

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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

**STATEMENT OF DECISION: in terms of Section 25 of the Housing (Scotland) Act 2006 (“the Act”) in respect of an application under Section 22(1A) of the Act**

**Chamber Reference number: FTC/HPC/RT/22/0840**

**Parties:**

- 1. Dumfries and Galloway Council per its employee Mr. Robert Rome, HMO Licensing and Landlord Registration Officer, Strategic Housing, Municipal Chambers, Buccleuch Street. Dumfries, DG1 2AD as third-party applicant in terms of Section 22(1A) of the Act (“the Third -party Applicant”);**
- 2. Mr. James Donnelly residing at 4, Knowe Cottages, Kirkconnel, Sanquhar, DG4 6NN (“the Tenant”) and**
- 3. Inkersall Investments Limited, Challenge House, 46, Nottingham Road, Mansfield, Nottinghamshire, NG18 1BL (“the Landlord”), together referred to as “the Parties”.**

**Property: 4, Knowe Cottages, Kirkconnel, Sanquhar, DG4 6NN being part of the subjects registered under title sheet number DMF22527**

**Tribunal Members**

**K Moore (Chairperson) and C Jones (Ordinary Member)**

**Decision**

This Decision should be read in conjunction with the Decision and Repairing Standard Enforcement Order (RSEO) both dated 21 June 2022.

The Tribunal determined to vary the RSEO in terms of Section 25 (1) of the Act and for the reasons set out below.

**Background**

- 1. By application received on 23 March 2022 (“the Application”), the Third -party Applicant applied to the First-tier Tribunal for Scotland (Housing & Property Chamber) for a determination that the Landlord had failed to comply with the duty imposed on him by Section 14(1)(b) of the Housing (Scotland) Act 2006 (“the Act”) in respect that the Property does not meet the Repairing Standard in respect of Sections 13 (1) (a), 13 (1) (b) and 13(1) (h) of the Act.**

2. Following an Inspection of the Property and a Hearing, the Tribunal imposed the RSEO:

*“The Landlord must on or before 21 September 2022 carry out all of the following:-*

*Instruct a damp proofing and timber specialist registered with the Property Care Association or similar trade organisation to carry out an inspection of the Property with a view to identifying the extent and causes of the dampness in the ground floor bedroom, entrance hall and living room of the Property, provide a fully documented report on their findings and recommend works to remedy the dampness and rectify any damage caused by the dampness (“the Dampness Report”). The instruction to the specialist should include a copy of this RESO, the said Decision of Tribunal and the Tribunal’s Inspection Report;*

*Submit the Dampness Report to the Tribunal, the Third-party Applicant and the Tenant;*

*Instruct a contractor or contractors capable of providing a 10- year guarantee to carry out all works recommended by the Dampness Report;*

*Instruct a drainage engineer registered with the National Association of Drainage Contractors or similar trade organisation to carry out a full inspection of the garden grassland area to the front of the Property with a view to identifying the extent and causes of the excess water in that area, provide a fully documented report on their findings and recommend works to remedy the drainage issues (“the Drainage Report”). The instruction to the specialist should include a copy of this RESO, the said Decision of Tribunal and the Tribunal’s Inspection Report;*

*Submit the Drainage Report to the Tribunal, the Third-party Applicant and the Tenant;*

*Instruct a contractor or contractors capable of providing a 10- year guarantee to carry out all works recommended by the Drainage Report;*

*Make good the décor damaged as a result of the water ingress to the front bedroom ceiling;*

*Replace the broken roof slates;*

*Replace the downpipe and guttering to the rear of the Property to ensure that these are in proper working order;*

*Replace the open fire hearth in the living room to ensure that the hearth is fully tiled with heat resistant tiling and that the fire can be used safely;*

*Repair or replace the back panel to the right side lower cabinet and re-instate the shelf to the adjoining left side cabinet in the kitchen.*

