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

Chamber Ref: FTS/HPC/CV/22/0477

Re: Property at 3/20 149 Ingram Street, Merchant City, Glasgow, G1 1DW ("the Property")

Parties:

Kay McIntyre Vassilopoulou, 42 Thetidos, Dionysos, Athens 145 76, Greece ("the Applicant")

Joshua Murray, 3/20 149 Ingram Street, Merchant City, Glasgow, G1 1DW ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member) and Frances Wood (Ordinary Member)

Decision

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

Background

1) This was an application by the Applicant for civil proceedings in relation to a private residential tenancy in terms of rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended ("the Rules"), namely an order for payment of rent arrears. The tenancy in question is a Private Residential Tenancy of the Property by the Applicant to the Respondent commencing on 15 November 2019.

2) The application was dated 18 February 2022 and lodged with the Tribunal on that date. The application sought payment of arrears of £3,060 but was amended twice during the application process and on the second day of the Hearing we granted an unopposed motion to amend the sum sought to £11,150. This motion was accompanied by an updated rent statement and, along with an historic rent

statement lodged with the application, we were aware that arrears first arose in April 2020 (that is, after the start of the pandemic). A material payment of arrears on 28 September 2021 left a balance of £300 after which arrears increased again. There had been no payments made in rent from 1 February to 1 November 2022. The lease for the tenancy accompanied the application and detailed a rental payment of £900 payable in advance on the 1st of each month.

3) The application was conjoined with an eviction application based on unpaid arrears (Ground 12) under reference EV/22/0476. We heard the two applications together throughout, and this concluded with two days of evidence and submissions at a Hearing heard on 31 August and 23 November 2022. The defence to the eviction application related to issues of whether the Notice to Leave was properly served, and whether the underlying rent was due (or whether an abatement for rent was appropriate). We shall address all issues regarding rent in the decision to this application and our decision in EV/22/0476 shall consider the defence on service of the Notice to Leave only, adopting this decision when considering what rent is due.

4) The defence on rent was that the Property had not been properly maintained within a reasonable time and accordingly an abatement on rent was appropriate. In his submissions, the Respondent's agent gave a range of possible abatements (in respect of two periods in the lease) but at the lowest range they resulted in arrears – once credit was given for rent already paid – of less than one month of arrears. At the highest range, sums were due back to the Respondent though no application was lodged by the Respondent seeking such a payment.

5) The issues with repair can be summarised as follows:
   a) From the date of entry, a sliding door leading to a balcony at the Property had failed to close properly, letting in wind and resulting in the Property being unpleasantly cold (and sometimes too cold to reside in). This further resulted in excessive heating costs. It was accepted by the Applicant that a number of contractors had sought to fix the problem, and that there was a locking pin broken on the door. Due to the unusual design of the door, no replacement part had yet been sourced and it was unlikely to be sourced, but the Applicant's position was that the door closed and it was not letting in wind.
   b) There was a problem regarding the washing machine not working for some months, and not yet having been repaired. The parties blamed each other for the failure to have contractors attend (the Respondent saying the engineer sent was unreliable and did not turn up when promised, and the Applicant saying that the Respondent had failed to give access).
   c) There had been a leak from the Property into the downstairs commercial property which, after significant investigation, had been dealt with but the process of doing so had caused disruption to the Respondent in providing access for investigations, periods without water supply, and remaining cosmetic damage to areas that had been opened up and not yet redecorated. These areas of cosmetic damage were in the upstairs bathroom and bedroom. The Applicant's position on this was, again, that the Respondent did not cooperate with inspections and access.

d) Whether or not connected to the previous point, the cistern in the upstairs bathroom toilet was no longer filling up and the Respondent had ceased to use that toilet, but had not separately reported it as an issue.

6) We have issued detailed Notes in regard to both days of the Hearing, due to various motions for late lodging and on scheduling of witnesses. We do not repeat the content of them here, though some of what is recorded within them is relevant in regard to the expenses motion made by the Applicant. In matters of doubt as to the background of procedural matters, we would refer parties to our Notes on those Hearings.

The Hearing

7) The matter called for a Hearing of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote videoconference by Webex on 31 August and 23 November 2022, both days starting at 10:00. Parties were represented throughout the days of the Hearing by Alexandra Wooley, trainee solicitor, Ballantyne Kirkwood & France, for the Applicant and Jack Smith, solicitor, Latta & Co, for the Respondent.

8) We heard the Applicant's three witnesses on 31 August and the Respondent's two witnesses and both parties' submissions on 23 November 2022. All witnesses had witness statements lodged which were adopted as their examination-in-chief. The majority of oral evidence heard was either in response to questions from ourselves, or in cross-examination.

Rory Cowan

9) Mr Cowan was the solicitor who served the Notice to Leave and his evidence related solely to the defence to EV/22/0476 and shall be reviewed there.

Lee Cunningham

10) Mr Cunningham is a director of Cairn Building Solutions Ltd ("CBS") and was a joiner for over twenty years before becoming a director of CBS. He regarded himself as having "a fair knowledge of door systems" from his years of working as a building contractor. He described attending the Property with CBS's operation manager Harry Mills on 10 November 2020. He said he detected no obvious temperature differential between the hallway and the living area where the balcony door was. He recalled the day was dry but did not otherwise recall the weather conditions or external temperature.

