

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION UNDER SECTION 26(1) OF THE HOUSING (SCOTLAND) ACT 2006

In connection with

Property at 97 Moraine Avenue, Glasgow G15 6HU, being the subjects more particularly described in Land Certificate Title Number GLA 170279 (hereinafter referred to as "the house")

The Parties

Glasgow City Council, DRS Private Housing, 2nd floor, 231 George Street, Glasgow G1 1RX ("the third party applicant")

Mr. Robert Fergie, 54 Aursbridge Crescent, Glasgow G78 2TJ and also 64 Stadyum Caddesi, No 64 Karsiyaka Girne, Cyprus ("the Landlord")

Reference FTS/HPC/RT/19/1437

The Tribunal comprised Mrs. Aileen Devanny, Chamber President and Legal Member, and Mr. Nick Allan, Ordinary (Surveyor) Member.

DECISION

The First-tier Tribunal for Scotland ("the Tribunal"), having made such enquiries as is fit for the purposes of determining whether the Landlord has complied with the Repairing Standard Enforcement Order (hereinafter referred to as "the RSEO") in relation to the house, and considering the written representations of the Landlord, determined in terms of Section 26(1) of the Housing (Scotland) Act 2006 (hereinafter referred to as "the Act") that the Landlord has failed to comply with the RSEO and directed that a notice of the failure be served on the Local Authority on which the house is situated. The decision is unanimous.

BACKGROUND

1. Reference is made to the Determination of the Tribunal dated 23 October 2019 which decided that the Landlord had failed to comply with the duty imposed by Section

14(1)(b) of the Act and to the RSEO dated 23 October 2019 which confirmed that the Landlord had failed to ensure that (a) the structure and exterior of the property (including drains, gutters and external pipes) are in a reasonable state of repairs and proper working order; (b) the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order; and (c) any fittings, fixtures and appliances provided by the Landlord under the tenancy are in a reasonable state of repair and in proper working order.

The RSEO required the Landlord to carry out such work as is necessary for the purposes of ensuring that the house concerned meets the repairing standard and that any damage caused by the carrying out of any work in terms of this Order is made good.

In particular the Tribunal required the Landlord to:-

- (a) carry out such works as are necessary to obtain a Gas Safety Certificate in respect of the property from a Gas Safe registered engineer and provide a copy of the Gas Safety Certificate to the Tribunal;*
- (b) instruct suitably qualified contractors to replace the cabinets in the kitchen and the gap between the sink and gas cooker to be cleared out, reinstated and boxed in at the same time all as necessary to ensure that the kitchen fittings are in a reasonable state of repair and in proper working order;*
- (c) instruct suitably qualified contractors to box in the sink and pipes in the bathroom and also to box in the gap between the bath panel and the wall as necessary to ensure that the bath fittings are in a reasonable state of repair and in proper working order;*
- (d) instruct suitably qualified contractors to clear and clean the front and rear guttering and rear downpipe as necessary to ensure the gutters and downpipes are in a reasonable state of repair and in proper working order;*
- (e) instruct suitably qualified contractors to repair or replace the fencing at the back of the property to be of a similar size and style to adjacent properties to provide security for the property and to ensure the said fencing is in a reasonable state of repair and in proper working order.*

The said works specified in the order to be carried out and completed within a period of 10 weeks from the date of service of the Notice of the RSEO. The Notice of the RSEO and determination with statement of reasons was sent by e-mail to the parties on 28 October 2019. The e-mail used for the Landlord had been provided to the Tribunal by him previously.

2. Information was received from the third party applicant in January 2020 that they understood that the tenant had vacated the house.

3. Re-inspections of the house by the Ordinary (Surveyor) Member were arranged for in turn 24 January 2020, 18 February 2020 and 9 March 2020. Before each inspection date a request for postponement was received from the Landlord and agreed to by the Tribunal. The Landlord in these postponement requests indicated that he was unwell; staying in Cyprus; the house was up for sale and would not be re-let because of previous experiences with tenants; access difficulties existed for the first two

inspections; and before the last postponement request, he indicated that a new agent has been appointed and works had not been completed and further time was required.

There then followed postponements at the instance of the Tribunal due to the Covid-19 pandemic, when for safety reasons and government coronavirus restrictions, all scheduled tribunal inspections were postponed and the Landlord was advised that there would be a delay in a re-inspection date being scheduled.

4. To advance the case in the absence of a re-inspection, the following direction was issued to the Landlord with a copy to the third party applicant on 20 October 2020.

