Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 of the Private Housing (Tenancies) (Scotland) Act 2016 and Rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) (Regulations) 2017 ("the Rules')

Chamber Ref: FTS/HPC/CV/22/0689

Re: Property at 95 Maree Drive, Cumbernauld, G67 4LW ("the Property")

Parties:

Mr Salah Alkirwi, Earls Homes, 47 Main Street, Cumbernauld, G67 2RT ("the Applicant")

Ms Jessica Marchant, sometime of 95 Maree Drive, Cumbernauld, G67 4LW ("the First Respondent")

Mrs Anne Marchant, 69 Thorniecroft Drive Condorrat, Cumbernauld, G67 4JT ("the Second Respondent")

Mr James Melvin, Coatbridge CAB, Unit 10, Fountain Business Centre, Ellis Street, Coatbridge, ML5 3AA ("the First Respondent's Representative")

Tribunal Members:

Martin McAllister (Legal Member) and Janine Green (Ordinary Member) ("the tribunal")

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the First and Second Respondent pay the sum of £890.45 to the Applicant and that their liability be joint and several.

Background

1. **This is an application for payment. In the Application, an order is sought, firstly in respect of rent arrears of £1,670.45 with interest at the rate of 8% and, secondly the sum of £7,623.15 respect of reimbursement of costs to repair the Property.**

2. **An order for payment had already been made by the Tribunal on 5th March 2022 in respect of rent arrears which are not included in the sum sought in this application.**

3. **Prior to the Hearing, the Applicant submitted a written communication and updated rent statement to the Tribunal which indicated that, after adjustment, the rent arrears being sought amounted to £ 930.45**

Case Management Discussion

4. **A case management discussion was held on 5th July 2022.**

5. **Prior to the case management discussion, the First Respondent's Representative submitted representations which stated that the First Respondent does not accept that she damaged the Property or has denied access to the Applicant for the purpose of routine and essential maintenance work which led to a deterioration in the condition of the Property. The representations state, in general terms, that the First Respondent does not accept that she has any responsibility for repairs carried out to the Property. The representations also state that the rent arrears claimed are disputed by the First Respondent and that the amount of arrears should be reduced by the principle of abatement to reflect the poor state of repair of the Property. The First Respondent's Representative had lodged a copy of the case of Fern Trustee 1 Ltd and Fern Trustee 2 Ltd as Trustees of The Buchanan House Unit Trust v. Scott Wilson Railways Ltd Sh Ct [2020] GLA 45 which he stated that he intended to rely on in his argument in respect of abatement of rent.**

6. **Prior to the case management discussion, the Applicant had lodged a decision by the Tribunal in respect of the Property (FTS/HPC/RP/21/0065) where a finding was made that the Property did not meet the repairing standard and issued a repairing standard enforcement order.**

7. **At the case management discussion, the Applicant stated that his position is that he was denied sufficient access to the Property to carry out necessary repairs and the required safety certification and that, as a consequence, the Property deteriorated. His claim for reimbursement is for materials and labour costs which he expended in bringing the house to the repairing standard as required by the Housing (Scotland) Act 2006.**

8. **At the case management discussion, the Applicant was advised that, at a Hearing, he would require to provide evidence with regard to the necessity of repairs and why the tribunal should find the Respondents responsible for such costs. He said that he had lodged various receipts and other documents, that he would give oral evidence and that he may lead witnesses.**

9. At the case management discussion, the First Respondent's Representative said that, prior to a Hearing, he planned to submit a statement of the First Respondent and that the First Respondent would attempt to provide extracts from her telephone records evidencing the frequent contact which there had been with the Applicant. Mr Melvin said that it would be useful if the maintenance activity logs of the Applicant could be produced and that, as he considered that there will be an issue with the validity of gas safety certificates, he would welcome production of all such certificates since commencement of the tenancy in 2009.

The Direction

10. Subsequent to the case management discussion, a Direction was made under Rule 16 of the Rules.

11. The Applicant was required to provide:

11.1 Copies of Gas Safety Certificates and Electrical Installation Condition Reports relevant to the Property and dating from the commencement of the tenancy to its termination.

11.2 Further information on why the Respondent should be responsible to reimburse the Applicant in respect of repairs carried out to the Property rather than such costs being borne by the Applicant in respect of his duty to maintain the Property to the repairing standard during the tenancy.

11.3 Copies of any maintenance logs in respect of the Property and details of any requests received from the Respondent in respect of repairs.

11.4 Evidence of any unsuccessful attempts made to access the Property for the purpose of carrying out repairs.

11.5 Copies of any letters received from North Lanarkshire Council in respect of the condition of the Property.

12. The Respondents were required to provide:

12.1 Copies of emails, texts or letters sent to the Applicant in respect of repairs requiring to be carried out to the Property.

12.2 Details of any reports made to the Applicant in respect of repairs which were considered necessary to be carried out to the Property. Dates of any reports should be provided.

