

# Housing and Property Chamber First-tier Tribunal for Scotland

---



## First-tier Tribunal for Scotland (Housing and Property Chamber) STATEMENT OF DECISION: in terms of Section 24 (1) of the Housing (Scotland) Act 2006

Chamber Reference: FTS/HPC/RP/18/3188

Property at Rossie Priory, Inchtute, Perth, Perth & Kinross, PH14 9SG ("the Property")

The Parties:

Dr Peter Dymoke and Mrs Beth Dymoke, residing at, Rossie Priory, Inchtute, PH14 9SH ("the Tenants")

Mrs Caroline Best, having a place of business at Rossie Home Farm, Estate Office, Inchtute, PH14 9SH ("the Landlord")

Tribunal Members:

Andrew Cowan, Chairman/Legal Member

Robert Buchan, Ordinary (surveyor) Member

### Introduction

1. The Tenant has made an Application to the Tribunal in terms of Section 22 of the Housing (Scotland) Act 2006 ("the Act") in which they have made a variety of complaints that the Landlord has failed to ensure that the Property meets the Repairing Standard at all times during this Tenancy, and that, accordingly, the Landlord has failed to comply with the duty imposed by section 14(1)(b) of the Act.
2. This is the third Application which the Tenants have made in relation to the Property. The Tribunal have previously issued a decision in relation to the first two Applications (case references: PRHP/RP/16/0027 and FTS/HPC/RP/18/1020). The decision in relation to these conjoined Applications was issued on 9 May 2019. In the course of those Applications the Tribunal were required to inspect the property on three different occasions. The Tribunal are accordingly familiar with the location, size and extent of the property.

## **The Extent of the Repairing Standard**

3. In terms of a preliminary decision issued by the Tribunal dated 17 January 2017 (in connection with the earlier cases) the Tribunal have accepted that the Landlord and Tenants have contracted out of certain parts of the Repairing Standard.

### 4. The Repairing Standard

Section 13 (1) of the Act defines the Repairing Standard which the Landlord must maintain.

In terms of Section 14 (1) of the Act, the Landlord in a Tenancy must ensure the house meets the Repairing Standard (a) at the start of a Tenancy and (b) at all times during the Tenancy.

Section 16 of the Act sets out certain exceptions to the Landlord's repairing duties. In particular Section 16 sets out as follows

*16 (1) The duty imposed by Section 14 (1) does not require-*

*a. Any work to be carried out which the Tenant is required by the terms of the Tenancy to carry out*

*b. Any work to be carried out for which the Tenant-*

*a. Is liable by virtue of the Tenant's duty to use the house in a proper manner, or*

*b. Would be so liable but for any express undertaking on the Landlord's part,*

*c. The house to be rebuilt or reinstated in the event of destruction or damage by fire or by storm, flood or other inevitable accident, or*

*d. The repair or maintenance of anything that the Tenant is entitled to remove from the house.*

*(2) The exception made by subsection (1)(a) applies only if the Tenancy concerned is-*

*a. For a period of not less than 3 years, and*

*b. Not determinable at the option of either party within 3 years of the start of the Tenancy*

*(3) Where the terms of a Tenancy are not agreed until after the Tenancy starts, the Tenancy is, for the purpose of subsection (2), to be treated as starting on the date of the agreement.*

*(4) A Landlord is not to be treated as having failed to comply with the duty imposed by Section 14 (1) where the purported failure occurred only because the Landlord lacked necessary rights (of access or otherwise) despite having taken reasonable steps for the purpose of acquiring those rights.*

The Tenancy agreement between the parties is comprised of an offer to let issued in April 2015 and two subsequent missives. Clause 4 of the offer to let refers to the condition of the property. In particular the offer of let provides as follows:-

*"4.1 Condition of the Subjects*

*(a) The Tenant accepts the subjects as complying with the Repairing Standard at the Date of Entry as evidenced by a Record of Condition to be prepared by the Landlord and assigned by both parties, a copy being retained by each of the parties.*

*(b) The Tenant accepts the subjects as being in good tenantable condition and repair and in good decorative order as at the Date of Entry. The Tenant will maintain the interior of the subjects throughout the period of this lease and leave it at the termination of this Lease, for any reason, in good tenantable condition and repair and in good decorative order.*