*Repair the extractor fan in the kitchen to ensure that it is in proper working order, is not excessively noisy and does not allow an excessive amount of wind to enter the Property. In the event that a repair is not possible, replace the fan with an electric fan to be fitted by a suitably qualified and registered SELECT, NAPIT or NICEIC electrical contractor and*

*Make good all damage as a result of these works.”*

### **Section 25(3) Application**

6. By email dated 20 September 2022, the Landlord applied to the Tribunal in terms of Section 25(3) of the Act to vary the RSEO in respect of both the wording of the RSEO and the time given for compliance. By email dated 7 October 2022, the third-party Applicant responded to the Landlord's application. As a Re-inspection of the Property had been arranged for 4 November 2022, the Tribunal advised the Parties that it would consider the Landlord's application to vary the RSEO at a Hearing after the Re-inspection had taken place.

### **Re-Inspection**

7. The Re-inspection took place on 4 November 2022 at 11.00 a.m. at the Property. The Third-party Applicant was represented by Mr. Robert Rome and his colleague. The Landlord was represented by Mr. James Woodcock. The Tenant was present along with Miss Parker, as a supporter. Also present in the Property was the Landlord's contractor who was carrying out work at the Property.
8. The Tribunal inspected the parts of the Property referred to in the RSEO namely:-
  - i) The areas of dampness to the front wall of the Property at the front door, the hallway and the adjacent front bedroom;
  - ii) The area of damp staining on the ceiling of the ground floor front bedroom at the gable wall;
  - iii) The skirting board and wall behind it in the living room;
  - iv) The grassland to the front of the Property;
  - v) The extractor fan in the kitchen;
  - vi) The broken roof slates;
  - vii) The open fire hearth in the living room;
  - viii) The interior of the kitchen cupboards and
  - ix) The cast iron downpipe and gutter to the rear kitchen extension of the Property.
9. At the Re-inspection, the Tribunal took damp meter readings and digital photographs which photographs are included in the Re-inspection Report which was issued to the Parties ahead of the Hearing.

### **Hearing**

10. The Hearing was held by telephone conference call on 30 November 2022 at 10.00 am. The Third-party Applicant was represented at the Hearing by Mr. Adam Black and Mr. Robert Rome. The Landlord was represented by Mr. James Woodcock. The Tenant, as an interested party in the case, was present as an observer along with Miss Parker, as a supporter.
11. The Tribunal explained that the purpose of the Hearing was two-fold: consideration of the Landlord's application to vary the RSEO and the outcome of the Re-inspection. Mr. Woodcock had not had sight of the Re-inspection Report and so there was a short adjournment for him to review the report. Prior to the Hearing, the Landlord had submitted a Dampness Report as required by the RSEO. As the Tribunal had had sight of only a part of the Dampness Report there was a further short adjournment for the Tribunal to review the whole of the Dampness Report.

12. The Tribunal then considered each issue of the RSEO in turn.

#### **Dampness and items 1-3 of the RSEO.**

13. In the application to vary the RSEO, the Landlord stated that they cannot find a contractor willing to give a ten-year guarantee to works and that, as the works recommended in the Dampness Report are not specialised damp proofing work, the works are capable of being completed by a general builder to a standard consistent with the repairing standard. Nonetheless, Mr. Woodcock advised the Tribunal that the Landlord had instructed Russell Preservation who carried out the Dampness Report and who can offer a seven-year guarantee to carry out the works. He advised that the earliest date for the works is 9 January 2023 and cautioned that, from previous experience, contractors often fail to attend due to the remote location of the Property. Mr. Woodcock expressed disappointment that the Tribunal had not been able to give him a steer at the Re-inspection that a reduced guarantee period would be acceptable and expressed an opinion that the requirement for a guarantee exceeded the Tribunal's powers in respect of requiring properties to meet the Repairing Standard. The Tribunal's view at the Re-inspection was that inspections are not the forum for fair discussion and are a visual inspection only. With regard to the Tribunal's powers, the Tribunal explained that it is entitled and obliged to ensure that work carried out on a property is carried out to a competent standard and a way in which to ensure this is to set a competence standard for the contractor which can be measured by the contractor's ability to warrant or guarantee its workmanship.