The Hearing

13. **A Hearing was held by video conference on 11th November 2022. The Applicant and First Respondent were present together with Mr Jim Melvin of Coatbridge CAB who represented the First Respondent. The tribunal heard evidence from the Applicant, the First Respondent and Mrs Louise Craig, an employee of the Applicant.**

Preliminary Matters

14. **It was noted that both parties had submitted skeleton arguments.**

15. **It was noted that the Applicant had submitted an updated rent statement (Applicant production 2B) brought down to the end of the tenancy on 29th August 2022. This statement showed the level of rent arrears to be £930.45.**

16. **Mr Melvin helpfully stated that the level of rent arrears was not disputed by the First Respondent but that what was disputed was the sum that was due in respect of rent. He referred to the submissions which he had lodged with regard to abatement of rent.**

17. **Mr Alkirwi said that the sum being claimed in respect of work which had to be done to the Property was now £8,243.80 and that this increased figure was as a result of work which was found necessary to be carried out to the Property after Ms Marchant had vacated the Property. He said that the claim would be vouched by the various estimates which he had submitted. Mr Alkirwi conceded that the increased figure had not been intimated to the Respondents.**

18. **Mr Melvin took no issue with the increased figure not being intimated but said that his overarching position was that no sums were due in respect of any money expended on the Property by the Applicant.**

19. **Parties were in agreement that the two broad issues in relation to the Applicant's claim was firstly with regard to rent arrears and secondly with regard to a claim for financial reimbursement of sums expended on the Property.**

20. **The tribunal raised the matter of the non-appearance of Mrs Anne Marchant, the Second Respondent. After enquiry, it was satisfied that intimation of the Hearing had been given to her by recorded delivery mail which had been signed for. Ms Marchant explained that the Second Respondent is her mother and that she is deaf and did not want to participate in the Hearing. It was explained to Ms Marchant that reasonable adjustments could be made to enable her to engage with the**

proceedings but she was clear in stating that her mother knew about the Hearing and did not want to participate. The tribunal was satisfied that the Hearing should proceed.

Responses to Direction

21. **Mr Alkirwi said that he was unable to produce copies of gas safety certificates and electrical installation condition reports from the commencement of the tenancy. He said that neither he nor the contractors involved would have any reason to retain copies once the certificates had been superceded by new ones.**

22. **The Direction had called for the Applicant to produce further information with regard to why it was considered that the Respondents would be responsible for carrying out repairs to the Property to bring it to the repairing standard as required by the Housing (Scotland) Act 2006. Mr Alkirwi said that he had submitted information at the beginning of the application process and subsequent to that. He said that if access had been allowed by his tenant, repairs would have been completed timeously and the fabric of the building would not have deteriorated. He said that he is a consultant engineer and that such matters are within his knowledge. He said that his business is due to be compensated for consequential losses as a result of not getting sufficient access to the Property to carry out repairs. He said that it is a fact that, if timber is exposed to water, it will deteriorate. He said that he had no evidence on the matter other than his own knowledge and the documents which he had lodged.**

23. **Mr Alkirwi said that he had lodged documents relating to interactions with the tenant. This included a communication log covering the period from 2012 to 2021. He said that his business does not have maintenance logs as such and that if he does not know about repairs and then, when he does, cannot get access, it is not the fault of him as a landlord if repairsa re not done.**

24. **Mr Alkirwi said that, other than what he had lodged, there were no other documents to evidence attempts to get access to the Property.**

25. **Mr Alkirwi said that, other than what had previously been lodged with the Tribunal, he had no other letters from North Lanarkshire Council to produce.**

26. **Mr Melvin said that the tribunal had any copy messages which his client could retrieve.**

Repairs to the Property

The Boiler

37. Mr Alkirwi said that his business has contracts with an electrician and a heating engineer and that tenants are aware that the procedure is that, if there are any issues, they should contact the contractors direct. He said that Ms Merchant would have received the contact details of these contractors when the tenancy commenced in 2009. He said that he knows that the Respondent has made use of the contact numbers in the past and has had electrical and heating work done. He said that, in relation to heating repairs, the procedure is that, if the heating contractor is contacted by a tenant, he establishes what is wrong and does the repair and, if required, sources any spare parts. Mr Alkirwi said that when the heating engineer looked at the boiler in April 2021 it had not been operational for some time and found that it was beyond repair which necessitated a new boiler being installed. Mr Alkirwi said that, if the engineer had known sooner about the issue, repairs could have been carried out and the boiler would not have needed to be replaced. The tribunal had copies of various letters from the Applicant to the First Respondent in the period from the end of 2019 to the beginning of 2020 which stated that access was being sought for the gas safety check. No evidence of delivery had been lodged and Ms Marchant disputed in particular that she had received letters dated 14th December 2019 and 5th February 2020 from the Applicant.

38. Mr Alkirwi said that he had owned the Property since 2006 and he did not think that the boiler in the Property had been replaced since then.

39. Mr Alkirwi said that a combination boiler could last over twenty years if properly maintained. It was put to him that manufacturers of boilers refer to a lifetime of ten to fifteen years and he maintained that, in the case of the boiler in the Property, it required to be replaced because of the tenant's failure to initiate the appropriate repairs by the designated central heating engineer.

40. Mr Alkirwi referred to his Productions 4a, 4b, 5, 6 and 7. He said that these showed the costs of the boiler replacement. The supply of the boiler from Grahams, the merchant, was £817.30, the invoice paid to Heatsure, the heating engineer for installation was £667.70, the invoice paid to JVM Property Services Ltd for a power flush of the heating system after the boiler change was £200 and the invoice paid to Mill Industrial Supplies for piping and fittings associated with the boiler replacement was £70.63. The total cost of replacing the boiler was £1,755.63. Mr Alkirwi explained that Heatsure and JVM Property Services are both businesses owned by Vinny McDuff, his designated heating engineer. He said that, when a boiler is replaced, it is good practice to power flush the system to ensure that no sludge enters the new boiler.