*(c) Throughout the duration of the Lease the Tenant is responsible for ensuring the Subjects meet the Repairing Standard except that the Landlord shall be responsible for ensuring that the Subjects meet the Repairing Standard in respect of the following only-*

*(i) The subjects are wind and watertight except that broken window panes will be replaced at the Tenant's expense,*

*(ii) The structure and exterior of the subjects (including drains, gutters and external pipes) are in a reasonable state of repair and in proper working order (having regard to the age, character and prospective life of the Subjects and the locality in which the Subjects are situated)...*

In terms of the Decision issued by the Tribunal dated 17 January 2017 and in particular under the heading "Preliminary Issue 4" the Tribunal accepted that the Landlord had "contracted out" of certain parts of the Repairing Standard. The Tribunal determined the lease between the parties was for a period of not less than three years and was not determinable at the option of either party within three years of the start of the Tenancy. The Tribunal therefore determined that the Landlord was entitled to restrict the Repairing Standard imposed by the terms of the Tenancy agreed by the parties. Reference to the Repairing Standard throughout this Decision therefore refers to the Standard as restricted by the terms of the tenancy between the parties.

## **Background**

5. In the latest Application, which is now being considered by the Tribunal the Tenants averred that the Property does not meet the Repairing Standard in relation to:-

a) Chimney heads (which the Tenants state are heavily eroded and leaning and may be unsafe).

b) Delaminating stone work (which the Tenants state represent a health and safety risk).

- c) Window frames and sills (which the Tenants state are in urgent need of repair and/or replacement).
- d) Statues and urns (which the Tenants state pose a serious health and safety risk because they threaten to fall off their plinths).
- e) Hot water supply (which the Tenants state as low hot water pressure means only one shower is useable).
- f) Missing documentation (the Tenants complain they are lacking evidence of the oil fired boiler's commissioning certificate and service history).

6. The Tenants lodged with their Application:-

- a. a copy of the tenancy agreement between the parties and
- b. a copy report by Mr Innes Aitken, Chartered Building Surveyor. That report was instructed by the Tenants and was issued on 23<sup>rd</sup> October 2018. The report included an Appendix of 62 photographs of various parts of the Property.

7. Following receipt of the Application the Tribunal, by email of 5 December 2018, requested the Tenants to ensure that the Landlord had fair notice of the complaints raised in their Application and to notify the Landlord of the specific complaints which were to be considered.

8. By email dated 11<sup>th</sup> December 2018 the Tenants issued a letter to the Landlord headed

“The Housing (Scotland) Act 2006 – Section 14 (1)(b)

Landlords duty not complied with – Notification of work required to be carried out”

In that letter the Tenants sought to notify the Landlord of the work which the Tenants believed required to be completed at the Property to ensure that the Property met the repairing standard. The required works identified by the Tenants in that letter to the Landlord were

those as stated in the Tenants' Application to the Tribunal. The letter issued to the Landlords referenced the terms of the report prepared by Mr Innes Aitken.

9. On 9<sup>th</sup> January 2019 a legal convenor of the Tribunal (with delegated powers under Section 23A of the Act) issued a Minute of Decision in which it was confirmed that the legal convenor considered there was no longer a reasonable prospect of any dispute being resolved between the parties by a later date and decided to refer the Application to a Tribunal.
10. On 22 January 2019 the Tribunal issued a Notice of Referral, Inspection and Hearing to all parties and to their respective legal advisors. That notice required parties to lodge any written representations that they may wish to make by 12<sup>th</sup> February 2019.
11. By letter dated 5<sup>th</sup> February 2019 Messrs Turcan Connell, solicitors acting on behalf of the Landlord, lodged written representations on behalf of the Landlord. In those written representations the Landlord argued that:
  - a. The Tenants have failed to provide advance notice to the Landlord of what works are required to be carried out to the property as required by Section 22 (3) of the Act.
  - b. Parts of the Application lack clear specification of the complaints raised by the Tenants in their Application.
12. On 28<sup>th</sup> February 2019 the Tenants lodged two emails (with a number of attachments) with the Tribunal. The attachments included
  - a. Copy letter issued by Sandy Mackie, Roofer, dated 25<sup>th</sup> January 2019 titled "Roof Survey" along with 17 coloured photographs.
  - b. Copy letter issued to the Tenants by Sandy Mackie dated 18 February 2019 titled "Chimney Survey" along with a schedule of 25 photographs.
  - c. A further copy of the report prepared by Innes Aitken, Chartered Building Surveyor and issued on 23 October.