14. Mr. Rome, on behalf of the Third-party Applicant stated that he was content with a seven-year guarantee standard. Mr. Rome stated that he disagreed that the work could be carried out by a general builder as fungicide treatment was required. He pointed out that the Dampness Report indicated that the source of penetrating damp had not been fully investigated and in relation to the bedroom, the report noted that the excess water retention in the front garden may be causing an issue with the saturated solum.

15. Mr. Woodcock disputed this as his view is that the ground around the front walls of the Property is sound and stable. Mr. Woodcock advised that, although Russell Preservation has cleared one of the vents at the Property, the work carried out in May 2022 including pointing to the brickwork and installation of a damp proof membrane might delay the drying out of the underfloor of the Property, but that Russell Preservation would carry out further work, in any event.

#### **Drainage and items 4-6 of the RSEO**

The Parties agreed that the drainage in the front garden is the more complex issue.

16. In the application to vary the RSEO, the Landlord stated that, in spite of their best endeavours, they cannot find a contractor able to provide the Drainage Report required by the RSEO, explaining that the National Association of Drainage Contractors are engaged in the trade services in respect of foul water or sewerage drains and not land drainage and the Landlord can find no alternate professional

expert, or member of an equivalent trade organisation, to make further recommendations or report. The application to vary the RSEO states that there are no sewerage or foul water drains in proximity to the front garden and states that the Landlord has previously mitigated excessive water in the front garden by the installation of a perforated agricultural drainage pipe bedded on pea gravel to enable excess water to drain to adjacent land. Mr. Woodcock suggested that the installation of further perforated agricultural drainage pipes might resolve the issue.

17. Mr. Rome questioned the effort made by the Landlord to obtain a Drainage Report and understood that a contractor had carried out an inspection. Mr. Woodcock explained that, although a contractor had attended, he had declined to prepare a report or take on the work.

18. Mr. Rome's view is that the water-logged front garden could be contributing to the dampness in the Property as the Dampness Report found penetrating dampness and a wet solum. His view is that water could be seeping underground and affecting the Property. Mr. Woodcock strongly refuted this suggestion and was of the firm view that they are two separate issues. Mr. Woodcock advised that the solum might still require time to dry out following the works done in May 2022. He explained that a land drain had been installed underground at the front of the adjacent property which might discharge at the path of the Property and that the ground level of the neighbouring property had been raised which also might have an adverse impact.

#### **Miscellaneous items 7-12 of the RSEO**

19. The parties agreed that the items listed in the RSEO at 7 - 11 had been dealt with satisfactorily.

#### **Extractor fan item 12 of the RSEO**

20. Mr. Rome advised the Tribunal that, although additional covers had been installed to alleviate the wind ingress, a significant amount of wind still enters the Property when the extractor fan is not in use. This would appear to be caused by the louvres which free swing. Mr. Woodcock agreed that three solutions had been tried in an attempt to remedy the Tenant's complaints.

#### **Summary of the Issues**

21. The issues to be determined by the Tribunal are whether or not to vary the RSEO in terms of Section 25 of the Act or to make a finding of failure to comply in terms of Section 26 of the Act.

#### **Findings of Fact**

22. The Tribunal's findings in fact were made from the Landlord's application to vary the RSEO, the Third-party Applicant's written submissions, the Re-inspection and the Hearing.

23. The Tribunal found the following matters established: -

- i) There remain areas of dampness to the front wall of the Property at the front door, the hallway, the adjacent front bedroom and living room and dampness under the floor of the front bedroom of the Property;
- ii) The Landlord has obtained a satisfactory Dampness Report and has instructed the contractor who prepared the Dampness Report to carry out the recommended works.
- iii) The grass to the front of the Property is still extremely wet and does not appear to be draining properly, rendering the front garden unusable;
- iv) The Landlord has been unable to obtain a Drainage Report as required by the RSEO;
- v) The extractor fan in the kitchen appears to allow excessive wind into the Property;
- vi) The remaining items in the RSEO have been dealt with satisfactorily.