11) He identified photographs that he had taken (which were lodged by the Applicant). He said that the "specific style of the balcony door is rare" and he could recall only seeing one other like it in his career, which was a door at "the Clydeside" where water was coming in along the track. He described the unusual design whereby when the door was opened it slid into the living room and then could be slid rightwards along a track. When closed, the door panel was flush with the neighbouring glass window panel.

12) He said that he and Mr Mills tested the “motion of the door by sliding it along the runners several times” and that it “slid cleanly and we did not see anything wrong with the runners”. He described testing the lock mechanism and that the “upper and handle locks were operated correctly and securely held the door to the door frame when closed” but that the “bottom lock was malfunctioning as the lock pin would not be thrown outwards when the handle was place in the ‘locked’ position”. He recalled that the door “operated smoothly but when you closed it you could tell something was wrong with the locking, as you could tell that the compression of the door was not fully correct from the drawing of the handle”. He said that the key still turned to lock the door, meaning that it was locking securely.

13) When the door was opened he could see that the bottom locking pin was bent and not in the correct position. He said that looking at the door, when closed, he was not able to tell that that was a defect.

14) He said that Mr Mills stepped onto the balcony and had the door closed behind him. Mr Mills then “leant heavily on the bottom corner of the door” where the defective locking pin was and Mr Cunningham could see “the door… could be pushed slightly inwards”. He described this as “some flex” but gave evidence that he did not consider “this to be a serious fault because the door was still wind and watertight and this would not affect anyone’s ability to use the Property fully”.

15) He described the door as having a slight gap around the edge where there was a rubber gasket as a draught proofing. There were gaskets around both the inside and outside edges (and visible on the photographs lodged).

16) He gave evidence that a repair would require a new bottom lock and that attempts were made to source this but this was unsuccessful, particularly due to a supplier ceasing to trade (and them not knowing who else could source such a specific part). CBS informed the Applicant’s letting agent of this in early 2021.

17) He believed that the doors would withstand a lot of rain and that he saw no evidence of rain or water ingress. He did think that in severe wind and driving rain, there could be some limited wind and water ingress at the bottom of the door.

18) He was asked questions about alternative remedies to the door, or using additional draught excluders. He was non-committal but did not rule out that some other remedies may be partly successful in eliminating the wind or water ingress that he felt could occur in inclement weather. He thought an additional rubber gasket on the closing edge of the door may be effective but may look unsightly.

Andrew Pace

19) Mr Pace is a Property Manager of Goodearl Property Management Ltd, the Applicant's letting agent and property managers. He gave evidence in regard to a discussion with the Respondent after the Notice to Leave was issued and that evidence, relevant to the defence to EV/22/0476, shall be reviewed there.

20) In regard to the matters relating to the rent and the abatement sought, he gave evidence that he received an email from the Respondent on 15 November 2019 that the "balcony door was stiff". He contacted contractors that day, and a visit arranged but the first contractors failed to fix it. He gave evidence about two further contractors visiting, over a period of time (interrupted by the pandemic). The further two contractors were not able to fix the door without a specific part, and their attempts to source it were unsuccessful. The second of these contractors was Cairn Building Solutions ("CBS") and Lee Cunningham of CBS visited on 5 November 2020. He said that his colleague Andrew Stewart principally dealt with CBS.

21) After the visit by CBS, he knew of steps by CBS contractor to seek to source the part and he believed, from conversations he had had with Mr Stewart, that by March 2021 the door was fixed. Mr Pace said that he had been in correspondence with the Respondent through until March 2021 but heard nothing from him afterwards until the matter was raised again in June 2022.

22) After the application was defended, partly on the basis that the door was not fixed, Mr Pace said that he sought information from Mr Cunningham and thus found out that the part for the door had not actually been sourced and replaced. In the email from Mr Cunningham (which was lodged), Mr Cunningham told him that he thought the defect was an "inconvenience" and the Property was habitable even though the defect was not resolved. Mr Pace gave evidence that he trusted Mr Cunningham's view and was satisfied that the Property was wind and water-tight. (Our understanding was that Mr Pace had not himself inspected the sliding door.) He further referred to the detailed Inventory for the Property prior to letting to the Respondent (which was lodged). This stated that the sliding door was in working order when it was first let to the Respondent.

23) In regard to the leak into the common parts, Mr Pace gave evidence that the Respondent made them aware of a leak in or around July 2021 and that he sent out their usual plumber. He described access difficulties in regard to the plumber obtaining access from the Respondent. He was further made aware of a leak into the common parts by the building's factors on 10 February 2022. The Respondent also emailed about a leak and a problem with the washing machine in March 2022. He was then told by his plumber that the leak and the washing machine issues were unrelated. He gave evidence on various visits being set up with their plumber and then the factor's plumber and being informed by the factors on 16 June 2022 that matters were resolved.

24) He instructed an appliance engineer on 6 May 2022 to visit. He was told by the engineer that a visit was planned for 9 May 2022 but the Respondent was not in,

and the engineer arranged a further date of 16 May 2022 but again the Respondent was not in. He was told that 30 May 2022 was then agreed and the engineer told Mr Pace that he called to confirm this a couple of days in advance but, on not receiving a response, chose not to attend on 30 May 2022.

25) He said that he had not had contact with the Respondent since and had raised an application to the Tribunal to obtain access to the Property. He also described earlier attempts to have the Respondent complete self-inspection documentation (such as in September 2020) and him failing to do so.

