NEILL

Signed...Date 17/11/15

Sarah O'Neill, Chairperson

Schedule of photographs taken during the inspection of Ardchyline House, St Catherines by the Private Rented Housing Committee on 14 September 2015

PRHP/RP/15/0079

Front elevation

Side elevation

PHOTO SCHEDULE *(Internal)*

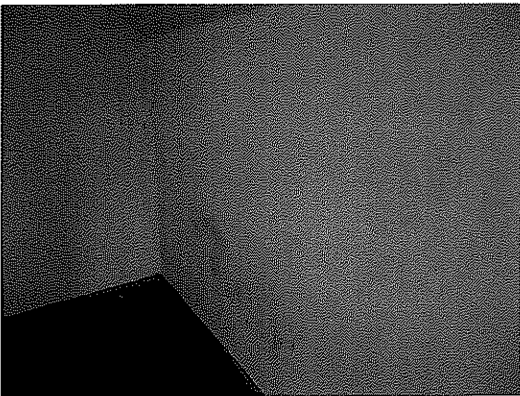

Photo 3

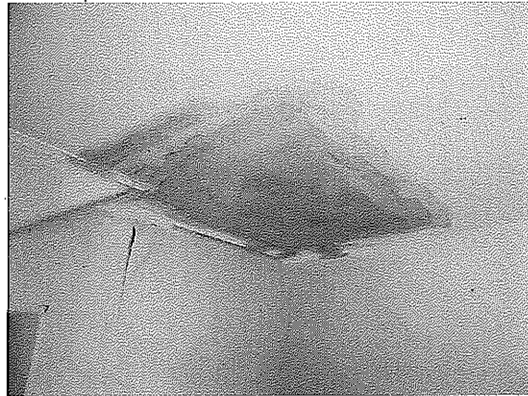

Photo 4

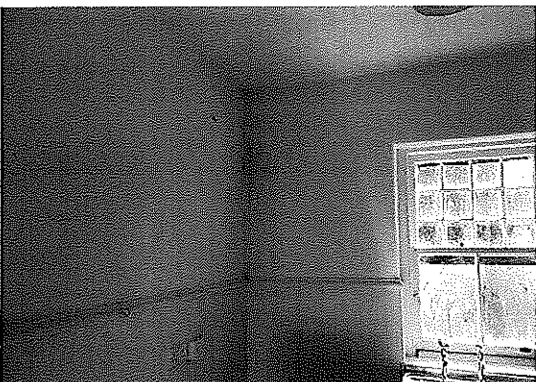

Photo 5

Photo 6

Photo 7

Photo 8

PHOTO SCHEDULE *(External)*

Photo 9

Photo 10

Photo 11

Photo 12

Photo 13