“NOTICE TO THE LANDLORD

The time limit for the completion of works in the Repairing Standard Enforcement Order (RSEO) has expired and the First-tier Tribunal requires information from the Landlord as to the stage of completion of the works within 14 days of the date hereof. A copy of the RSEO already sent to you is attached.

This direction requires the Landlord

1. to provide the up to date gas safe certificate for the property which is a requirement of the RSEO;
2. to confirm if the property is vacant; and
3. to lodge photographs to evidence the completion of required works detailed at (b), (c), (d) and (e) of the RSEO.

The Landlord is required to lodge the certificate, photographs and information with the First-tier Tribunal Housing and Property Chamber, 4th Floor, 1 Atlantic Quay, 45 Robertson Street, Glasgow G2 8JB no later than midday on 30 October 2020.

It is possible that the First-tier Tribunal will draw an inference from any failure to lodge the up to date gas safe certificate required in the RSEO and photographs to evidence completion of the required works that the certificate and required works detailed in the RSEO have not been carried out.

After 31 October 2020 the First-tier Tribunal will consider if a decision in terms of Section 26(1) of the Housing (Scotland) Act 2006 should be made and the Landlord has an opportunity to submit written representations in relation to this prior to this date.”

On 21 October 2020 the third party applicant responded that they had no further information to give and that, due to Covid-19, they were not undertaking any visits to properties. No response was received from the Landlord.

5. A check of the issued direction noticed that a former address for the Housing and Property Chamber had been inserted in the direction and, accordingly, in the interests of fairness to the Landlord, the direction dated 3 November 2020 was re-issued to the Landlord and the third party applicant on 4 November 2020 in the same terms but stating the correct address of the Housing and Property Chamber within the direction and replacing the time limit for compliance to the following:

“The Landlord is required to lodge the certificate, photographs and information with

the First-tier Tribunal Housing and Property Chamber, 20 York Street, Glasgow G2 8GT no later than midday on 20 November 2020.

It is possible that the First-tier Tribunal will draw an inference from any failure to lodge the up to date gas safe certificate required in the RSEO and photographs to evidence completion of the required works that the certificate and required works detailed in the RSEO have not been carried out.

After 20 November 2020 the First-tier Tribunal will consider if a decision in terms of Section 26(1) of the Housing (Scotland) Act 2006 should be made and the Landlord has an opportunity to submit written representations in relation to this prior to this date.”

On 9 Dec, 2020 a message was sent to the Landlord confirming that since no response had been received from him to the e-mail communication sent on 4 November 2020 with the direction (copy attached with communication), the Tribunal intended to proceed to making a decision in 7 days.

This prompted an e-mail response from the Landlord on 15 December 2020 stating that he had contacted the Tribunal’s office approximately 7 days before and again on that day with regard to the property. He stated that the property remained empty with no tenants and had been put up for sale. Some of the required repairs had not been carried out owing to the Covid-19 situation in UK and in Northern Cyprus where he had been forced to stay because of lockdowns both there and in UK, plus the travel and quarantine restrictions in both countries. His health had been bad resulting in a heart operation which he had just had done and he still was undergoing further heart treatment in Northern Cyprus. Because of all these factors he had been unable to complete necessary repairs but the property remained vacant and was up for sale. He stated that he did intend to carry out the repairs as soon as Covid-19 is under control and he requested another postponement of a hearing be granted under these serious and unique circumstances.

The Tribunal checked with the Tribunal administration to confirm the communications received from the Landlord given his comments in the e-mail of 15 December. An SCTS caseworker responded on 17 December 2020 as follows:

“I have checked CMS & Outlook for any written communication that may have been received. According to both systems the last written correspondence received from Mr Fergie appears to be 09 March 2020 requesting a postponement. I also checked for any calls that have been logged on to our CMS and there appears to be no communication until 15 December 2020 when Mr Fergie called in to explain why the works had not been completed and the caseworker who took the call explained to Mr Fergie that he would have to put this in writing. Mr Fergie then submitted his e-mail of the 15 December 2020.”

6. Given the contents of the Landlord’s e-mail of 15 December 2020, the Tribunal sought further information and issued a direction to the Landlord with a copy to the third party applicant. The direction was issued to parties on 22 December 2020.

“NOTICE TO THE LANDLORD

Following the issue of a direction dated 3 November 2020, the Landlord has responded by e-mail on 15 December 2020. As a consequence of the details provided in that e-mail, the Tribunal issues the following direction.

