

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

Re: Property at 41, Woodcroft Avenue, Largs, North Ayrshire, KA30 9EW registered in the Land Register for Scotland under Title Number AYR15648 ("the Property")

Chamber Ref: FTS/HPC/RP/22/4474

The Parties

Mr. Robert James Whitney, otherwise known as Bob Whitney, residing at 63 Ritchie Street, West Kilbride, North Ayrshire, KA23 9HF ("the Landlord")

Ms. Susan Thomson ("the former Tenant")

The Tribunal comprised Mrs. Aileen Devanny, Chamber President and Legal Member, and Ms. Carol Jones, 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 ("the RSEO") in relation to the Property, and having carried out an inspection of the Property and having considered the written representations and productions of the Landlord, determined in terms of Section 26(1) of the Housing (Scotland) Act 2006 ("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 Property is situated. The decision is unanimous.

BACKGROUND

1. Reference is made to the Determination of the Tribunal dated 25 April 2023 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 25 April 2023 which confirmed that the Landlord had failed to ensure that the Property met the repairing standard.

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) instruct a suitably qualified drainage engineer to carry out a full inspection of the garden area to the rear of the Property and the land drains therein with a view to identifying the extent and causes of the excess water in that area and flooding to the adjacent paved garden area, provide a report to the Tribunal and the Tenant on the findings and carry out any recommended works to remedy the drainage issues (“Drainage Report”);
- (b) repair or replace the defective handle on the rear bedroom window to ensure that the window closes properly; and
- (c) repair or replace the defective handle on the porch/ vestibule door to ensure that the door closes properly.

The said works specified in the order to be carried out and completed on or before 30 June 2023. The Notice of the RSEO and determination with statement of reasons was sent by e-mail to the parties on 3 May 2023. The e-mail used to communicate with the Landlord had been provided to the Tribunal by him previously.

2. The Landlord’s representatives at that time, Ayrshire Lettings and Sales, provided documentation to the Tribunal, being an invoice dated 3 May 2023 from Drainpro Ayrshire. This invoice confirmed that Drainpro Ayrshire had conducted a CCTV survey, dye test of the rainwater downpipe and wavin coil drain to main drain and no drainage issues had been found. No report was submitted beyond the invoice to identify the extent and causes of the excess water in the area and flooding to the paved patio area at the Property. A copy of this invoice was circulated to the Tenant’s representative Mr. Alister Meek from CHAP, an Ayrshire Charity providing advice and information on housing and welfare issues, and in a response dated 30 June 2023 Mr. Meek wrote to the Tribunal stating that the Tenant had provided to him, and which he attached to the email, a video recorded on 27 June 2023 showing that the garden is still flooding when it is raining. This video was taken after the visit from DrainPro Ayrshire. The Tribunal administration detailed to Mr. Meek in a letter dated 4 July

2023 that the video could not be opened onto the SCTS computer system and the process Mr. Meek would require to follow for the video to be uploaded as evidence. The video was never uploaded and on 27 July 2023 Mr. Meek communicated that the Landlord had been granted an order for possession of the Property on the ground that the Landlord and his wife intended to reside in the property themselves. The representative of the tenant indicated that the re-inspection was no longer necessary and the tenant did not wish to continue with the proceedings. He stated that the tenant was content with the state of the tenancy.

3. On 30 June 2023 a re-inspection of the house by the Tribunal members was arranged for 21 August 2023 at 10am. Following receipt of the communication from Mr. Meek dated 27 July 2023, the parties were advised on 9 August 2023 that the Tribunal proceedings are formal judicial proceedings which must follow to a statutory conclusion.

The Tribunal in this case has made an RSEO and registered it against the property title as required in Section 61 of the Act. The RSEO is included as a burden in the land certificate of the Property Title Number AYR15648 and transmits to any subsequent owner, as the successor in title to the Landlord in terms of the definition of landlord in Section 194 of the Act. The existence of an RSEO on the title to the Property results in the operation of Section 28 of the Act which has the effect of restricting the use of the Property to exclude new tenancy and occupancy agreements in relation to the Property during the time when the RSEO has effect. The RSEO remains in place until it is revoked or discharged.