### **Relevant Legislation**

24. The relevant legislation is Section 25 of the Act which states:"

“(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.

(2) Where subsection (3) applies, the First-tier Tribunal must vary the repairing standard enforcement order in question (a) so as to extend, or further extend, the period within which the work required by the order must be completed, and (b) in such other manner as it thinks fit.

(3) This subsection applies where (a) the First-tier Tribunal considers, on the submission of the landlord or otherwise, that the work required by a repairing standard enforcement order has not been, or will not be, completed during the period within which the order requires the work to be completed, and (b) the First-tier Tribunal (i) considers that satisfactory progress has been made in carrying out the work required, or (ii) has received a written undertaking from the landlord stating that the work required will be completed by a later date which the First-tier Tribunal consider satisfactory.

### **Decision of the Tribunal and reasons for the decision.**

- 25. The Tribunal’s decision is based on all of the information before it whether specifically referred to or not.
- 26. The Tribunal, firstly, had regard to Section 25(3) of the Act. The Tribunal was satisfied that the Landlord had made a competent submission in respect of Section 25(3)(a) of the Act. The Tribunal then considered Section 25(3)(b)(i) of the Act as the Tribunal had not received an undertaking in respect of Section 25(3)(b)(ii). The Tribunal took the view that as items 7-11 inclusive of the RSEO had been dealt with and as progress had been made in respect of items 1-3 inclusive of the RSEO, the Tribunal, in terms of Section 25(2) of the Act must vary the RSEO.
- 27. As the Tribunal was bound by Section 25(2) of the Act, the Tribunal could not consider Section 26 of the Act.

28. Accordingly, the Tribunal considered the way in which it must vary the RSEO.

#### **Dampness and items 1-3 of the RSEO**

29. The Tribunal accepted the Landlord's position that they could not find a contractor willing to give a ten-year guarantee to works, that they had sourced a contractor who could provide a seven-year guarantee and had instructed that contractor to carry out the works recommended in the Dampness Report. The Tribunal noted that the Third-party Applicant does not oppose this course of action. Therefore, the Tribunal varies the RSEO to conform to this course of action.

#### **Drainage and items 4-6 of the RSEO**

30. The Tribunal accepted the Landlord's position that they could not find a contractor willing to provide a Drainage Report. The Tribunal had regard to the facts that the front garden remains in a water-logged condition and, having regard to the Third-party Applicant's views, cannot rule out at this stage that the condition of the front garden does not contribute to the dampness in the Property. The Tribunal had regard also to the Landlord's views that other factors such as the works carried out at the neighbouring property could be having an impact on the dampness in the Property and on the condition of the front garden. The facts remain that a Drainage Report is proving extremely difficult to obtain and that drainage works are required. Therefore, the Tribunal varies the RSEO to allow the Landlord greater latitude in addressing the drainage issues in the front garden.

#### **Miscellaneous items 7-11 of the RSEO**

31. The Parties having accepted that these matters have been attended to satisfactorily, the Tribunal varies the RSEO accordingly.

#### **Extractor fan item 12 of the RSEO**

32. The Tribunal accepted that, although the Landlord has made attempts to resolve the wind ingress when the extractor fan is not in use, these attempts have not been successful. Therefore, the Tribunal varies the RSEO in respect of time to comply with this part of the RSEO. The Parties are reminded that this part of the RSEO states that "*In the event that a repair is not possible, replace the fan with an electric fan to be fitted by a suitably qualified and registered SELECT, NAPIT or NICEIC electrical contractor.*"

#### **Unanimous Decision**

33. This decision is unanimous.

#### **Repairing Standard Enforcement Order**

34. Having determined that the Landlords have failed to comply with the duty imposed by section 14(1)(b), the tribunal proceeded to make a Repairing Standard Enforcement Order as required by Section 24 (1) of the Act.

#### **Appeal**

35. In terms of section 46 of the Tribunals (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.

**Effect of Section 63**

36. 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.

Signed

K Moore, Chairperson

Date 13 December 2022