41. Mr Alkirwi referred the tribunal to the witness statement of Vinny McDuff which he had submitted. This was a statement signed by Mr McDuff on 6th November 2022. It confirmed that he operated as Heatsure and that he is contracted to Earls Homes to provide a maintenance service for heating and plumbing. It stated that tenants of Earls Homes usually call direct to report any

issues with heating. In relation to the Property, Mr McDuff states that, on 8th April 2020, he had checked the boiler and had found it to be beyond economical repair and that a new boiler was installed on 12th May 2021 when a gas safety certificate was issued. Mr McDuff states that he had previously carried out an annual system check of the boiler at the Property on 28th January 2020 when he had issued a gas safety certificate. Mr McDuff states that, on 3rd January 2019, Ms Marchant had contacted him and that he attended on the same day to carry out a boiler repair and that he also issued the gas safety certificate at that time.

42. In evidence, Mrs Craig said that there had been issues in gaining access to the Property to have gas safety checks carried out.

43. In evidence, Ms Marchant said that the heating in the Property failed in the summer of 2020 and that this was reported to the Mrs Craig. She said that, at one point, in January 2020, Mr McDuff came to the Property and said that the boiler required a part but that he then did not return. She said that, at no time, had she refused access for the boiler to be repaired. Ms Marchant disputed that the gas safety certificates which had been submitted were accurate in as much as gas safety checks were not done on the dates stated and that what purports to be her signature on the certificates is not.

Urgent Floor Repairs

44. Mr Alkirwi said that, as a result of the Tribunal being involved in the consideration of the repairing standard application, access was obtained to the Property when it was found that part of the flooring on the ground floor had deteriorated. He explained that the particular design of the Property was that it was built on a slope and had a hidden retaining wall. He said that he believed that the Property was one of a development of houses which had been built in the 1960's. Mr Alkirwi said that the ground level was higher at the ground floor of the Property and that, over time the waterproofing barrier would fail. He said that the floors were in such poor condition that urgent repairs had to be carried out for safety reasons. He explained that the full repairs which were required could not be done when the tenant was living in the Property.

45. Mr Alkirwi referred the tribunal to his Productions 1,2 and 3 which were invoices from April 2021 for materials from Beatson's Building Supplies (£68.23) and for labour from Danny Walker Joinery (£320). The joinery invoice referred to "urgent floor repairs to bedrooms at 95 Maree Drive, Cumbernauld." The total sum in respect of the works to the floor was £388.23.

46. Mr Alkirwi said that the work which required to be done to the flooring was as a result of the tenant not reporting defects and that, if the issues had been reported earlier, a less extensive programme of work could have been carried out. He said that the flooring required to be replaced because of rot.

Bathroom Floor Repairs

47. Mr Alkirwi said that the Property is on three levels and that the bathroom is on the middle floor. He said that the flooring in the bathroom required to be

replaced. He accepted that it is not unknown for there to be leaks in bathrooms which can cause issues with flooring. He said that it was common for there to be rot under a bath which had been caused by a leak. He said that, with regard to the Property, it was not the case that the problem with the bathroom floor was as a result of a leak caused from something like a faulty seal around a bath.

48. Mr Alkirwi said that rot is caused by water and the process of wood getting wet and then drying. He said that this destroys the wood. He referred to the document which he had lodged which was a report from Curol Ltd, a woodworm, rot and rising damp specialist dated 14th June 2021. This stated *"it was evident that the bathroom floor has suffered from extensive water flooding to the extent that it shows extensive sign of rot and it would require treatment and replacement. We also recommend that all the plumbing installation in the bathroom should be checked and repaired as needed."* Mr Alkwiri said that the plumbing fitments were checked and that they showed no sign of leaking. He said that the issues had been caused by the tenant's "bad usage of the bathroom itself."

49. Mr Alkirwi referred to his productions 8 to 15 inclusive which represented materials and labour for removal of the existing floor, its replacement and the removal and reinstatement of the sanitary fittings. He said that the invoices included an item for replacement of the WC and cistern but that the bath and basin had been able to be reinstalled. The total cost of labour and materials amounted to £1,816.33.

50. Ms Marchant said that she had not flooded the bathroom and she did not accept that any problems with the bathroom floor had been caused by her.

Wall Mould treatment and decoration

51. Mr Alkirwi described the mould in the Property to be "self inflicted" and he explained that he believed that it had been present because of the condensation as a result of the way in which the Property was being used by the tenant. He said that tenants are given a leaflet with information on how to stop condensation. He said that there had been condensation in the lower part of the house and in the stairwell. He said that he considered that the tenant's lifestyle had caused the condensation.

52. Mr Alkirwi said that the situation with condensation had got worse because of the difficulties in getting access to the Property. He said that the tenant raised no issues of repairs being required to the Property until there had been problems arising from non payment of rent around 2018/2019.

53. Mr Alkirwi suggested that, if access to the Property had been allowed sooner, the issue with condensation would not have been as bad. He referred the tribunal to the Applicant's Productions 16-19 inclusive. The first three invoices were from Beatson's Building supplies and totalled £179.66. Mr Alkirwi said that these invoices were for materials required to deal with the eradication of the mould and that the fourth invoice from Danny Walker Joinery represented the labour costs in connection with treating the issue. The invoice stated *"Treat*

mold effect walls with Ronseal Mold Treatment. Decorate upper hall, Lower hall and effected bedrooms at 95 Maree Drive, Cumbernauld" **and was for the sum of £420. Mr Alkirwi said that his claim under this heading amounted to a total of £599.66.**

Further Urgent Floor Repairs and additional mould work

54. Mr Alkirwi said that the flooring repairs to the bedrooms in the lower part of the house could not be completed until the house was vacated because otherwise it would have been too disruptive for the tenant. He said that, when the Tribunal inspected as a consequence of the application in respect of the repairing standard application, some matters were highlighted which required attention. He said that the invoices Productions 24,25,26,27 and 28 represented the materials costs for the flooring works and that the invoice from Danny Walker Joinery for £1,920 was in respect of the labour costs. The total sum claimed was £2,730.49.