26) In regard to payment of the rent, Mr Pace described a period of default in payment, during which the Respondent gave updates on his financial position and offers of payment. Payments were made sporadically, including a large payment in September 2021. Mr Pace did not recall any comment by the Respondent that non-payment was an attempt to retain rent, until the raising of the action. He referred to retention being mentioned (relating to the balcony door) in February 2020, but the rent was not then retained that month or the month after.

The Respondent

27) The Respondent gave evidence in regard to service of the Notice to Leave relating to the defence to EV/22/0476 and that evidence shall be reviewed there.

28) In regard to the matters relating to the rent and the abatement sought, he gave evidence that the sliding door "does not close properly at the bottom" and that it is "not secured and it blows open". On this, he said that "countless times" the door was blown inwards from a closed position to a partially open one (though the wind did not force it to then slide to the right). He said that this meant the wind was pushing the door out of a closed position by 3 to 4 cm (ie the width of the door). He said that the wind has "damaged things in the property" and "even when it is just a breeze, you can feel it coming in through the gap in the door". He lodged a photograph of the top of his finger inside the inside edge of the door. When asked whether this was simply him compressing the rubber gasket to push his finger into the gap, he disputed this and insisted that there was gap in the door that he should not be able to fit his fingertip into. He confirmed that he had not attempted to fit any additional draught excluder but had at times wedged a kitchen roll in the gap and pushed the sofa against it to keep it in place which had some effect.

29) Regarding the detriment suffered from this, he said that the Property "is always very cold and costs a fortune to heat because of this". He had lodged his own electricity bills (as the Property is electric heating only) for periods November 2019 to March 2020; March to July 2020; July to November 2020; and November 2021 to March 2022. We noted monthly costs in these three periods ranged from £39.83 to £44.06 (November 2019 to March 2020); £32.14 to £39.66 (to March to July 2020); £32.54 to £41.55 (July to November 2020); and £51.82 to £61.07 (November 2021 to March 2022). He that that he did not know what he should have been paying but it "feels the bills a bit too expensive" for a single person in

a flat of his size. He said that he had tried to obtain neighbour's bills for comparison but not been able to. Under cross-examination, when asked on what he was basing his view that his bills were high, he said "no idea".

30) He described the Property as having a hallway which, if the doors to it were closed, would stay warm. It then opened into an open-plan living area with a large glass wall (in which the sliding door was situated). The living area was double height and from the first level, a walled in spiral staircase led upwards to a mezzanine level which had a hall with two bedrooms off of it. The bedrooms were partially walled and on 1.5 sides there was a low wall over which you could look down into the lower floor living area. Neither of the bedrooms could thus be fully sealed off, and the heat in them was affected by the temperature within the living area.

31) In regard to the relative temperature, he said the "downstairs area of the flat is always freezing even when the heating is on because of this problem with the balcony door" but the "upstairs gets very hot… which makes it very difficult to sleep with the heating on all the time". In response to further questions, the Respondent modified his response to say that the upstairs bedrooms can be very cold but become very hot if the weather changes. He said that the heating system has no thermostat (and so is either on or off), and a number of the radiators did not have thermostatic valves, so that if the heating is on to make the lower area warm, if can become too hot upstairs to where the heat rises. There were thermostatic valves in the "long radiators" in the hallway and living room which he set "to 5" but the living room "doesn't heat up". (We were not shown any photographs of the heating system or radiators.) He was asked if he had taken any thermometer readings of the temperature in the living area and he said he had not.

32) He gave similar evidence to Mr Pace as to multiple visits by contractors to attempt to fix the sliding door. He said he had met "with up to 10 people". He gave a very brief comment about how he tried to find a contractor but was unsuccessful.

33) Due to him finding the Property too cold he said that "it is impossible to live there at times". He estimated he had spent around 8 weeks of the Tenancy thus far living with his mother, in her flat elsewhere in Glasgow, though that required him sleeping on her sofa.

34) Regarding the leak into the common area, he gave similar evidence to Mr Pace as to multiple visits by contractors to seek to fix it, but was very negative about the plumbers sent by the Applicant's letting agent (saying that the factor's plumber had also made such negative comments about the other plumber's work). He described the final state of the Property as: having a crack in the bath panel; damage to the unit covering the toilet cistern; broken skirting; and replastering still required over the hole that had been cut in the bathroom wall. (Photographs were provided showing all of these except the damage to the unit covering the cistern.) He gave evidence that he believed that the Applicant's letting agent was aware of these issues, because he had told the factor's plumber

about it, but he “had no confidence” that “the letting agent’s plumbers would do anything”.

35) He confirmed he had not chased for the decorative issues to be remedied. He said: “I didn’t really want those plumbers [ie the letting agent’s plumbers] to come back”. In explaining why he did not chase further, he answered with a rhetorical question as to why would he chase when the Applicant’s letting agent had taken “two and half years to fix a door”. He said he did not “have confidence in the plumbers and I don’t have confidence in the letting agents either”.

36) In regard to the water being turned off, he said he “can’t put an exact number” on how many times he was without water but it was mostly off for a few hours. He referred to “a few occasions” without water for “15 to 20 hours”.

37) At present, he did not use the bath in the upstairs bathroom, using only a separate shower cubicle there. He accepted that he had not been expressly told not to use the bath. He gave evidence of a problem with the cistern in the upstairs toilet not filling, which he believed was connected to the work to the bathroom to remedy the leak, but that he had never referred that problem to the letting agent. He used the toilet in the downstairs WC.

