

Housing and Property Chamber

First-tier Tribunal for Scotland



Statement of Reasons: Section 25 and paragraph 6 of Schedule 2 of the Housing (Scotland) Act 2006 (“the Act”)

Chamber Ref: RP/16/0351

The Property:

ALL and WHOLE that area of ground upon which the cottage known as Barr Bheag, Taynuilt, Argyll PA35 1HY is erected; which area of ground forms part and portion of ALL and WHOLE that plot or area of ground at Am Barr, Barguilean, by Taynuilt, Argyll extending to one hectare and seven hundredth parts of a hectare or thereby (2.65 acres) and being the area of ground outlined in red on the plan annexed and signed as relative to Disposition by Anthony Robin Marshall in favour of David Arthur Marshall, Mrs Anne Taylor and Kilbride Trustees Limited as Trustees therein mentioned dated Third December Two Thousand and Two and recorded in the division of the General Register of Sasines applicable to the County of Argyll on 10 January Two Thousand and Three

The Parties:-

**Mr Nicholas Charlton, residing at Barr Bheag, by Taynuilt, Argyll PA35 1HY
 (“the tenant”)**

and

**The Josephine Marshall Trust, Barguilean, Taynuilt, Argyll PA35 1HY
 (“the landlords”)**

THE TRIBUNAL:

The First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Private Rented Housing Committee (PRHC):

David M Preston (Legal Member) and Andrew Taylor, Surveyor (Ordinary Member)

Decision:

The tribunal refuses to vary further the Repairing Standard Enforcement Order (RSEO) dated 8 March 2017 as varied by Variation dated 12 June 2017.

Background:

1. By letter dated 28 June 2019 the landlords applied under section 25 of the Act for a variation of the RSEO dated 8 March 2017 to extend the deadline for compliance from 23 December 2017 until after the tenant's appeal to the Inner House of the Court of Session is concluded. By email dated 5 July 2019 the tenant opposed the application to vary.
2. The basis upon which the landlords sought the variation is as set out in the Paper Apart to their letter:
 - i) Following the expiry of the period for appeal of the Upper Tribunal Decision, the suspension of the RSEO occasioned by the appeal to the Upper tribunal may have ceased to have effect, thus putting the landlords in breach of the RSEO. The landlords' stated intention is not to carry out the works because an order for repossession on grounds of intention to demolish has been granted and the subjects will be demolished shortly after possession is obtained which is delayed only by the appeal process.
 - ii) Compliance with the RSEO would be very expensive and likely to exceed the value of the subjects and perhaps even to require rebuilding of all or part of them. The landlords also, reasonably, do not wish to be in breach of the RSEO and open to prosecution for noncompliance. The landlords accordingly seek variation of the period for compliance with the RSEO until after the appeal process is concluded.
 - iii) Reference is made to the undertaking given to the Upper Tribunal at the hearing on 9 May 2019 and recorded at paragraph 39 of the reported decision dated 28 May 2019, i.e., "*that if an order for repossession is granted the landlord will demolish the property within 6 months of obtaining vacant possession*". Vacant possession will be sought at the earliest opportunity but, unless the tenant removes voluntarily, that will not happen at least until the outcome of the appeal process is known.
 - iv) The variation sought by the landlords is to extend the period for compliance with the RSEO until after the appeal process is concluded.
3. In support of the application to vary, the landlords outlined a number of submissions:
 - a. The Upper Tribunal was satisfied that the landlords had the requisite intention to demolish the subjects and (1) quashed the First-tier Tribunal decision of 23 March 2018 to refuse repossession of the property and (2) ordered repossession of the property in terms of section 18(3) of the Housing (Scotland) Act 1988.
 - b. Subject only to the tenant's appeal (for which permission has not yet been, and may not be, granted) the landlords expect to receive

an Order for Removal. The landlords shall then enforce the repossession order as quickly as possible. It is hoped and expected that vacant possession will be obtained within two or three weeks of receiving the Order.

- c. Once the subjects are vacated, they will remain unoccupied until they are demolished. The landlords will demolish the subjects as soon as reasonably practical thereafter. Without prejudice to that intention, the landlords have, as noted above, also given a formal undertaking to demolish the subjects within six months of gaining vacant possession.
- d. As noted, the Upper Tribunal has held that the landlords' intention to demolish the property is genuine. Further, at paragraph 40 of its decision, the Upper Tribunal held that, "*A remit [to the First-tier Tribunal for reconsideration of the Landlord's intention to demolish] would therefore represent an unnecessary duplication of effort and a further delay.*" That point is now subject to appeal by the tenant, but it is submitted that the First-tier Tribunal (Housing and Property Chamber) should as matters stand and for present purposes, accept the Upper Tribunal's determination on intention. In any event, the landlords' intention to demolish, and that it is genuine, is reiterated here.
- e. Given the tenant will likely be in occupation of the subjects for only a short time longer, and that the subjects will then remain unoccupied until they are demolished thereafter, performance of the obligations under the RSEO would be futile. Reference is made to paragraph 36 of the Upper Tribunal decision, in which it was said that requiring repairs to be carried out prior to demolition would be absurd: "*That situation would indeed be absurd, because it would require wasted expense while not protecting any interest of the tenant.*" Variation of the RSEO is accordingly appropriate, in order not to require futile repairs to be carried out when repossession and demolition are imminent. It would be absurd, disproportionate and unreasonable to require the landlords to put the subjects into compliance with the repairing standard before the appeal is decided given that complying with the RSEO would be very expensive and the subjects are, subject only to the appeal process, going to be demolished imminently.
- f. The tribunal is asked to note that the landlords do not at this stage seek to invoke Section (26)(1)(b) of the 2006 Act, i.e. no application is presently made for the RSEO to be revoked. The landlords accept and defer to the decision made by the Upper Tribunal (at paragraphs 33 and 37 of its decision) that the RSEO should not be revoked at this stage given that the existence of the RSEO provides the tenant and the Tribunal with a remedy in the event possession

were obtained by the landlords but demolition not carried out. The landlords also accept that if the tenant's repossession appeal succeeds, the RSEO would then be enforceable despite the Upper Tribunal's observations about the difficulty of complying with it.