- d. A sketch plan of the South garden at the property.
- e. The Tenants also indicated that they held four short films of parts of the property but these films were not lodged as the format of the films were too large to email.

13. The Tribunal intimated Directions dated 12 March 2019, in terms of rule 16 of the First-Tier Tribunal for Scotland (Housing and Property Chamber (Procedure) Regulations 2017.

14. The Directions issued by the Tribunal were in the following terms:-

- a. "In relation to each complaint the Tenant is DIRECTED to identify to the Tribunal which part of the Repairing Standard (as amended by clause 4.1 (c) of the Lease) the Tenant believe the Landlord has failed to meet.
- b. Where the Tenant complaint relates to a large area of the Property (e.g. the roof) or a number of related parts of the Property (e.g. windows or chimneys ) the Tenant is DIRECTED to specify the location or locations to which his complaint relates (preferably with reference to a photograph of that particular part of the Property) and a note of the particular issue the Tenant believes arises in relation to each particular part of the Property;
- c. The Tenant is DIRECTED to explain how (if at all) they have notified the Landlord that specific work requires to be carried out for the purposes of complying with the Repairing Standard in relation to each location as identified in compliance with Direction b (above). The Tenant should make reference to any particular letter or report which was intimated to the Landlord in advance of the current Application how such intimation was made (including evidence of that intimation).
- d. Where the Tenant seeks to found upon any report lodged with the Tribunal the Tenant is DIRECTED to ensure photographs lodged with that report are appropriately numbered and cross referenced to the text of the report itself.
- e. The Tribunal DIRECTS that the Tenant is required to lodge a written response with the Tribunal in compliance with these Directions by not later than 29<sup>th</sup> March 2019.

The Tenant is required to copy their response in full to the Landlord's legal representative by the same date."

15. On 29<sup>th</sup> March 2019, Messrs Lindsays, solicitors acting on behalf of the Tenants lodged written submissions consisting of a covering note and, a schedule relating to each area of the complaints raised by the Tenants in their Application (along with number of attached documents including:

- a) Photographs of affected chimneys with narrative.
- b) Floor plan of Rossie Priory House showing location of damaged chimneys.
- c) Email from Peter Dymoke to the Landlord dated 11 December 2018.
- d) Floor plan of Rossie Priory House showing the location of the laminated areas.
- e) Sketch plan showing location of urns.

16. As part of the further submissions lodged, on 29 March 2019, the Tenants accepted that the complaint raised relative to the hot water supply and relative to the documentation in relation to oil-fired burners did not give rise to complaint based on a breach of the Repairing Standard by the Landlord. Those parts of the Tenants Application accordingly were not considered further by the Tribunal.

17. On 7<sup>th</sup> May 2019 Messrs Lindsays Solicitors intimated to the Tribunal that they were no longer instructed by the Tenants in relation to the Application. By email dated 8<sup>th</sup> May 2019, Dr Peter Dymoke advised the Tribunal that the Tenants had now instructed Messrs Thorntons solicitors to represent them in relation to their Application.

18. By email dated 31<sup>st</sup> May 2019 the Tribunal intimated to the parties (and their respective legal representatives) that the Tribunal intended to inspect the property on 11<sup>th</sup> July 2019 and to thereafter hold a hearing on the same date.



19. By email dated 4<sup>th</sup> July 2019 the Tribunal intimated to the parties (and their respective legal representatives) that the Tribunal no longer intended to inspect the property.

20. By email dated 5<sup>th</sup> July 2019 the Tenants' solicitors intimated an Inventory of Productions to the Tribunal. That Inventory of Productions consisted of:-

- a. Photographs showing the additional affected areas of delaminating stone work;
- b. Photographs showing the additional affected areas of windows, frames and sills;
- c. Intimation that the Tenants held videos to show the instability of urns. The Tenants indicated that they intend to bring these videos on the day of the hearing together with a laptop to play the videos.