38) Regarding the washing machine, he said that it did not drain and he gave evidence of the letting agent’s appliance engineer setting a date, and then coming so late that the Respondent had needed to leave. On a further occasion, he set a date and then did not turn up. He said that he did not then seek to set up a further time and “just gave up on getting it fixed”. He said his last contact with the letting agent was in May 2022, and that it was in regard to the washing machine. He did not look into arranging his own contractor for the washing machine and instead chose to drive to his mother’s flat to do his laundry there. He knew of a laundrette near the Property on Candleriggs but had not investigated the costs of using it as he thought it “seems it would be a more expensive route” than going to his mother.

39) He said he was not aware of any application against him to seek access to the Property. He disputed that he had been uncooperative with giving access, citing the number of people he had met regarding the balcony door.

40) Regarding the payment of the rent, he disputed that he was simply unable to afford the rent. He accepted that he had paid rent, without stating he was retaining rent, into 2021 but explained that he did not have legal advice at that time. He said that he was advised to seek legal advice by Govan Law Centre when he had taken advice from them about a rental support scheme. They had recommended that he seek legal advice and that led to him instructing Latta & Co. (implying that he then received advice on retention of rent in regard to seeking an abatement of rent).

41) He gave evidence that he lives alone in the flat. He said that he was “not keen to stay in the flat anymore”.

Alison Connolly

42) Ms Connolly is the Respondent's mother. She gave evidence principally regarding: his staying at her flat; doing his laundry; and her experience of the temperature of the Property.

43) She said that "whenever I've been to the flat it is freezing cold because of the door". She said "it's less of a problem in the summer months but during the winter it is really cold". When asked further on this, she said that she "didn't look at it specifically enough to say where the draught was coming from" but that she "just knows it made the room feel cold" and "it did seem to be colder around the door area" and the living area "never felt warm". She "didn't examine the door" and said that "I've never spent a huge amount of time there, but whenever I was there it seemed draughty and cold". She said that she had never operated the door herself. She was not aware of any thermometer readings taken within the Property.

44) In regard to periods when the Respondent had stayed at her property, she also estimated 8 weeks in total that he had stayed where her. She said that he would "stay with me temporarily as it is unliveable" but accepted that she was relying on the Respondent's word that he had found the flat unliveable at those times. She said that he would sleep on her sofa at those times and sometime he went back because "I need the space", and she thought there would have been times when he returned to the Property and still found it to be cold. She was clear that the Respondent was only staying with her because of the temperature in the Property and, "much as he loves his mum", he was not staying with her for other reasons.

45) In regard to doing laundry at her Property, she found it inconvenient but thought it was likely a cheaper option for him than going to a laundrette. She described him as coming back to drop off the laundry twice a week, with a further two trips to pick it back up. She regarded the visits as purely to do the laundry, as sometimes the Respondent would visit when she was working from home and unable to speak with him when he came by.

46) She confirmed that a sizable payment of rent of £5,500 paid on 28 September 2021 came from her parents, and was made in an attempt to help out the Respondent with sizable arrears that had developed. At the time of the payment, the Respondent had not discussed with her any intention to retain rent and she said he was keen to make payment of rent at that time.

Submissions for the Applicant

47) The Applicant's agent moved for decree in the amended amount of £11,050. In regard to the sum sought, she moved for us to hold her witnesses as both credible and reliable. In regard to the balcony door, she described Mr Cunningham as an expert and that he had found the door to be wind and watertight notwithstanding the broken bottom pin. She referred to Mr

Cunningham giving evidence that the door could be closed without any special manipulation, and that in all the issue was a minor one.

48) She further relied on the Respondent not making any further complaints regarding the door (prior to the raising of the applications) from May 2021 and submitted that the Respondent was not acting in good faith, and the electricity bills provided by him being without any context.

49) Regarding the leak into the common parts and the apparent defect with the washing machine, she referred to the Respondent's admission that he had not chased the Applicant's letting agent on the washing machine recently and submitted that the Respondent could not be troubled by the issue. In regard to the leak, she accepted that the leak from a pipe into the communal areas had needed repaired but that it had been repaired, and all remaining matters were ancillary issues arising from the tenant not providing access. She referred to the Applicant seeking an application for access as it was not being provided. She referred to section 14 of the *Housing (Scotland) Act 2006* regarding the landlord's obligation to ensure the Property reached the repairing standard but that, under s14(4):

> *The landlord complies with the duty imposed by subsection (1)(b) only if any work which requires to be carried out for the purposes of complying with that duty is completed within a reasonable time of the landlord being notified by the tenant, or otherwise becoming aware, that the work is required.*

She submitted that any prolonged issues with repairs arose from the tenant not providing access and not a breach by the Applicant of s14.

50) In anticipation of the Respondent's submissions on abatement, she submitted that a tenant has an obligation to act in good faith and retain funds in anticipation of resolution of issues, just as with a tenant who was seeking to retain. In this case the Respondent never disputed the rent. She said that he had acquiesced through historic payments and referred to *Stewart v Campbell, (1889) 16 R 346* (further referred to in *Renfrew District Council v Gray, 1987 SLT (Sh Ct) 70*) in support of this proposition. *Stewart v Campbell* regarded a one-year agricultural lease that had renewed into a fifth year, and on vacating the tenant sought to avoid payment for the last half-year of rent, on the basis of issues with building not being placed in full repair within the first year. In regard to her authorities, she submitted that the Respondent had paid rent for the majority of the period of the Tenancy, never qualified his payment, and paid on his own volition. As a result, she stated that he cannot retrospectively seek abatement through to the beginning of the tenancy.