Additional Costs

55. Mr Alkirwi referred the tribunal to Production 23 which was an invoice for £240 which, he said, was in respect of the costs incurred in clearing the Property of belongings of the tenant and which had to be removed after the she had left the Property. Mr Alkirwi said that things such as beds, a broken wardrobe and other items had been left which had necessitated the use of two vans for removal.

56. Mr Alkirwi referred to an invoice for £320 from his business which he said was in respect of costs incurred by it in having staff attend the Property to inspect and liaise with tradespeople carrying out work. He said that he had sent his employee, Mrs Craig, to the Property and that she had been involved in dealing with contractors.

57. Mr Alkirwi said that Earls Property is a family business and that he personally owns forty properties and that, with those belonging to his family, there is a combined portfolio of more than sixty properties. He said that the business does not operate as a letting agent for other owners and that Mrs Louise Craig is the employee who has day to day involvement with tenants.

Cross Examination

58. Mr Alkirwi was referred to Respondent Production 4 which was a copy of emails between Mr McCulloch, environmental health officer of North Lanarkshire Council and him relating to the Property and which were dated 26th November 2019 and 8th December 2019. The email from Mr McCulloch dated 26th November referred to a number of matters with regard to the Property which he had identified at an inspection and which included *"defective/leaking gas boiler"* and issues with water penetration and dampness. The email lists nine repairs issues. Mr McCulloch states that he considers that the Property does not meet

the tolerable standard and repairing standard as required by the Housing (Scotland) Act 2006.

59. The email of 8th December was Mr Alkirwi's response to Mr McCulloch. It states that the tenant is aware of the repairs procedure of Earls Homes having been a tenant for over ten years and that she had had repairs carried out using the procedure. Mr Alkirwi cited in his email the example of the tenant reporting an issue with the central heating system on 3rd January 2019 when the contractor called at the Property and effected a repair. The email states that, since the start of 2019, it had been *"next to impossible to contact her."* The email refers to rent arrears and a belief, at one time, by the landlord that the Property had been abandoned. The email states that the tenant can get five of the nine issues resolved by contacting the heating and electrical contractors direct.

60. Mr Alkirwi said that there was no response from the tenant to his suggestion to resolve some of the repairs and that there were issues about him getting access to the Property. He said that he offered to meet with Mr Melvin and Mr McCulloch to try and resolve matters.

61. Mr Alkirwi said that he recognised that it is his duty to maintain any let property to the repairing standard but that he could only do so if tenants reported any repairs issues to him. He said that, in relation to the Property, he had contacted Mr Melvin and Mr McCulloch more than once. He said that, because of the tenant's considerable rent arrears, there had been "silence" from her. He said that he made an application to the Tribunal for assistance to access the Property and that this had been as a last resort. He explained that subsequently this had not been required because of the repairing standard application made by the Respondent.

62. Mr Alkirwi was asked about his method of recording repairs issues. He referred to the communication log which he had submitted in response to the Direction and, when it was pointed out to him that this appeared to deal almost predominantly about issues with rent, he said that he had a book in which he noted repairs issues.

63. It was put to Mr Alkirwi that the gas safety certificates were not accurate and the inspections by the gas engineer, and specifically the inspection in 2019, had not been done. Mr Alkirwi emphatically denied that this was the case. He said that such a complaint had been made to the Health and Safety Executive and that it was satisfied that there were no issues in relation to the certificates. He said that he has an annual contract with Mr McDuff of Heatsure and that this includes annual gas safety inspections.

64. Mr Alkirwi said that a carbon monoxide detector had been posted to the Respondent because access had not been made available. Mr Melvin put to Mr Alkirwi that a gas safety certificate had stated there to be a carbon monoxide detector when one was not present. Mr Alkirwi said that this was sometimes a problem with tenants and that detectors supplied then went missing. He said that if Mr McDuff, when issuing the gas safety certificate had stated one to be there then it must have been.

65. Mr Alkirwi was referred to the witness statement of Paul Hart which he had lodged. The document which is dated 3rd November 2022 states that Mr Hart is an electrician and the co-owner of HB Electrical Installations who is contracted by Earls Homes to provide electrical maintenance services to sixty four domestic properties in Cumbernauld. It detailed the work carried out at the Property for the previous five years. Mr Alkirwi denied that he had instructed Mr Hart to restrict his statement to provide information in his statement only going back to November 2018 so that there would be no information on previous Electical Installation Condition Reports.

66. Mr Alkirwi was questioned on dampness at the Property and answered that it had been "self inflicted." He accepted that some dampness in the walls had come from outside the Property but that the intensity of it had been caused by the tenant. It was put to Mr Alkirwi that the "classic reasons" for condensation being poor heating, insulation and lack of ventilation were present in the Property. He responded by saying that it was for tenants to properly ventilate their homes. He said that if there was inadequate heating then it should be reported and, in the case of the Property, reports were not received with regard to the length of time which the Respondent maintains the boiler was not functioning.