21. The Tenants also requested reasonable adjustments to be made under the Equality Act 2010.

### **The Hearing**

22. The Tribunal proceeded with the hearing on 11 July 2019. The hearing was held at The Carers Centre, Seagate House, 132/134 Seagate, Dundee, DD1 2HB.

23. In attendance at the Tribunal hearing were:-

- a. Dr Peter Dymoke (Joint Tenant)
- b. Mrs Beth Dymoke (Joint Tenant)
- c. Ms Ling Deng, Solicitor for the Tenants
- d. Mrs Caroline Best (the Landlord)
- e. Ms Glenda Mowatt (formerly the Landlord's estate manager)
- f. David Ogilvy, Solicitor for the Landlord

### **Request for Reasonable Adjustments**

24. The Tenants had lodged a request for reasonable adjustments to be made under the Equality Act 2010. The request for reasonable adjustments was in the following term:-

- i. To have regular breaks after around 45 minutes of discussion;

- ii. To have a large supply of drinking water or permission to bring in a bottle of water to the hearing;
- iii. The clerk to ask during the breaks if I am OK or the opportunity to be made available to ask him or her for assistance;
- iv. For parties to be courteous, respectful and professional towards each other and not to laugh at Mrs Dymoke's disability;
- v. To allow the Tenants to record the hearing so that Mrs Dymoke does not need to write everything down, particularly if she has to give evidence at a stage during the hearing.

25. The Tribunal noted the first three of these requests and made arrangements for those requests to be complied with wherever possible.

26. In relation to the fourth request the Tribunal highlighted that they would always expect the parties and the Tribunal to comply with the request made.

27. In relation to the fifth request (permission to record the hearing) the Tribunal had regard to Rule 35 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("Tribunal Rules"). Rule 35 states that "The First-tier Tribunal may prohibit photography or any audio or visual recording of the proceedings, except in so far as is required to make reasonable adjustments to accommodate the disability of a party or a party's representative or supporter".

28. The Tribunal were accordingly required to consider whether the recording of the proceedings was required to make reasonable adjustments to accommodate the disability of Mrs Dymoke. The Tenants' solicitors made reference to the explanation given in the papers lodged with the Tribunal as to the nature and extent of Mrs Dymoke's disability. In particular the Tenant's solicitor highlighted that as a result of her disability, Mrs Dymoke's memory and concentration is adversely affected and she is not always able to easily recall discussion or evidence given at a hearing. It was accepted on the Tenants behalf that written notes could be taken at the

hearing. Notwithstanding this, the Tenants' solicitor submitted that allowing the recording of proceedings would allow Mrs Dymoke to review that recording at a later date.

29. The solicitor for the Landlord highlighted that the request had been made in terms of the Equality Act 2010. He highlighted that no specific submission had been made in terms of the Equality Act and in particular section 20 thereof which encompassed the duty to make adjustments. He highlighted that no medical evidence had been submitted in support of the request and there was no independent evidence which would support why any recording of evidence would be reasonable or necessary in the particular circumstances of this case.

30. The Tribunal considered the Application and the opposition thereto. The Tribunal did not consider that the recording of the proceedings was appropriate or necessary in the circumstances. The Tribunal did not accept that the Tenants had supported their argument with any particular evidence of disadvantage which Mrs Dymoke may suffer as a result of not being able to record the proceedings. The Tenants had accepted that written notes could be taken by parties. The Tenants were represented by a solicitor. The Tenants indicated that a recording might allow them "further follow up" at a later date. The Tribunal did not consider that this would be an appropriate use of the recording. In all the circumstances the Tribunal refused this request for the proceedings to be recorded.

### **Submissions in Relation to the Jurisdiction of the Tribunal and the Specification of the Application**

31. The Landlord's solicitor made preliminary submissions in relation to the jurisdiction of the Tribunal and the specification of the Application.