51) In any case, the Applicant's agent rejected the scale of the inconvenience and held that any inconvenience was disproportionately increased by his actings.

Submissions for the Respondent

52) The Respondent's agent invited us to dismiss the application due to the substantial and long-standing issues of disrepair. He submitted that there was no dispute that there was an issue with the balcony door that had not been addressed. He said that the door was last inspected on 10 November 2020, which was followed by confirmation that the replacement part was not available. The issue was last raised by the Respondent on 24 March 2021 but his failure to raise it since was within that context.

53) The Respondent's agent invited us to hold that Mr Cunningham's evidence was contradictory as he held the door was fine but also that it could be pushed in, and that it may admit wind and water if there was driving rain and wind. He disputed Mr Cunningham was an expert on this door, as he had spent only a short time inspecting the door and admitted that it was only the second of that design he had ever seen. Further, Mr Cunningham's background was as a joiner. In all, he submitted that the evidence of the Applicant, who lived with the door, should be preferred and that his evidence supported there being a serious issue that effected the enjoyment of the Property.

54) In regard to the leak to the common parts and the washing machine, again he submitted that there was acceptance of both issues. In regard to the toilet, he referred to it having been viewed by the letting agent's plumber, who advised that it not be used. (We did not think that evidence supporting this statement was heard by us.)

55) On abatement, he referred to *Muir v McIntyre and Others, (1887) 14 R 470* in support of the principle, and to an Upper Tribunal decision of *Linden v MacPherson, [2022] UT 05* as an example of it in recent practice. The authorities supported it as operating like a damages claim, but not requiring it to be made as a separate damages claim in advance. He referred to there being a further concept of abatement as being appropriate where there was a loss of beneficial enjoyment.

56) He distinguished *Stewart v Campbell* as in that case no issue had been raised with the disrepair by the tenant prior to the retention, whereby the Respondent had raised the issue of the balcony door from the outset but that it had not been repaired in a reasonable time. He submitted that there was no acquiescence by the Respondent.

57) He identified a three-stage test on considering abatement:
    a) Were there issues of disrepair? He said it was accepted that there were.
    b) What is the impact of them, and is the Respondent barred from taking issue? He submitted there was an impact and the Respondent was not barred.
    c) If there is an impact, and the Respondent is not barred, then what is the appropriate level of abatement?

    In response to our questions, he further accepted that after the first stage, it was appropriate to consider whether the landlord had repaired in a reasonable time

(per s14(4) of the 2006 Act which the Applicant had relied upon) but he submitted that the tests were met in his client's favour and we should consider the appropriate level of abatement.

58) In regard to an appropriate level of abatement, he referred to the 8 weeks that the Respondent had resided elsewhere and that an abatement of 100% was appropriate for this period (so two months' rent totalling £1,800). He referred to *Renfrew DC v Gray* as authority for this (which case referred to a property being uninhabitable due to disrepair and abatement of the rent in full for the period that it was uninhabitable).

59) In regard to the other periods, he referred to two English decisions, *Moorjani v Durban Estates Limited, [2015] EWCA Civ 1252*, and *Earle v Charalambous, [2006] EWCA Civ 1090*. In *Earle v Charalambous*, there was a damages claim that equated to a 50% reduction in rent for a period where a property suffered significant water ingress resulting in a partial collapse of a ceiling. In *Moorjani v Durban Estates*, the tenant chose to live elsewhere albeit the repair issues were "essentially decorative". (We noted that these also arose from water damage, and included warped doors and flooring, and electrical issues.) An abatement of 20% was awarded.

60) The Respondent submitted that the case law supported a 50% abatement for the remaining period (excluding the 8 weeks at 100%)). This meant 34 months of 50% abatement totalling £15,300. Combined with the £1,800 for the 8 weeks of full abatement, this eliminated the outstanding arrears. In the alternative, an abatement of 30% for the 34 months would mean that arrears remained but only of £170.

Interest and expenses

61) There was no interest sought in the application but the Applicant's agent sought 3% per annum as a reasonable amount. The Respondent's agent accepted that as reasonable.

62) The Applicant made a motion for expenses should she be successful. She sought the expenses of the second day of the Hearing (23 November 2022) on the basis that it would not have been required had the Respondent provided his witness statements by the original deadline. She referred generally to multiple delays and Directions (such as the deadline for lodging the statements) not being complied with, but her motion was restricted to seeking expenses of 23 November 2022 on the basis that:
    a) She believed the Hearing would have fully concluded on 31 August 2022 otherwise; and
    b) The Applicant was prejudiced by not seeing the statements prior to her witnesses giving evidence, so were unable to be asked certain questions.

    The Applicant was thus put to the additional expense of preparing supplementary witness statements and making a motion at the commencement of 23 November 2022 for lodging of the statements and recall of the witnesses. (These motions

were refused, and reference is made to the separate Note covering the preliminary matters.)

63) The Applicant relied on a case before this Chamber (in a Letting Agent matter), *Murray v Elliott Estates, FTS/HPC/LA/19/1036*, both in regard to a review of Rule 40 covering expenses, as well as authority for such an award. The decision related to a letting agent materially conceding points at the Hearing which the Tribunal held could have been conceded long before. The Tribunal held that the Hearing, and preparation therefor, could have been avoided had earlier concession been made.