4. The tribunal members attended for the re-inspection on 21 August 2023 but it did not go ahead as the Tribunal members could not obtain access. On 29 August 2023 the Tribunal issued a direction to parties to check if the tenancy remained in place and if the Property was occupied; and to direct a further inspection of the Property and hearing be arranged with parties required to attend.

5. A further re-inspection of the Property was arranged for 1 December 2023 with a hearing fixed thereafter at Ardeer Neighbourhood Centre, Stevenson to check compliance with the RSEO. An email was received from the Tenant's representative, Mr. Meek, on 28 September 2023 stating that Ms. Thomson was no longer resident in the Property as the Landlord had enforced an eviction order. The Landlord's representative confirmed this and that the Property is no longer let.

6. The original legal member of the Tribunal, Mrs. Karen Moore, could not continue on the case for personal reasons and the Chamber President was substituted as the legal member.

7. The Tribunal confirmed on 16 November 2023 that even although the house is in

the occupation of the owner, the RSEO remains a burden on the Property title which prevents the house being re-let in terms of Section 28(5) of the Act. This burden will remain on the title and will transmit on sale to a purchaser and can restrict the future use of the Property. The Tribunal intimated that an inspection and hearing as intimated would proceed.

8. An inspection and hearing took place on 1 December 2023. The Tribunal comprised Mrs. Aileen Devanny, Chairperson, and Ms. Carol Jones, Ordinary (Surveyor) Member. The Landlord attended the inspection of the Property but did not attend the hearing. The Landlord indicated to the Tribunal members at the inspection that he was undecided as to whether the Property would be sold or re-let.

The inspection confirmed that the Property was unoccupied and unfurnished.

The inspection was confined to the issues mentioned in the RSEO. The inspection showed that items (b) and (c) in the RSEO had been completed with new handles fitted. The handle in the rear bedroom was checked, as was the handle on the porch/ vestibule door, and the handles were found to be working correctly.

At the inspection of the Property the Tribunal members noticed that the observations on the smoke detector alarms and heat alarm detailed in the Determination of the Tribunal dated 25 April 2023 were still outstanding. These observations do not form part of the RSEO for the reasons detailed in the said Determination. In the case of the heat alarm mounted on the kitchen ceiling that alarm has now been removed from the ceiling and was seen to lie on a window sill. The smoke alarm mounted on the living room ceiling is loose and hanging from a wire. These issues are not part of the RSEO but are made as an observation for the Landlord because of the safety issue the lack of such working alarms pose.

The weather was dry and frost lay on the ground when the inspection took place. An external inspection of the rear garden area showed that some items of rubbish previously present at the first inspection before the RSEO was made had been removed and some rubbish remained, such as old doors. The garden has a paved area immediately at the rear of the house and beyond that a small retaining wall with a grassed sloping area above. The rear garden is enclosed by a timber boundary fence with a very steep grassed slope to the east beyond the curtilage of the Landlord's title. There is an exposed section of land drainage pipe at the base of the grassed slope within the southern boundary of the garden of the Property. Observation of the gardens on either side of the Property show that attempts have been made to improve drainage from the steep grass slope to the rear of these properties. The rear garden of the house on the northern side of the Property consists of tiered descending levels topped with red chips and the rear garden of the house on the southern side of the Property has added a drain covered with a plastic grill on the paved area at the bottom of the slope. Drainage channels have been cut into a cultivated area of the garden slope and

the land beyond the eastern boundary to channel water into the drainage grill.

Whilst the Tribunal did not observe flooding at the Property at the inspection, the grassed area above the retaining wall was frozen hard and the weather was dry. There appears to be an ongoing problem with land drainage due to the steep gradient of the slope as the water descends into the paved patio area adjacent to back door of the Property. The Tenant reported that flooding was an ongoing issue after the visit from Drainpro Ayrshire. The purpose of requirement (a) in the RSEO is to identify the extent and cause of the excess water in the paved area of the garden, which as a video showed before the RSEO was made, impacts on the paved area beyond the back door of the Property and the use and enjoyment of that area. A Drainage Report was sought on the findings of a suitably qualified drainage engineer on any identified works which could take place in the curtilage of the rear garden area of the Property to provide a solution. The invoice provided by Drainpro Ayrshire is not such a report. The Tenant's representative indicated in July that he had a video which indicated that the problem persisted after the RSEO was made and after the visit of Drainpro Ayrshire, although the video was not submitted in a format which could be accessed by the Tribunal.