### **Legislation**

Section 14 of the Housing (Scotland) Act 2006 states that:-

***"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."*

32. Section 22 of the Act states that:-

***"Application in respect of the Repairing Standard***

- (1) *A tenant may apply to the First-tier Tribunal for determination of whether the landlord has failed to comply with the duty imposed by section 14 (1) (b).*
- (1A) *A person mentioned in subsection (1B) may apply to the First-tier Tribunal for determination of whether a landlord has failed to comply with the duty imposed by section 14 (1) (b) (a person who makes such an application being referred to as a "third party applicant").*
- (1B) *The persons are –*
- (a) *A local authority,*
  - (b) *A person specified by order made by the Scottish Ministers.*
- (2) *An application under subsection (1) or (1A) must set out the tenant's, or as the case may be, the third party applicant's reasons for considering that the landlord has failed to comply with that duty.*

*(3) No application under this section may be made unless the person making the application has notified the landlord that work requires to be carried out for the purpose of comply with that duty.*

33. It was submitted on behalf of the Landlord that, before the Tribunal can accept that they have jurisdiction to consider the Application, the Tribunal must be satisfied that:-

- a. Section 14 (3) of the Act has been triggered; and
- b. Section 22 (2) and (3) have also been complied with by the Tenants.

34. It was further submitted that the Tribunal would require to be satisfied that the Tenants have notified the Landlord of the requirement to carry out work (or the Landlord had otherwise become aware of the requirement for such works) and the Tenants have given reasons for considering that the Landlord has failed to comply with the duty to carry out work such works as were necessary to meet the Repairing Standard. It was the Landlord's submission that the Tenants have failed to properly notify the Landlord of the requirement for work and to properly provide reasons for considering that the Landlord had failed to comply with her duty under the Repairing Standard. Accordingly it was the Landlord's submission that the Tribunal had no jurisdiction to consider the Application.

35. The Application was first made on 27 November 2018. On 11 December 2018, the Tenants had issued a formal letter to the Landlord in which they sought to notify the Landlord of work which required to be carried out to the Property. In the Landlord's submission the Application was premature as it was submitted prior to the formal notification to the Landlord that work was required to be carried out and accordingly the Tenants have not complied with section 14 (3) or section 22 (2) or (3) of the Act.

36. The Landlord also criticised the specification of any required works which had been intimated by the Tenants in their letter of 11 December 2018. The formal notification of works dated 11 December 2018 had no other documents attached to it (although it was accepted that it made

reference to the survey report prepared by Mr Innes Aitken, a copy of which had been intimated to the Landlord prior to the date of the Application).

37. In relation to the each part of the Tenants' claim the Landlord observed that:-

**Tenants' complaint in relation to chimney heads**

The written report indicated that chimney heads should be inspected and necessary work completed. The report made specific reference to the east most chimney as showing signs of movement and as leaning. The author of that report had carried out his inspection from a ground level inspection and make references to the fact that "there was a distinct possibility" that stone work will also be heavily eroded". The Landlord commented that the comment in the report that "The eastmost chimney head is leaning" is not in itself specific enough to identify the nature and extent of any repairing issue especially with an older property such as this. Similarly the comment that "All missing pots should be replaced" lacks specification in that it does not explain why they should be replaced and how that relates to the Repairing Standard.

In general the Landlord's submission was that the reference to the Aitken report did not in itself set out reasons for considering that the Landlord had failed to comply with the duty imposed by section 14 (1)(b) of the Act. The Tenants have failed to notify the Landlord of the specific works which the Tenants considered required to be carried out in relation to these matters. The Landlord's solicitor submitted that reference to the Aitken report at the time the Tenants notified the Landlord of the required works did not specifically state the location of any part of the Property or the nature of any work required to repair such subject. In particular it was submitted that with such a large and complex property this lacks specification and could not amount to proper notification as required under the Act.

**Tenants' complaint regarding delaminating stone work**

The Aitken report states that "there are various areas of scaling/delaminating stone work", it notes "a large piece of obviously loose stone moulding from the court yard to the rear". It was

the Landlord's submission that the description of the delaminating stone work was so unspecific that the Landlord was unable to determine the area of the Property to which the report referred. The Landlord was accordingly not able to determine the nature and extent of the Tenant's complaint and accordingly the Tenants had failed to notify the Landlord of a requirement for a specific repair and had failed to give adequate reason for considering that the Landlord had failed to comply with the duty imposed by section 14 (1)(b).