64) In response to the motion for expenses, the Respondent disputed that there was any chance of the Hearing having concluded within 31 August 2022, given that the first day concluded at 15:30, and evidence took more than the morning on 23 November 2022 before submissions were commenced. He held that there was no material prejudice to the Applicant in the late lodging, as the issues said to arise had been dealt with by redaction of a single line of the Respondent's witness statement. As for the lateness, the Respondent had not engaged in "unreasonable behaviour" under Rule 40(1) as the lateness arose due to him suffering from ill-health. (Again, we would refer to the separate Notes for further details on both the redaction and ill-health.) In regard to *Murray v Elliott Estates*, the Respondent submitted it could be distinguished from the current position given that no concessions were made and the Hearing still took place on the disputed law and facts. In any event, the Respondent was in receipt of full legal aid and any expenses award would be subject to modification. (He undertook to lodge the Legal Aid Certificate as evidence of same as it was not before us.)

Findings in Fact

65) On 15 November 2019, the Applicant let the Property to the Respondent under a Private Residential Tenancy with commencement on that date ("the Tenancy").

66) Under the Tenancy, in terms of clause 8, the Respondent was to make payment of £900 per month in rent to the Applicant in advance, being a payment by the 1st of each month to cover the month to follow.

67) There is no contractual provision in the Tenancy Agreement setting the rate of interest to be charged on late payment of rent.

68) As of 1 November 2022, there were unpaid arrears of rent of £11,150 being arrears on irregular payments from 1 April 2020 to 4 January 2022 of £2,150 and unpaid rent for nine months from 1 February to 1 November 2022 of £9,000. The arrears of £11,150 relate to unpaid rent under the lease for the period of the lease to 30 November 2022.

69) The Respondent has made no payment of any part of the said unpaid rent of £11,150.

70) The Property has a sliding door leading from the main open plan living area to a balcony.

71) The sliding door is of unusual design in that the door panel, when closed, sits flush with the windows of the living area. To open, the door slides into the living area and then is slid to the right.

72) The door has a locking mechanism whereby the door is guided and then locked into place using a handle, and the door locks against locking pins at the top and bottom of the door. There are two types of locking pins in both locations, in mirror positions of each other. The round locking pin at the bottom of the door is broken.

73) The edge of the door has rubber gaskets running along the inside and outside edges of the door, to provide additional wind- and water-tightness. The seal gaskets remain in place and functioning.

74) The said round locking pin was broken prior to the commencement of the Tenancy.

75) The Respondent reported a defect with the sliding door shortly after commencement of the Tenancy.

76) The Applicant's letting agent made multiple attempts to obtain a contractor to identify the issue with the sliding door and remedy it.

77) Such attempts to fix and remedy the issue with the sliding door included visits by at least two contractors to the Property, for which the Respondent required to attend with the contractors at the Property.

78) The protracted attempts to fix and remedy the issue with the sliding door resulted in the Respondent communicating with the Applicant's letting agent on multiple occasions seeking updates, through to around March 2021.

79) The sliding door, when properly closed and locked, remains securely locked.

80) If pushed on with force from the outside, the bottom of the door – where the locking pin is broken – will move in slightly but the door remains securely locked.

81) The sliding door, when properly closed, does not admit wind or water in most weather conditions.

82) In high winds and driving rain, some wind and water may come through the edge of the door and around the gaskets at the bottom edge where the locking pin is broken.

83) From in or around Summer 2021, a leak was identified in the common parts of the building in which the Property is situated. The leak was suspected to be coming from within the Property. This resulted in multiple visits to the Property to

identify the source of the leak and seek to remedy it. The leak was remedied in or around June 2022.

84) The attempts to identify the source of the leak and remedy it resulted in at least two set of contractors (being plumbers sent by the Applicant's letting agent and then plumbers sent by the building's factor) being instructed, for which the Respondent required to attend with the contractors at the Property.

85) The work to investigate and remedy the leak resulted in the bath and bath panel in the upper bathroom at the Property being removed and refitted, and a panel being cut in a bedroom wall and then re-covered. This has left minor damage and need for redecoration which has not yet been fully addressed.

86) The work to investigate and remedy the leak further resulted in water to the Property being turned off on a number of occasions, more than once for around fifteen hours and otherwise for around a couple of hours each time.

87) In or around March 2022, the Respondent reported to the Applicant's letting agent that there was an issue with the washing machine at the Property draining. The Applicant's letting agent instructed an appliance engineer to visit but access has not been obtained.

88) The Respondent has not sought to reschedule a visit from the Applicant's appliance engineer since May 2022.

89) The Respondent has not reported to the Applicant any problem with the cistern in the upstairs bathroom toilet.

90) Prior to the raising of this application, the Respondent did not intimate to the Applicant that his failure to pay rent timeously was due to him seeking to retain rent in regard to any disputes on repairs to the Property.

91) The Applicant's letting agent has applied for an order from the Tribunal for access to the Property for inspection. The Respondent says he has no knowledge of this.

Reasons for Decision

92) The application was in terms of rule 111, being an order for civil proceedings in relation to a PRT. We were satisfied, on the basis of the application and supporting papers, that – subject to the abatement defence - rent arrears for the period to 1 November 2022 (so covering rent up to 30 November 2022) of £11,150 remained outstanding. The application clearly set out the sums and we were satisfied that the necessary level of evidence for these civil proceedings had been provided, and in any case the Respondent accepted the arithmetic.