67. Mr Alkirwi did not accept that he had visited the Property in 2017 following a complaint about dampness. He said that he recalled that he visited in 2017, did not get access and telephoned the police because he suspected that the Property had been abandoned. He said that he never visited the Property with a damp meter. Mr Alkirwi could not remember if specific information on condensation dampness had been sent to the Respondent.

Mrs Louise Craig

68. Mrs Craig said that she is employed by Earls Homes and that she deals with tenants on a day to day basis. She said that, with regard to electrical, plumbing and heating repairs, tenants have contact telephone numbers so that they can deal directly with the plumbing/heating contractor and the electrical contractor. She said that tenants contact her direct with regard to other repairs.

69. Mrs Craig said that she had not been contacted by Ms Marchant with regard to any repairs which were required to the Property. Mrs Craig was asked by Mr Alkirwi if he had ever instructed her not to arrange for repairs to be done to properties where tenants were in arrears of rent. Mrs Craig said that this had never occurred.

70. Mrs Craig said that there had been issues about getting access to the Property and that she remembered that there were particular issues with the gas engineer getting access to carry out the gas safety inspections.

71. Mrs Craig said that she could remember no other dealings with the Property and she did not visit it.

72. In cross examination, Mrs Craig was referred to the communication log which had been lodged. She said that these were extracts from the "rent register." She said that Mr Alkirwi would keep a log in relation to any repair issues. She said that she did not know how he kept such records and that she has no access to these in the office. She said that, if there were repair issues reported to her, she would pass them on to Mr Alkirwi.

73. Mrs Craig was referred by Mr Melvin to specific instances with regard to repairs issues. She was asked if she knew if Mr Alkirwi had visited the Property in 2017 after a report of dampness and she replied that he may have visited without her knowledge. She said that Mr Alkirwi has a knowledge of building maintenance issues and she confirmed that he has a dampness/ moisture meter. Mrs Craig said that, in general terms, if condensation dampness is present, tenants are provided with a leaflet detailing preventative measures. After questioning by Mr Melvin, Mrs Craig said that she did remember that Ms Marchant had contacted her about dampness.

74. In re- examination, Mrs Craig said that Mr Alkirwi would generally leave repairs to contractors and would only go to a property if there was a more serious matter. Mrs Craig said that if she is telephoned about a repair issue, she writes the details on a pad in front of her and that she keeps notes in this pad.

The Respondent

75. Ms Marchant said that she is a student with two children, that she had been a tenant of the Applicant for thirteen years and that she is now in temporary accommodation.

76. Ms Marchant said that she made the repairing standards application to the Tribunal on 8th January 2021 but that she had complained to Earls Homes prior to then. She said that Mrs Craig had told her that no repairs would be carried out because she had significant arrears of rent.

77. Ms Marchant agreed that she did have rent arrears. She said that she had been working part time and was in receipt of housing benefit. She said that this had been stopped but that she had not been contacted to be advised of this and that arrears had built up as a consequence.

78. Ms Marchant said that she got wrong advice from North Lanarkshire Council and withheld payment of rent in August 2021. She said that, when she stopped paying, she did not advise her landlord the reason she was doing so.

79. Ms Marchant said that, in 2017, she first reported dampness issues in the Property and that, in response, Mrs Craig sent her a "damp leaflet." She said that Mr Alkirwi came to the Property with a damp meter to take readings and, when he had finished, did not tell her what he had found.

80. Ms Marchant said that she contacted the Environmental Health Department of North Lanarkshire Council on 2019 and complained about the condition of the Property. She said that she could not remember if anything happened after the

report of Mr McCulloch of the Council. She said that she visited the CAB who emailed the landlord on her behalf and advised them of the problems she was having with the Property.

81. Ms Marchant said that she stopped having heating in the summer of 2020 and that the boiler was eventually replaced in April 2021. Ms Marchant said that she had telephoned Mrs Craig and advised her about the problem she was having with the heating system. She said that the heating engineer came out and said that a part was needed for the boiler but that he then went away and did not return.

82. Ms Marchant said that she made the repairing standard application to the Tribunal because of the condition of the Property and that she was advised to do so by the CAB. She said that, prior to making the application, she had sent an email to Mr Alkirwi on 12th November 2020 advising him of the things in the Property which had to be attended to. A copy of the email had been lodged with the Tribunal.

83. Ms Marchant did not accept that she had refused access to her landlord. She said that she wanted the Property to be repaired as she had two children and needed a suitable home for them. She said that, on one occasion, access to the gas engineer for the gas safety check had to be denied because her daughter had covid.

84. Ms Marchant was referred to the gas safety records of January 2019 and January 2020. She said that what purported to be her signatures on the certificates were not. She said that, at some point in 2019, she had complained to the Health and Safety Executive because checks had not been done and she said that a gas safety check was not done until 2021. She said that no electrical checks were carried out.

85. Ms Marchant said that she did not have the rent which she withheld. She said that she had lost her job as a consequence of Covid and had to use the funds which had been withheld.

86. In cross examination, Ms Marchant accepted that she had met with Mr Alkirwi in 2017 at the point when her rent arrears amounted to £2516 and that he had told her that he would not take action to evict her if she limited the level of arrears to £2,500. She accepted that it is "most likely correct" that the arrears were £6,345 at the end of 2018.

87. Ms Marchant said that the dampness got worse and that it was always Mrs Craig that she reported matters to and had done so several times. Ms Marchant said that Mr Alkirwi refused to do repairs because she owed so much money.