#### **Tenants' complaint regarding window frames and sills**

The Landlord's solicitor submitted that the terms of the Aitken report were not specific in relation to this part of the complaint. The report contained general observations that pointing around windows and below window sills was aged, deteriorated and missing and that there were some gaps between window framing and stone work in areas. It further noted that there were a number of badly rotten window sills and that paint work to windows and down pipes was in a poor condition. The Landlord's solicitor submitted that there was no specification of which windows within this large Property were being referred to by the Tenants. No specific reasons for considering that the Landlord had failed to comply with the Repairing Standard were given. The Tenants failed to notify the Landlord of the specific work that required to be carried out for the purpose of complying with that duty.

#### **Tenants' complaint regarding statues and urns**

The Aitken report states that there "is a significant health and safety risk caused by the condition of the large stone urns in the front garden. It goes on to say "most of these are loose and unstable when manual pressure is added. Some are also insecurely wedged by slate". The Landlord states that any such complaint is unspecified and does not clearly identify what work is required.

38. The solicitor for the Landlord also drew the Tribunal's attention to the terms of The Tribunal's Directions of 12 March 2019. Those Directions had required the Tenants to specify the location or locations to which the complaint relates, preferably with reference to a photograph

and to explain how they had notified the Landlord that the specific work required to be carried out by reference to any particular letter or report. The Tenants had been directed to ensure that any photographs lodged were appropriately numbered and cross referenced to the text of the report. In the Landlord's submission the Tenants had failed to comply with the Directions of the Tribunal in this respect. Had the Tenants complied fully with the terms of these Directions then there may have been a more specific case to which the Landlord could respond. The Tenants had failed to specify the specific parts of the Property to which their complaint related and accordingly it was the Landlord's submission that the terms of the Application should be rejected in full on the basis that the Tenants had not complied with the statutory requirements of notification and Application as required by sections 14 and 22 of the Act.

#### **Submissions made by the Tenants' Solicitor in response to the Landlord's Solicitors**

39. The Tenants' solicitors highlighted the requirement of the Tribunal's Procedure Rules.

40. Rule 48 of the Tribunal Rules:-

The Tribunal's requirements in relation to an "Application for determination of whether the Landlord has failed to comply with the Repairing Standard

(1) Where a tenant makes an application under section 22(1) (application in respect of the repairing standard) of the 2006 Act-

a. In addition to the tenant's reasons as required by section 22(2) of the 2006 Act (reasons for considering that the landlord has failed to comply with the landlord's duty), the application must state-

- i. The name and address of the tenant;
- ii. That the application is made under that section;
- iii. The name, address, and profession of any representatives of the tenant;
- iv. The name of the landlord;



- v. The address of the landlord or the name, address and profession, if known, of any representative of the landlord;
  - vi. The landlord's registration number, if known;
  - vii. The nature of the work requiring to be done; and
  - viii. That the landlord has been notified of the work under section 22(3) of the 2006 Act;
- b. The application must be accompanied by-
- i. The lease or tenancy agreement, or if these are not available as much information about the tenancy as the applicant can give;
  - ii. The notification referred to in paragraph (1)(a)(viii) and any subsequent correspondence relating to that notification; and
- c. The application must be signed and dated by the tenant or by a representative of the tenant. "

41. The Tenants' solicitor also highlighted that rule 5 of (3) of the Tribunal Rules states that:-

"(3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held to be made on the date that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement."

42. It was the Tenants' solicitor's submission therefore that although the Tenants had not, (at the time of their Application), notified the Landlord of required works under section 22(3) of the Act by letter, rule 5(3) of the Tribunal Rules did allow such intimation to be lodged at a later date.

43. The Tenants' solicitor stated that she did not consider the Tenants had an obligation to specify exact work. She highlighted that section 14 (3) of the Act identified the Repairing Standard duty applied either where the Tenants had notified the Landlord or where the

Landlord otherwise became aware that work required to be carried out. The Tenants' solicitor highlighted that the Landlord previously had sight of the Aitken report and as such were aware that work required to be carried out to the Property for the purposes of complying with the Repairing Standard. In the Tenants' solicitor's submission the Aitken report was prepared by a qualified surveyor and any reasonable person would have accepted that that report was appropriate notification that work was required to be carried out to the Property to ensure that it complied with the Repairing Standard.