93) Parties were in agreement that there had been two repair issues at the Property: the broken pin on the balcony door, and the leak into the common area. Regarding the pin, there was no dispute that it had taken well over a year to come

to the point where it was still broken and the Applicant did not believe there was any way to source the replacement part. The issue was the magnitude of the problems arising from the broken pin. Regarding the leak, there was no dispute that it took several months, and two sets of contractors, to stop the leak. Further there was no dispute that during this time there had been some investigations which had resulted in water being turned off, and areas within the Property being opened up. The issue was the magnitude of that inconvenience and any remaining decorative repair. (The Respondent was further holding off from using the bath but this appeared to be of his own volition and not due to any instruction from the letting agent.)

94) In regard to the washing machine, it had not been inspected and we only had the Respondent's evidence that it did not drain. There seemed no reason to doubt this occurred, but whether it was a simple or complex issue, or user error, could not be assessed. The toilet cistern allegedly not filling was also uninspected and the Respondent accepted that he had not referred it direct to the letting agents.

95) Following from these and the evidence, we identified eight heads of claim:
    a) The cold in the Property due to the Property not being windtight (including being so cold the Respondent needed to live elsewhere at times);
    b) Excessive heating bills due to the Property not being windtight;
    c) Inconvenience dealing with all the visits from contractors on the door;
    d) Inconvenience dealing with all the visits from contractors on the leak;
    e) Inconvenience of times without water during the investigations on the leak;
    f) Inconvenience of continued need for decorative repairs after the leak repair;
    g) Inconvenience of a lack of a washing machine for many months; and
    h) Inconvenience of a lack of a working upstairs toilet.

96) On issues (a) and (b), the Respondent has failed to satisfy us of the issue on the balance of probabilities. We have only his evidence and that of his mother that the Property was, generally in the downstairs open plan living area (and sometimes in the upstairs bedrooms), "always freezing", "very cold", "freezing cold", "really cold", and at times "so cold on occasion… it is unliveable". The cause of this was attributed to the balcony door but only the Respondent gave first-hand evidence of allegedly experiencing a breeze (or worse) coming through the bottom of the door. No thermometer was ever used to take a reading of the actual temperature in different parts of the Property.

97) The Property has a modern design with a high ceiling in the double height living area/bedrooms, and a floor-to-ceiling glass wall. It will undoubtedly heat up in a different way to a building with small enclosed rooms. It may feel warmer in some areas than others due to the radiators or doors being able to be closed. We could not rule out that there was inaccurate use of the radiators by the Respondent. The Respondent gave evidence of turning thermostatic valves, on those radiators which possessed, them up to "5". In some radiators, this may mean that the radiator heats up to an excessive temperature before turning off, so resulting in the problem – complained of by the Respondent – of some areas being too hot while having no effect on the living area. We saw no pictures of the different types of radiators, and had no heating expert give evidence, so we stress that

we are not concluding there is inaccurate use of the radiators, but merely that we were not satisfied that there was accurate use of the heating system (and so that the issues with any alleged heating differential have a different source).

98) We had the evidence from Mr Cunningham that the door closed and it was only under significant force that it moved in slightly. There was no evidence (from the Respondent or Mr Pace) that any other contractor had found the door unsecure, yet the Respondent insisted that the wind was able to blow the door out of position by several centimetres. For it to do this, we were satisfied that it meant that the door was either not locking or was not locked on occasions when it blew in. As there was no evidence to suggest that it was not capable of being securely locked, the Respondent's evidence on the door blowing in was either incredible or evidence of the Respondent failing to securely close the balcony door at times (and thus potentially leaving the wind to come through a partially closed door). We saw only a single photograph of the Respondent placing his finger into the edge of the door. We had no photographs of the door when allegedly blown in by the wind, and no witnesses (other than the Respondent) who spoke to experiencing a breeze coming from a specific gap in the door. Considering all this evidence together, we could not conclude that there was an issue with the door closing or with it not being wind and watertight. We preferred the evidence of Mr Cunningham that the door closed securely and that there was a minor issue only.

99) In regard to the evidence shown for the heating costs, the Respondent's evidence was that it "costs a fortune" but he failed to satisfy us that his heating costs were higher than those that could reasonably be expected for the Property. We had no comparators from neighbours nor any public guidance on what a 'usual' bill should be for a two-bedroom Property (leaving aside that this is not a 'usual' two-bedroom Property given the design). There was no material difference between the heating costs in Autumn and Winter versus Summer.

100) In all the circumstances, we do not accept that an abatement is due in regard to issues (a) and (b). Had we taken a different decision, we would have held that abatement was still possible notwithstanding *Stewart v Campbell*. We distinguish that case as there were a number of reasons that the Inner House held that abatement was not possible, including that the lease was a one-year lease that had renewed and the issue was not raised until the fifth year (so effectively the fifth contractual period). This application relates to a PRT which is of indefinite length and we are dealing with issues within the same contractual period. Further, though no retention was expressed prior to the raising of the applications (and indeed promises to pay were made up to that point), there were issues raised about the balcony door from the outset.