88. Ms Marchant said that her boiler stopped working in the summer of 2020 and was not replaced until 2021. She said that she had to sleep on a couch in the living room because there was so much dampness. She said that she learned to adapt to there being no running hot water and had to fill the bath from water heated on the stove. She said that she had to buy electric heaters.

89. Ms Marchant said that her general experience with repairs needed to the Property was that, either tradespeople did not come when asked and, if they did attend, did not carry out repairs properly. She stressed that she had not, at any time, signed a gas safety certificate.

90. Ms Marchant said that she considered that the issues with the bathroom occurred because of the lack of heat in the house. She did not accept that any issues had been caused by the floor being flooded. She said that this had not occurred at any time.

Submissions

91. Mr Alkirwi said that he had set up a repairs protocol more than twenty years ago. He said that he had contracts with an electrician and a heating engineer/ plumber and paid them annually. He said that tenants knew to contact them direct when relevant repairs required to be done.

92. Mr Alkirwi said that, since the start of the tenancy, there had not been a year when Ms Marchant had not been in arrears with her rent. He said that in 2017 the level of arrears was around £2,500 but had escalated since then as evidenced by the rent statements which he had lodged.

93. Mr Alkirwi said that he does not interfere in repairs matters and that the contractors deal with things. He said that he would have no reason not to have repairs done to his properties even if there were rent arrears. He said that he had made an agreement with Ms Marchant on matters regarding rent arrears which involved him conceding that there would be an ongoing balance of arrears of £2,500 but that she had not complied with the terms of the agreement and had allowed the level of arrears to increase.

94. Mr Alkirwi said that he had carried out some repairs to the Property which he had not sought reimbursement for. He said that all repairs which had to be carried out were done because of the failures of the tenant.

95. Mr Alkirwi said that a central heating boiler had a lifespan and that, in relation to the one in the Property, if faults had been reported and access allowed, it would have been able to be maintained and a new boiler would not have been required.

96. Mr Alkirwi said that the dampness had been caused by condensation and that it would not have been as bad had matters been reported and access allowed to carry out repairs. He said that the tenant's use of the Property had allowed the dampness issue to develop and get worse.

97. Mr Melvin said that the onus was on the Applicant to convince the tribunal that his claim was well founded.

98. Mr Melvin said that no evidence had been produced by the Applicant to support his contention that the responsibility for the cost of repairs should be

apportioned to the tenant and that there were inconsistencies in what evidence had been produced.

99. With regard to the Respondent's argument with regard to abatement of rent, Mr Melvin referred to the skeleton argument which he had submitted. This stated that the tenant lived in a home in a substantial state of disrepair and continued to do so after she had made the repairing standard application to the Tribunal.

100. The skeleton argument states *"The equitable principle of abatement of rent in Scots Law applies to the Complainant's application for an award to reflect rent arrears. This is not a legal remedy analogous to the right to withhold or retain rent deriving from the laws of contract. Abatement is a common law right arising from the equitable principle of failure of consideration. The Respondent did not receive what she bargained for because her home was not repaired timeously by the Complainant. The principle of abatement falls to be taken into account unless the Tribunal accepts the Complainant's submissions that the Respondent was refusing to allow access at the material time…..Even though, it is believed that the Tribunal does not have the power to apply a counterclaim to the Complaint, it is submitted that the Tribunal has the power to reduce the amount claimed by abating rent for the period concerned. This is not a counterclaim. The words of Lord President Inglis in Muir v. McIntyre 1887 are relied upon- (the tenant) 'ceases to be the debtor of his landlord to the extent to which he is entitled to an abatement.' Thus rent abatement is not a counterclaim arising from breach of contract. Where rent is abated it extinguishes (part of or all of) the claim because some or all of the rent is not due as a matter of law and therefore cannot be claimed."*

101. Mr Melvin said that he considered that the material time for the abatement would be from 12th November 2020 which was when notice was given to the landlord prior to the repairing standard application being made.

102. Mr Melvin said that there was penetrating dampness in the Property which had badly affected the bedrooms as well as the lack of heat from Summer 2020 until May 2021. He submitted that it would be appropriate to abate the rent by 50% from 21st November 2020 until the termination of the tenancy. He said that the Respondent had not been able to get full enjoyment of the Property.

103. Mr Alkirwi said that he was able to access the Property only after the involvement of the tribunal which dealt with the repairing standards application. He said that, as soon as he was able to access the Property, he mobilised the necessary team to carry out repairs. He said that when the repairs for dampness had been done there was then a drying out period.

104. Mr Alkirwi reiterated that he can only do repairs to a property when he has been advised that there are issues. Mr Alkirwi disputed that he had received the notification email from Ms Marchant on 12th November 2020 and asked the tribunal to note that the copy which had been lodged appeared to show that the text of the email had been forwarded to Mr Melvin who had then lodged it.

Findings in Fact

1. **The Applicant and Respondent were parties to a short assured tenancy for the Property which commenced on 2nd February 2009 and which terminated on 29th August 2022.**
2. **There are rent arrears of £930.45.**
3. **Following upon termination of the tenancy, the Applicant incurred a cost of £240 to clear the Property of items which had been left by the Respondent.**
4. **The Applicant carried out various works to the Property for which the Respondent has no financial obligation and the cost of which fall to be paid by the Applicant.**

Findings in Fact and Law

1. **The Applicant is entitled to a rebate of rent of £280.**

Discussion and Reasons

105. The tribunal considered that there were two aspects to the Applicant's claim for an order for payment which, though linked are distinct. The first is in respect of a claim to compensate him for moneys he has spent to repair the Property together with associated costs arising at the termination of the tenancy and the second is in respect of recovery of rent arrears.