- g. The landlords accept that the RSEO (subject to any variation) should remain in place for the purpose of providing the potential remedy described by the Upper Tribunal. Variation of the RSEO as sought is wholly consistent with that purpose. If the subjects were not demolished within the period of the undertaking, the RSEO could then be enforced. The remedy described by the Upper Tribunal would therefore remain extant even if the RSEO were varied. Variation of the RSEO as sought would mean only that the landlords would not be in breach of the RSEO for the period of the appeal process.
- h. Upon demolition of the property, the landlords will make a further application to the Tribunal under Section 26(1)(b) of the Act requesting that the RSEO be revoked, as it will then be superfluous. Reference is made to paragraph 35 of the Upper Tribunal's decision, in which it was said that, "demolition will simply mean that an RSEO is superfluous, and the tenant has no further need of legal protection from a defective property." In the meantime, only variation of the RSEO is sought.

4. The tenant opposed the application and made the following submissions:

- a. Although the repairs case and the eviction case were conjoined, this was for the purpose of allowing the Upper Tribunal to hear both appeals together and that as the repairs case is not to be the subject of an appeal the cases should not be regarded as conjoined.
- b. The effect of the decision of this tribunal in July 2018 to refuse to vary or revoke the order and decided: that the landlords had failed to comply with the RSEO; to issue a Notice of Failure; and to make a Rent Relief Order (RRO) to reduce the rent by 85%.
- c. There is no reason to further suspend the operation of the order as the decision that the landlords have failed to comply with the RSEO is no longer impugned.
- d. The tenant has continued to make payment of the rent in full because the effect of the RRO was suspended, pending appeal and that he should now have the benefit of the RRO.

Reasons for Decision:

5. The tribunal notes that the repairs appeal (PRHP/RP/16/0351) was conjoined with the eviction appeal (FTS/HPC/EV/18/0045). However, this tribunal considers that the position remains that it has no concern with the repossession application. It is accepted that while the matters are interdependent, the matter of the landlords' failure to comply with the RSEO is separate from their intention to demolish the property. It is noted that the application to vary the RSEO relates solely to the repairs case and although the appeals were conjoined the two cases are now following separate routes.
6. As stated in previous decisions of this tribunal, the landlords' duty to ensure that the property meets the repairing standard subsists at all time during the tenancy (section 14(1)(b)). Until the Order for repossession is enforced and / or the landlords obtain possession, the current tenancy will subsist, and the tenant is entitled to the protection of the Act. If the RSEO were to be further varied by extending the time for the work to be done, the tenant would be denied the effect of the RRO granted on 9 July 2018 for so long as the tenancy remains in effect. The tribunal does not regard the effect of the RRO as a 'benefit'. It is to reflect the fact that the tenant is occupying property which fails to meet the repairing standard.
7. In addition, a Notice of Failure was issued to the Local Authority on 13 July 2018 and while its effect was suspended until the appeal to the upper tribunal was finally determined, the decision is now effective as of the Decision of the Upper Tribunal to adhere to the decision of the tribunal not to revoke the RSEO. In any event the landlords' failure was to implement the terms of the RSEO. That was the case at the time of the re-inspection in May 2018 and in the absence of any work having been carried out since then, remains the case.
8. The tribunal is of the view that as at the date of the Reinspection Report (11 May 2018) the landlords had failed to implement the RSEO in a number of respects over and above the items related to the expert report, all as outlined in the tribunal's decision of 9 July 2018. In particular, the works which had been carried out in respect of the following items from the RSEO:
 - a. Item 3: Replacement or repair of the downpipe at the right hand (eastmost) end of the front elevation of the property;
 - b. Item 5: Repair or replacement of the front porch;
 - c. Item 6: Repair or replacement of the back doorstep;
 - d. Item 7: Replacement of the floorboards affected by wet rot adjacent to the threshold of the back door;
 - e. Item 8: Repair or replacement of the kitchen external roof trim to ensure that the area is wind and watertight;

Were found not to have been carried out satisfactorily to the extent of meeting the repairing standard.

9. In relation to the expert report obtained by the landlords, and with respect to the views of the Upper Tribunal as to its effectiveness the tribunal remains of the view that the landlords' failure relates to the fact that they have not obtained a report which addresses "*the requirements for a property of this form of construction to make the property wind and watertight and to address the issues of dampness within the property where evident throughout*" and "*the issue of the roof of the property where it meets the gutters to prevent overspill of rainwater*".
10. With respect to the Upper Tribunal, the requirement for the expert report was not part of an information-gathering exercise. It was intended to inform the landlords of the work required, in the expert's opinion, to bring the property up to the repairing standard. The tribunal does not exercise control of works to be carried out. The work to be done, and how it is done, are entirely matters for the landlords. Once completed, the property is re-inspected and the tribunal will then determine whether, at that point, the property meets the repairing standard. If "minimalist" recommended work is found to be effective, then the tribunal will be satisfied. If "extravagant" recommended work is not effective to make the property meet the repairing standard, the RSEO will not be revoked. It is for the landlords to decide the extent and nature of the works to be carried out, so long as the works are effective in meeting the repairing standard.
11. The tribunal agrees with the submissions made on behalf of the tenant that he is entitled to the protections afforded by the Act and to be entitled to the effect of the RRO.

A landlord, tenant or third party applicant 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.

D Preston

11 July 2019