This direction requires the Landlord

A. to provide written representations as to the relevancy of the house being up for sale to the determination of the issue of failure to comply with a repairing standard enforcement order over the house; The Landlord may wish to address in his representations the provisions in Schedule 2 Paragraph 7 (3), and Sections 25, 26 and 194 (definition of “landlord”) of the Housing (Scotland) Act 2006.

B. to provide (1) an up to date home report relative the house required for marketing the house and (2) evidence from a selling agent that the house is being sold;

C. to provide written representations and explanation on why the Landlord considers that works cannot be carried out to the vacant house due to Covid19;

D. to explain why the Landlord cannot instruct works to the house via telephone or e-mail from Cyprus or through any selling agent or other person acting on his behalf;

E. to provide written representations as to why the Landlord considers an oral hearing is required and why he considers Rule 18 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 as amended should not apply; a copy of the rules of procedure can be accessed on the Chamber website.

F. If the Landlord seeks an oral hearing before the Tribunal, why this hearing could not be conducted by teleconference with his participation from Cyprus.

The Landlord is required to lodge the information with the First-tier Tribunal Housing and Property Chamber, 20 York Street, Glasgow G2 8GT no later than midday on 6 January 2021. It is possible that the First-tier Tribunal will draw an inference from any failure to lodge the information sought and may proceed to determine the case in the absence of further communication from the Landlord

After 7 January 2021 the First-tier Tribunal will consider if a decision in terms of Section 26(1) of the Housing (Scotland Act 2006 should be made and the Landlord has an opportunity to submit written representations in relation to this prior to this date.”

No response was received and due to the intervening public holidays a reminder was sent to the Landlord on 14 January 2021 extending the time limit to 21 January 2021. No response was received to the reminder.

7. The Tribunal intimated to parties the following communication on 22 February 2021.

“At the end of last year, the Tribunal issued two directions to try to move this case forward to a determination. The landlord responded to the first direction but despite a reminder has not responded to the second.

The first direction issued in October 2020 sought information and evidence from the landlord on the completion of works as detailed in a Repairing Standard Enforcement Order (RSEO) at the property. He responded to this in an e-mail dated 15 December 2020 in which he states

"I have contacted your office approximately 7 days ago and again today with regard to the above property. This property has remained empty with no tenants and has been put up for sale. Some of the required repairs have not been carried out owing to the covid 19 situation in UK and in Northern Cyprus where I have been forced to stay because of lockdowns both here and in UK, plus the travel and quarantine restrictions in both countries.

My health has been bad resulting in heart operation that I have just had done and I'm still undergoing further heart treatment here in Northern Cyprus. Because of all these serious factors I have been unable to complete necessary repairs but property remains vacant and is up for sale. I do intend to carry out these repairs as soon as the Covid 19 is under control but I request that another postponement of your hearing be granted under these serious and unique circumstances."

Following receipt of the e-mail from the landlord, a further direction was issued asking for supporting evidence that the house was up for sale and written representations on a number of issues he refers to and asking why he could not participate at a hearing by means of a teleconference call. In the second direction he was asked for written representations-

- (1) as to the relevancy of the house being up for sale to the determination of the issue of failure to comply with a repairing standard enforcement order over the house;
- (2) to provide written representations and explanation on why the Landlord considers that works cannot be carried out to the vacant house due to Covid19; to explain why the Landlord cannot instruct works to the house via telephone or e-mail from Cyprus or through any selling agent or other person acting on his behalf;
- (3) to provide written representations as to why the Landlord considers an oral hearing is required and why he considers Rule 18 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 as amended should not apply.

The landlord has failed to respond to this direction has failed to respond to a reminder sent on 14 January 2021. The direction was issued via his e-mail account which he used to respond in December 2020.

The Tribunal has considered the provisions in Rule 18 which provides

"Power to determine the proceedings without a hearing

18.—(1) Subject to paragraph (2), the First-tier Tribunal—

(a) may make a decision without a hearing if the First-tier Tribunal considers that—

(i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and

(ii) to do so will not be contrary to the interests of the parties; and

(b) must make a decision without a hearing where the decision relates to—

(i) correcting; or

(ii) reviewing on a point of law, a decision made by the First-tier Tribunal.

(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties."