101) We decline to consider what an appropriate abatement would be for any period, as we have taken the view that there is a lack of evidence as to the magnitude of the alleged detriment. Simply that the Respondent found the Property unliveable and stayed with his mother on a number of different periods, does not give any guidance as to what the conditions at the Property were during those periods. The Respondent did not return to the Property to see if it was more (in

his opinion) liveable and simply returned when he chose to, or felt he needed to. Even if we were to accept that there were eight weeks in total when he lived with his mother (on which the evidence seemed to be based on their estimates without reference to any diaries, records, or anything else to help them fix the dates in their mind), we were not satisfied that this period represented a time when the Property was colder than other times, or what it was like when he was living there.

102) We do accept that the Respondent required to make himself available (and did make himself available) for many visits of contractors seeking to examine the balcony door, and that he chased for a response over the months after the last visit, before giving up on the chance of a repair. We are satisfied that the door is broken, and was broken when he moved in. He was inconvenienced in regard to repairs visits for something that was not his fault, and was within the Applicant's duties to (attempt to) fix. In regard to issue (c), we make a finding that an abatement is appropriate in regard to this inconvenience. We think £500 is an appropriate amount, being just over one-half of a month's rent.

103) In regard to issues (d), (e), and (f), again we do accept that the Respondent required to make himself available (and did make himself available) for visits of contractors seeking to identify the source of the leak (first unsuccessfully) and then resolve it. This involved periods without water, though we heard no evidence of specific issues arising from the lack of water, except generally inconvenience. (Earlier in the application, the Respondent's defence included requiring to shower elsewhere during times without water, but we heard no evidence on this at the Hearing.) We saw photographs illustrating decorative issues remaining after the works but the Respondent accepted that he had not chased the letting agent for contractors to fix this (and did not seem to want the letting agent's plumbers to visit again). Further, the Respondent did not seem overly concerned about the decorative issues and did not explain any material detriment arising from them.

104) On balance, we hold that an abatement is appropriate in regard solely to the inconvenience of dealing with the multiple repairs visits and periods without water. Again, we think £500 is an appropriate amount in regard to issues (d) and (e).

105) In regard to issue (g), the Respondent accepted that he had not chased the letting agent for the appliance engineer to return. We accepted the Applicant's evidence that an access application had been lodged due to problems with access in general (and on the washing machine specifically) at the Property. We heard conflicting evidence on whether it was appliance engineer or the Respondent who was more unreliable and had caused the initial visits not to occur, but it was clear that that the Respondent had not sought the engineer to reschedule a visit since May 2022, and had not done anything else to resolve the matter. In the circumstances, we do not find a breach of the repairing standard under s14 of the 2006 Act, due to the access issues (at least on the grounds that the Respondent has not sought to re-arrange access) and due to the lack of evidence as to whether there is a fault at all with the washing machine.

106) In regard to issue (h), we are not satisfied that this formed part of the original defence. The Respondent may have intended this to have been part of the defence regarding the work to remedy the leak, but it now seems to be a standalone complaint. It was not clarified as an ongoing problem until the late lodging of the Respondent's witness statement. As the Respondent accepted it had never been intimated to the letting agent and a repair requested, we do not uphold a defence on this ground.

107) We thus make a decision to award the sum of £10,150 against the Respondent in regard to all sums due in rent under the lease to 30 November 2022 less the £1,000 of abatements in regard to issues (c), (d) and (e).

108) In regard to interest, parties were agreed on the rate of 3% from the date of the decision until payment and we will set this amount.

109) In regard to the expenses motion, we reject this and make a finding of no expenses. Rule 40(1) states:

> *The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.*

We do think there were periods of delay and inconvenience arising from the Respondent missing clear deadlines (on more than one occasion, in particular when failing to lodge the witness statements prior to the first day of the Hearing). We did not see that these resulted in material "unnecessary or unreasonable expense". The Applicant would likely have required to precognose her witnesses in light of the witness statements whenever they came in. That she did so, and prepared supplementary witness statements (which we refused to allow lodged), was not materially more than the level of preparation than would have been required in any case. There was some wasted time on discussions on the first and second day arising from the failure by the Respondent to follow the timetabling but, from our records, this took until 10:42 at the start of the first day (with some initial delay getting started), from around 15:00 to 15:30 at its conclusion; and from 10:21 to 10:54 on the second day. There were some earlier email exchanges on rescheduling of deadlines prior to the Hearing. These were minor procedural discussions.

110) In any event, the Applicant was quite specific that the wasted cost sought was the whole of the second day. We simply do not agree that the Hearing could have been finished in one day. Excluding IT issues, the above motions and brief comfort breaks, evidence was heard from 10:42-13:00 and 14:00-15:00 on the first day and from 10:58-13:05 and 14:08-14:22 on the second day. Submissions took from 14:22-16:15 on the second day. It comfortably took more than one day and we decline to engage in fine decisions on whether to award the costs of part days (which we think amount to, at most, a difference between the second day finishing at around 12:45 as opposed to 16:15).

111) In any event, we were not satisfied that the delays arose due to "unreasonable behaviour". We did have evidence that the Respondent was signed off as not fit for work. We had our own concerns as to whether these issues stopped him engaging with preparations in the application, but we are not satisfied that the test of "unreasonable behaviour" was met. Certainly, there was nothing akin to dropping a defence at the last moment (as in *Murray v Elliott Estates*). The Respondent maintained his defence throughout.

Decision

112) In all the circumstances, we were satisfied to make the decision to grant an order against the Respondent for payment of £10,150 with interest at 3% from the date of this order until payment.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Joel Conn

1 December 2022

Legal Member/Chair **Date**