44. Having made that submission the Tenants' solicitor sought an adjournment of proceedings as she appeared to accept there was no supporting documentation in relation to the work which the Tenants maintained required to be carried out to the windows of the Property. The Tenants' solicitor indicated that she wanted to make a submission in relation to the Landlord's concerns regarding the jurisdiction of the Application and thereafter to adjourn proceedings to allow the Tenants to provide further documentary evidence. The Tenants' solicitor indicated that the Tenants previous solicitors had been given information and reports which had not been lodged with the Tribunal. The Tenants' solicitor was not able to confirm the reasons why these reports had not been lodged with the Tribunal. The Tenants' solicitor submitted that the information which had been supplied to the Tribunal to date complied with the Tribunal's directions but nonetheless she submitted that further reports were required to be submitted to support the Tenants position that the Landlord had prior notification of required works to the Property.

45. The Landlord's solicitor submission opposed any adjournment of proceedings. He submitted that this was unfair to his client. The Tenants wanted "a second bite at the cherry" and it was not the first time that the Tenants had failed to provide evidence. He claimed that it was up to the Tenants to make their case and that they had failed to do so. He further submitted that the Tribunal was in a position to make a decision on the basis of the information it had at the time of this hearing. The Landlord's solicitor drew the Tribunal's attention to the overriding objectives of the Tribunal as narrated in rule 2 of the Tribunal Rules. That overriding directive required the Tribunal to deal with proceedings justly and in particular avoid any delay, so far

as compatible with the proper consideration of the issues. The Landlord's solicitor went on to say that the Direction had been very clear that it had been made to avoid further delays.

46. Having heard parties in relation to the submission to adjourn proceedings and in relation to the Landlord's submission that the Tribunal did not have jurisdiction to consider the Application and that specification of the Application was poor, the Tribunal adjourned to consider the matter.
47. Having adjourned to consider the various representations made the Tribunal determined that the Tenants had failed to fully comply with the terms of section 22 (3) and section 14 (3) and (3) of the Act.
48. An Application to the Tribunal as to whether the Landlord has failed to comply with the Repairing Standard was made under section 22 of the 2006 Act. That section of the Act required that the Tenants set out reasoning for considering that the Landlord has failed to comply with the duty imposed by section 14(1)(b) of the Act. The duty imposed by section 14(1)(b) of the Act is to ensure that the Property meets the Repairing Standard at all times during the tenancy.
49. Section 22 of the Act sets clear duties on the Tenants to set out their reasons for considering the Landlord has failed to comply with their duty to meet the Repairing Standard and confirms that an Application cannot be made unless the Tenants have notified that work requires to be carried out for the purposes of complying with that duty.
50. In the current Application the Tenants submit that the Landlord was aware that work was required to be carried out to the Property as the Landlord had previously had sight of the report prepared by Mr Innes Aitken, Chartered Surveyor. The question for the Tribunal therefore was intimation of that report can satisfy the requirement of section 14 and section 22(3) of the Act. It is the Tribunal's view that it does not.

51. In terms of the Act the Tenants have to intimate to the Landlord that specific work requires to be carried out for the purpose of complying with the duty to ensure that the property meets the Repairing Standard. It is not sufficient to say simply that work requires to be carried out. This is especially relevant with a property of this size, complexity and age.

The Innes Aitken report makes no specific reference to the Repairing Standard. The Innes Aitken report notifies a number of potential defects in the Property but it does not indicate which part of the Repairing Standard (if any) the Landlord has failed to meet as a consequence of any such defects. It is perfectly possible that, for example, "an old chimney has a lean to it or that some pointing is missing". That does not, in itself, however mean that the Property does not meet the Repairing Standard.

52. In any case the terms of the report that was prepared by Mr Aitken lacks clear specification of the areas and nature of the work which the Tenants consider requires to be carried out to ensure that the property meets with the Repairing Standard.