106. Section 14 of the Housing (Scotland) Act states:

Landlord's duty to repair and maintain

(1) The landlord in a tenancy must ensure that the house meets the repairing standard—

(a) at the start of the tenancy, and

(b) at all times during the tenancy.

(2) The duty imposed by subsection (1) includes a duty to make good any damage caused by carrying out any work for the purposes of complying with the duty in that subsection.

(3) The duty imposed by subsection (1)(b) applies only where—

(a) the tenant notifies the landlord, or

(b) the landlord otherwise becomes aware,

that work requires to be carried out for the purposes of complying with it.

(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.

107. The matter before the tribunal was not in connection with the repairing standard but one seeking a payment order. Notwithstanding that, the repairing standard was relevant to its considerations. The provisions of the Act are clear in stating that a landlord has a duty to maintain a house to the repairing standard but only if he is aware of the repairs which are required.

108. The tribunal considered that, in the case before it, the Applicant had to prove that any delay in being informed of repair issues caused damage to the Property which would otherwise not have occurred and that therefore the cost of the work which was carried out to the Property falls completely on the Respondents.

The Boiler

109. The Applicant purchased the Property in 2006 and his evidence was that he could not remember having replaced the central heating boiler between the purchase and May 2021. The boiler was at least fifteen years old and may have been older. The Applicant maintained that the failure of the Respondent to allow access to the central heating engineer caused the condition of the boiler to deteriorate. The Respondent did not accept that she had refused such access but the tribunal, in respect of this aspect of the Applicant's claim did not need to determine whether or not such access had been withheld.

110. The gas safety certificates lodged by the Applicant showed that the boiler was functioning on 28th January 2020. The Applicant chose not to lead Mr McDuff, the heating engineer in evidence, but rather to submit a signed written statement in which he said that the boiler had been found to be beyond economical repair in April 2021 and had been replaced on 12th May 2021. This meant that Mr McDuff could not be questioned on matters relating to the central heating boiler. What was not contained within his statement was anything to support the Applicant's assertion that delay in allowing access to the central heating engineer would have caused such deterioration to the boiler which would have necessitated its replacement.

111. The tribunal accepted the Respondent's evidence that the boiler had ceased to work in the summer of 2020. Although the Respondent disputed the veracity of the gas safety certificate of 28th January 2020, it is being relied upon by the Applicant and, if accepted at face value, it demonstrated that the boiler ceased to be operational around six months after the engineer had

checked it. The tribunal also considered that it was entitled to find that a combination boiler, which was at least fifteen years old, was nearing, or at the end of its life.

112. The tribunal found that the part of the Applicant's claim relating to replacement of the central heating boiler was not proven on the balance of probabilities.

Dampness and work to flooring in the lower part of the Property

113. The Applicant's position was that lifestyle of the Respondent together with her failure and/or delay in notifying the Applicant of the need for repairs had necessitated works to be carried out which otherwise would not have been necessary.

114. The Applicant's evidence on the matter was his oral testimony and the report of Curol Ltd. He led no expert witness.

115. The report of Curol Ltd is dated 14th June 2021. It does refer to condensation and states *"This is usually caused by excessive moisture present in the property due to lack of heating and ventilation as well as the life-style of the occupants. This could also be worsened further by undetected water penetration to the building as is the case with the potential defective retaining wall in this property."* The report also states that *"Although we had limited access to inspect the split level retaining wall in the property, in our opinion, the wall damp proofing had failed and this has been a source of water ingress. Hence the wall would probably need treated and re-tanked with a Cementous slurry."* The Applicant stated in evidence that, over time, the waterproofing barrier on the retaining wall would fail.

116. The tribunal noted the Decision of the Tribunal (FTS/HPC/RP/21/0065) in relation to the Property. The Decision refers to an inspection which had been carried out by the legal and ordinary (surveyor) members on 18th June 2021 and the inspection report which referred to high levels of moisture being apparent to the lower walls of bedrooms 1 and 3 and the lower hallway. The inspection report also refers to walls in this area being *"earth retaining."*

117. The tribunal had no credible evidence that works carried out to replace flooring and deal with dampness in the bedrooms and hallway in the lower part of the Property had to be carried out as a consequence of the lifestyle of the Respondent or as a result of failure to report any defects in the Property which necessitated repairs. The tribunal was entitled to rely on the report of Curol Ltd and the inspection of the Tribunal which was carried out in connection

with the application in relation to the repairing standard. This is a property with a wall which retains earth and where, according to Curol Ltd, it appears that the wall damp proofing had failed.

118. On the balance of probabilities, the tribunal found that the Respondent is not liable to reimburse the Applicant in respect of costs incurred to deal with dampness and flooring issues in the lower part of the Property.

The bathroom floor

119. The Applicant had provided limited evidence as to the cause of the damage to the flooring which necessitated its replacement. He had produced the report by Curol Ltd and had provided his own oral testimony.