The Tribunal observed at the inspection that gutters to the rear of the Property remain choked with vegetation which was present at the first inspection. The downpipe feeding into a drain at the end of the rear paved patio area is now damaged and disconnected at the joint. This is likely to exacerbate any flooding and drainage issue in the area of the rear paved patio of the Property.

A hearing took place after the inspection which neither the Landlord nor any representative attended.

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” is 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.”

DETERMINATION AND REASONS

The Tribunal considered the evidence and unanimously decided in terms of Section 26(1) of the Act that the RSEO should be varied to delete reference to items (b) and (c) which have now been satisfactorily completed; and that item (a) of the RSEO had not been completed by the Landlord. No Drainage Report has been provided as required. Section 24 (5) of the Act states that

“A repairing standard enforcement order may specify particular steps which the First-tier Tribunal requires the landlord to take in complying with the order”

This would include the obtaining of a Drainage Report from a suitably qualified drainage engineer.

Should a Drainage Report have been submitted, the Tribunal would have considered the report's findings and the Tribunal could have specified further steps to remedy the drainage issue. Given the absence of a tenant and the need for the Tribunal not to delegate their decision making role, the Tribunal deletes the phrases in item (a) of the RSEO “and the Tenant” and “any recommended”. However, no Draining Report has been submitted to the Tribunal and this variation does not impact on the Landlord's failure to comply with the RSEO. The drainage arrangement at the Property remains as existed at the first inspection. The Landlord had failed to submit a Drainage Report as required and has failed to comply with the RSEO and the Tribunal directs that a notice of the failure be served on the Local Authority for the area in which the Property is situated.

The Landlord had already had sufficient time to complete the RSEO by obtaining a Drainage Report specified in item (a) of the RSEO. The house is empty but the obtaining of a Drainage Report and implementation of a remedy for the drainage issue is still necessary. The RSEO relates to required works to the Property which involves an issue for future occupants of the house.

Since the former Tenant has left the house, a rent relief order is not appropriate.

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.

Note: that in terms of Section 28(1) of the Act, a landlord who, without reasonable excuse, fails to comply with a RSEO commits an offence liable on summary conviction to a fine not exceeding level 3 on the standard scale. A landlord (and that includes any landlord's successor in title) also commits an offence if he or she enters into a tenancy or occupancy arrangement in relation to the house at any time during which an RSEO has effect in relation to the house. This is in terms of Section 28(5) of the Act.

A Devanny

Mrs. Aileen Devanny
Chamber President
20 December 2023

Housing and Property Chamber
First-tier Tribunal for Scotland



Schedule of photographs taken during the inspection of 41 Woodcroft Avenue, Largs
KA30 9EW by the First-tier Tribunal for Scotland (Housing and Property Chamber) on
Friday 1 December 2023

Reference Number : FTS/HPC/RP/22/4474



Front Elevation



Back Bedroom - new window handle



Internal timber/glazed panel door to front porch - new handles



Rear elevation/garden



Back Garden- small grassed slope below rear timber boundary fence adjoining very steep sloping land to east



Back garden - paved patio below grassed slope and retaining wall



Back garden - exposed section of land drainage pipe at base of grassed slope just within southern boundary of garden



Ground to rear/east of adjoining end terrace house - showing draining channels dug into slope/ water flowing in channels



Rear elevation - gutter choked with vegetation



Rear elevation - downpipe damaged/ disconnected at joint



Ceiling mounted smoke detector - landing (observation)



Ceiling mounted smoke detector loose/hanging from wire - living room (observation)



Ceiling mounted fitting/heat detector missing - kitchen (observation)



Heat detector loose/lying on living room window sill (observation)