The Tribunal unanimously considers that it is possible to determine the proceedings without a hearing in accordance with Rule 18. The Landlord has been asked to provide written representations as to why the Landlord considers an oral hearing is required and he has not responded. The Tribunal having considered the history of this case, the provisions of the repairing standard enforcement order (RSEO) and

the contents of written representations from the landlord considers that the Tribunal can make sufficient findings to determine the case on the basis of the information before it and that it would not be unfair or contrary to the interests of justice to do so. The Tribunal will proceed to make a determination on the landlord's compliance with the RSEO and will do so without a hearing. The landlord and third party applicant have until **midday on 8 March 2021** to submit any written representations which they wish the Tribunal to consider in their determination on the landlord's compliance with the RSEO."

8. No response was received from the third party applicant. On 8 March 2021 the Landlord submitted the following

"with regard to 97 Moraine Avenue the tenant paid no rent whilst she lived in my property yet claimed housing benefit for the entire time she lived there. She kept the housing benefit and reported me to environmental health when I found out that she had been in receipt of housing benefit and not paying it to me for her rent. Although I had been not been paid any rent environmental health inspected said property and a number of legal requirements needed to be addressed. Whilst said tenant who was playing the system continuing to claim housing benefit refused to allow access to my property for tradesmen to carry out necessary electrical and gas inspections and other remedial repairs. I have been in lockdown in Northern Cyprus for over a year because of the Covid 19 situation and the fact that I have had 2 heart attacks as well as an emergency heart operation in September and I'm still in recovery and having on going medical treatment. I am also now suffering from severe depression because of all my my problems which I had a mental breakdown 20 years ago when I was diagnosed with severe depression by my doctor and had 6 months of work. I have sent copies of electrical safety certificates to David Cardigan. I have arranged for new locks to be fitted this weekend and I will arrange for gas engineer/plumber to inspect and issue a gas certificate next week As for all other repairs they are cosmetic. This property has been empty since you stated that I cannot rent it out .I put said property up for sale but because of the present climate there has been little interest. I have split up with my partner whom I lived with in her house in Glasgow therefore I have no fixed abode. once I am able to return to UK after I have my Covid 19 vaccine and it is safe for me to return and flights are permitted I will move into 97 Moraine avenue as I now consider it my Uk residential home"

LEGISLATION

9. Section 26 of the Housing (Scotland) Act 2006 as amended states

"Effect of failure to comply with repairing standard enforcement order

(1)It is for the First-tier Tribunal to decide whether a landlord has complied with a repairing standard enforcement order made by the First-tier Tribunal.

(2)Where the First-tier Tribunal decides that a landlord has failed to comply with the repairing standard enforcement order, the First-tier Tribunal must—

(a)serve notice of the failure on the local authority, and

(b)decide whether to make a rent relief order.

(3)The First-tier Tribunal may not decide that a landlord has failed to comply with a repairing standard enforcement order—

(a)unless the period within which the order requires the work to be completed has ended, or

(b)if the First-tier Tribunal is satisfied, on the submission of the landlord or otherwise—

(i)that the landlord is unable to comply with the order because of a lack of necessary rights (of access or otherwise) despite having taken reasonable steps for the purposes of acquiring those rights, or

(ii)that the work required by the order is likely to endanger any person.

(4)Where the First-tier Tribunal is prevented by reason only of subsection (3)(b) from deciding that a landlord has failed to comply with a repairing standard enforcement order, the First-tier Tribunal must serve notice on the local authority stating that it considers the landlord to be unable to comply with the repairing standard enforcement order.”

The definition of “landlord” in contained in Section 194 of the Act:

“landlord” means any person who lets a house under a tenancy, and includes the landlord's successors in title”

The Act envisages that the application and enforcement proceedings following upon a determination under Section 24(1) of the Act can proceed against a Landlord even if the tenancy has been lawfully terminated, all in terms of Schedule 2 Paragraph 7(3) of the Act. This provision in the Act states

“Withdrawal of application

7(1) A tenant may withdraw an application under section 22(1) at any time (and the tenant is to be treated as having withdrawn it if the tenancy concerned is lawfully terminated).

(1A)A third party applicant may withdraw an application under section 22(1A) at any time.....

(3)Where an application is withdrawn after it has been referred to the First-tier Tribunal, the First-tier Tribunal may—

(a)abandon consideration of the application, or

(b)despite the withdrawal—

(i) continue to determine the application, and

(ii) if it does so by deciding that the landlord has failed to comply with the duty imposed by section 14(1), make and enforce a repairing standard enforcement order.”