120. The report of Curol Ltd stated *"DEFECTIVE PLUMBING- it was evident that the bathroom floor has suffered from extensive water flooding to the extent that it shows extensive sign of rot and it would require treatment and replacement where necessary."*

121. The inspection report following the inspection of the legal and ordinary members on 18th June 2021 stated, in relation to the bathroom, *"Below floor coverings it was evident that floor boards were defective, unsupported and likely affected by decay. The issues identified were consistent with plumbing defect having caused damage."*

122. The Applicant had not persuaded the tribunal that the Respondent was responsible for any damage to the bathroom which had necessitated the works which were carried out to the floor. On the balance of probabilities, the tribunal found that the Applicants' claim in respect of this aspect of his claim was not sustained

Clearance of the Property

123. The Applicant had submitted an invoice for clearance of the Property and the matter was not challenged by the Respondent. The tribunal accepted that the Applicant had incurred the cost of £240 and that this part of his claim was sustained.

Administration attendance charges

124. The Applicant had given evidence that his business had incurred additional costs as a result of a member of staff having to attend the Property and liaise with contractors. Since the tribunal had not found the First Respondent to be responsible for any of the costs to repair the Property, it followed that no liability should be attached to her in respect of any such costs. In any event, the evidence of Mr Alkirwi and Mrs Craig differed with regard to the involvement of

Mrs Craig. His evidence was that he had sent Mrs Craig to the Property to deal with such matters and hers was that she had not attended at the Property for this purpose.

125. The tribunal found that this aspect of the Applicant's claim was not sustained.

Rent Arrears

126. Parties were agreed that the level of rent arrears at the termination of the tenancy on 29th August 2022 was £930.45.

127. In the application, the Applicant sought payment of arrears "plus interest thereon at the rate of 8% per annum." At the Hearing, the Applicant did not address the tribunal on the matter of interest. The tribunal considered that interest was a matter of contract. The relevant contract is the tenancy agreement between parties which is dated 30th January 2009. The tenancy agreement states that the tenancy commenced on 2nd February 2009 and that there was a liability to pay rent of £520 per month from that date. The tenancy agreement has no provision for payment of interest on any rent unpaid. The tribunal determined that, if it were to make an order requiring the Respondent to pay a sum to the Applicant in respect of rent arrears, it would make no award in respect of interest.

128. The Respondent's position is that, although there are arrears of rent, she should be entitled to an abatement because of the condition of the Property. Mr Melvin submitted the Fern Trustees case as an authority which referred to the earlier decision of Muir v McIntyre (1887). His skeleton argument set out his position in more detail and has been quoted in this decision.

129. Mr Melvin's submission is that the relevant period for abatement of rent is from 12th November 2020 when the Respondent gave specific notice to the Applicant that repairs were required and that the period should continue until the end of the tenancy on 29th August 2022.

130. The matter of abatement depends on a number of factors. There requires to be an inability of the tenant to enjoy the let premises and this can be whole or partial. In the Muir case, premises had been destroyed by fire. The Respondent is not arguing that the Property was uninhabitable but that, because of issues with dampness and heating, she is entitled to an abatement of 50% of the rent because she had not received what she had bargained for. The tribunal considered that it was well established given the decision of the Sheriff Principal in Renfrew District Council v Gray (1985) that where a property is uninhabitable or partially uninhabitable a tenant is entitled to an abatement of rent.

131. The Applicant had notice of the issues with the Property in November 2020 because the Respondent had sent a letter of notification prior to submitting an

application to the Tribunal in connection with her application with regard to the repairing standard. The tribunal accepted that the email had been sent.

132. Prior to the termination of the tenancy, certain works were done by the Respondent. A new boiler had been installed in May 2021. In July 2022, the ordinary member of the Tribunal reinspected the Property in connection with the repairing standard application and found that some work had been done but that there were still high levels of moisture and that some works were still outstanding.

133. The Respondent had stopped paying rent but had not advised the Applicant of her reasons for doing so. The rent statements lodged by the Applicant demonstrated that there was a history of arrears of rent going back many years. Whilst it is not essential for a tenant to advise why rent is not being paid, in this particular tenancy, the tribunal considered it significant when that is set against the Respondent's record of arrears of rent.

134. There were competing positions from the parties: the Applicant said that he had not been advised of repairs which required to be done and the Respondent said that she had reported matters and that they had not been attended to. The Respondent said that repairs would not be done to the Property because of the existence of rent arrears and that Mrs Craig had told her this. Mr Melvin did not put this to Mrs Craig but she did give evidence that Mr Alkwiri, in general terms, had never instructed her not to arrange repairs to a property.

135. The Respondent had notified the Applicant about repair issues in November 2020 but had not produced any other evidence of notifications which one might expect given the level of repairs which she stated had to be done to the Property. Considering that the Applicant had a portfolio of over sixty properties, it was surprising that he had not a more robust method of registering and tracking repair issues particularly since he appeared to have such a detailed system in relation to rent.

136. The tribunal could come to no settled view with regard to the reporting of repair matters other than in relation to the notification of November 2020. It had to determine whether or not the Respondent was entitled to some kind of abatement of rent from that point. The tribunal noted that an order for payment against the Respondents in favour of the Applicant had been made on 5th March 2021 and that this was in respect of rent arrears up to that date. The tribunal did not consider it appropriate to make any abatement of rent in respect of a period where there had been arrears and for which an order of payment had been made. The tribunal determined that an abatement of rent should be allowed from 5th March 2021 to 12th May 2021 when the boiler was replaced, a period of just over two months. On balance, the tribunal decided that there should be an abatement of rent for that period amounting to £280 in total and that the Applicant was entitled to recover the sum of £650.45 in respect of rent arrears in addition to reimbursement of £240 for clearance of the Property.

Right of Appeal

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

Martin McAllister

Martin J. McAllister
Legal Member
1st December 2022