53. The Tribunal have visited the Property on a number of occasions. They are aware that it is an extremely large Property with an extensive number of public and private rooms. In a Property of the age and size of that type it is reasonable for the Landlord to expect that the Tenants would indicate the specific area or areas in relation to which any particular complaint relates. That has not been done in this case. The Tenants have not in the Tribunal's view clearly identified their reasons for considering that the Landlord has failed to comply with the duty to ensure that the property meets the Repairing Standard and have not clearly identified and notified the Landlord of what work requires to be carried out for the purposes of complying with that duty.

54. The Tenants sought to adjourn proceedings to allow them to lodge further documentation in support of and in specification of their claim that the Property did not meet the Repairing Standard. The Tribunal are of the view that it would be unfair to the Landlord to allow such an adjournment for this purpose at this stage in proceedings. If further documentation is

available which specifies the nature and extent of any works required then that should have been intimated to the Landlord prior to the Application being raised to allow the Landlord an opportunity to carry out any necessary works.

55. The Tribunal had issued clear directions to the Tenants in relation to their case. The purpose of those directions had been specifically to ensure that where the Tenants complaint related to a particular part of the Property the Tenants specified the location to which the complaint relates. It is the Tribunal's view that the response by the Tenants to the direction clearly failed to specify such locations. The response to the Tribunal's direction also failed to clearly notify the Landlord of specific work which was required to be carried out for the purposes of complying with the Repairing Standard.
56. Section 22 of the Act clearly requires the Tenants to have notified the Landlord of required work at the Property. The Tribunal consider such notification would have been required to allow the Landlord an opportunity to carry out rectification works (if required) and to receive fair and prior notice of such a requirement. Rule 5 (3) of the Tribunal Rules does allow the Tribunal to allow further documents to be lodged in support of an Application. That Rule in itself does not, in the Tribunal's view, allow a Tenant to ignore the terms of Section 22. An Application could be made and copies of Section 22 intimation documentation could be submitted after the date of the Application. That Section 22 intimation documentation however would require to be dated prior to the date of the Application in order to ensure that the Tenants had fully complied with the terms of Section 22 of the Act.
57. In all the circumstances therefore the Tribunal determined that the Tenants had failed to comply with the terms of section 22(2) and (3) of the Act and that accordingly the Tribunal did not have jurisdiction to consider the Application further.

## **Expenses**

58. At the end of the hearing the solicitor for the Landlord made a submission that the Tribunal should consider awarding expenses in favour of the Landlord in terms of Rule 40 of the Tribunal Rules. The Tribunal Rules state at rule 40 that:-

### **“Expenses**

- (1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expenses.
- (2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made”.

59. In the Landlord’s solicitor’s submission it was appropriate for the Tribunal to award expenses in this matter as the Tenants had been given an ample opportunity to ensure that their Application complied with the requirements of the Act. In particular it was highlighted that the Tribunal’s directions had been given to the Tenants and the Tenants had failed to comply with the clear terms of those directions. The Landlord had been put to the expense of preparing responses to the written Application and preparing for the Tribunal hearing. In the Landlord’s submission the actions of the Tenants had been unreasonable and the Landlord had as a consequence been put to unnecessary expense. In the circumstances the Landlord was entitled to expenses in terms of regulation 40(1).

60. The Tenants’ solicitor submitted that expenses should not be awarded. She highlighted that the decision of the Tribunal was based on the Tenants failure to properly specify the work which they considered was to be carried out to the Property. The Tribunal’s decision did not identify that work did not require to be done to the Property. The Tenants genuinely believed

that the work needs to be done. The Tenants have taken photographs of the Property and had submitted these to her previous solicitor. They have not behaved unreasonably in the conduct of the case.

61. Consideration of a motion for expenses of this kind requires the Tribunal to identify unreasonable behaviour in the conduct of a case to justify an award of expenses. The Tribunal approached this issue by asking whether the Tenants had exhibited unreasonable behaviour in the conduct of the case. The Tribunal are not satisfied that there was any such unreasonable behaviour. The Tribunal accepted that the Tenants have genuinely believed that they had followed the correct process in relation to the Application. The Tribunal do not accept that the test for expenses as set out in Rule 40 of the Tribunal Rules has been met.

62. Having adjourned to consider the Application for expenses the Tribunal determined not to make any award of expenses.

### **Right of Appeal**

63. 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.

64. 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 Cowan

.....

Andrew S Cowan

1/10/19  
.....

Date