Section 28(5) of the Act supports that the enforcement of an RSEO applies even although there is no tenant in the property. Section 28(5) states

“(5) A landlord commits an offence if the landlord enters into a tenancy or occupancy arrangement in relation to a house at any time during which a repairing standard enforcement order has effect in relation to the house.”

Section 25 of the Act details the provision on revocation of a RSEO

“Variation and revocation of repairing standard enforcement orders

(1) Where the First-tier Tribunal has made a repairing standard enforcement order, it may, at any time—

(a) vary the order in such manner as it considers reasonable, or

(b) where it considers that the work required by the order is no longer necessary, revoke it.”

REASONS FOR DECISION

10. The Tribunal considered the written representations of the Landlord.

Issues he raises in connection with rent arrears or the payment of housing benefit are irrelevant to the issue of failure to comply with an RSEO. The repairing standard duty in Section 13 and 14 of the Act applies to a landlord irrespective of whether there exist arrears of rent.

The issue of difficulty with access is irrelevant in the context that the house has been vacant for over a year and during that period works could have been carried out. There has been no continuing government restrictions on work being undertaken to a vacant property during the pandemic. The RSEO required the completion of works before the first scheduled re-inspection in January 2020, which was before Covid-19 restrictions applied. A landlord can apply for assistance in terms of Section 28A of the Act to gain access for the purpose of carrying out works to comply with landlord’s statutory responsibilities in the event of difficulties with a tenant facilitating access to a tenanted house. The Landlord made no reference in representations to making such an application.

Whilst the Tribunal may feel some sympathy for the Landlord’s health problems, this does not excuse his failure to arrange for work to a property. The Landlord has indicated in communications that he has put the house up for sale, although has

provided no evidence in the form of a home report or evidence from a selling agent to support this, despite being specifically asked for this in a Tribunal direction. He indicated in a postponement request before a hearing in March 2020 that a new agent had been appointed and works had not been completed and further time was required. He has been able to instruct agents to deal with works and market the house and, therefore, he would have been able to arrange works from Cyprus either himself or through an agent.

The Landlord's stated intention not to re-let the property and to stay in it himself is not sufficient reason to avoid compliance with an RSEO. The legislative requirements are clear. A landlord must comply with the RSEO except in the circumstances detailed in Section 26(3) of the Act. Furthermore, the Tribunal has no guarantee that the Landlord will follow through with his statements, the safety issues continue for any occupant, and the basis for any revocation in terms of Section 25(1) of the Act, which the Tribunal may consider, applies only if *the work required by the order is no longer necessary*. The focus is on the requirement for work rather than the status of the tenancy and legal title of an occupant. There is no evidence before the Tribunal that the works in the RSEO are no longer necessary. The Tribunal did not consider that revocation of the RSEO in terms of Section 25 (1) (b) of the Act is appropriate as the works are still required to the house. The existence of the RSEO registered in the Land Register gives protection that the house will not be re-let as to do so would be an offence in terms of Section 28(5) of the Act.

The Landlord has stated that works have been completed but has provided neither the up to date Gas Safety Certificate for the property which is a requirement of the RSEO; nor lodged photographs to evidence the completion of required works detailed at (b), (c), (d) and (e) of the RSEO as required in a direction. The Landlord has been provided with notice in the directions issued in October and November 2020 that it is possible that the First-tier Tribunal will draw an inference from any failure by him to lodge the up to date gas safe certificate required in the RSEO and photographs to evidence completion of the required works that the certificate and required works detailed in the RSEO have not been carried out. The Landlord responded on 15 December 2020 to the direction. He is aware of the requirements in the direction and the inference which may be drawn.

The Landlord has had considerable time to comply with the RSEO since its issue on 28 October 2019. He has not produced the Gas Safety Certificate as required or any evidence of completion of the required works. He admits that "cosmetic" works in the RSEO have not been completed. He refers to works to locks and the obtaining of an electrical report but neither was included in the RSEO. The Tribunal has provided him with a number of opportunities to comply with the RSEO which he has not done. The written representations he has provided do not provide a relevant reason for not complying with the RSEO.

In all the circumstances and taking into account the Landlord's written submissions, the Tribunal unanimously decided in terms of Section 26(1) of the Act that the Landlord had failed to comply with the RSEO and directed that a notice of the failure be served on the Local Authority on which the house is situated.

APPEAL PROVISIONS

A Landlord 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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

A Devanny

Mrs. Aileen Devanny
Chamber President and Legal Member
8th April 2021