

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Statement of reasons for decision for failure to comply with the Repairing Standard Enforcement Order under section 26 of the Housing (Scotland) Act 2006 (“the Act”)

Chamber Ref: PRHP/RP/16/0310

Property: 1/7, Southhouse Square, Edinburgh, EH17 8DN (“the property”)

Title Number: MID30943

The Parties:-

Mr Robert Slominski, 1/7, Southhouse Square, Edinburgh, EH17 8DN (“the tenant”)

Mr David Ross, Private Rented Services, City of Edinburgh Council, City Chambers, 249 High Street, Edinburgh, EH1 1YJ (“the third party”)

Shercor Limited having their registered office at 32 Sir William Wallace Wynd, Aberdeen, AB24 1UW and Ms Lynn Anderson, 1, Broomieknowe, Lasswade, Edinburgh EH18 1LN (“the landlords”)

Tribunal Members:

Simone Sweeney (Legal member) David Godfrey (Surveyor member)

Decision

Having made such enquiries as are fit for the purposes of determining whether or not the landlords have complied with the terms of the Repairing Standard Enforcement Order

("RSEO") dated 23rd February 2017, the Tribunal determined that the landlords continue to fail to comply with the terms of the RSEO. The Tribunal determines that the RSEO and Rent Relief Order ("RRO") dated 16th December 2017 remain in effect. The Tribunal refuses to discharge the RSEO and RRO.

Background and procedural history

1. Reference is made to the terms of earlier procedure by the Tribunal and the terms of the RSEO of 23rd February 2017. The RSEO required that the landlords carry out the following works to the property:

"To repair or replace the windows of the living room to ensure that they are wind and water tight.

To repair or replace the door and door frame leading from the living room to the balcony to ensure that it is wind and water tight.

To carry out all necessary repairs to ensure that the window of the living room is fully operational.

To replace the flashing at the foot of the exterior wall of the balcony to ensure that the property is wind and water tight.

To re-point the exterior face of the brick infill below the living room window to ensure that the property is wind and water tight."

2. The Tribunal ordered the works specified within the RSEO to be completed within 42 days from the date of service of the RSEO.
3. A re-inspection of the property was undertaken by the surveyor member of the Tribunal on 19th May 2017. The findings of the surveyor are set out within his report from May 2017.
4. The landlords disagreed with the findings of the surveyor and a second re-inspection and hearing were assigned to take place on 11th December 2017.
5. The Tribunal's findings from the second hearing are set out in the Tribunal's written reasons of 19th December 2017. The Tribunal determined that the landlords had failed to comply with the terms of the RSEO and that a notice of failure be served on the local authority.
6. The Tribunal determined that a RRO should be issued. Reference is made to the terms of the RRO dated 19th December 2017.
7. By email of 8th November 2019, the third party advised that it was understood that the landlords had undertaken works to the property and sought a further re-inspection.

8. A third re-inspection was arranged for 13th December 2019. The surveyor's findings are contained within his report of 13th December 2019 which was intimated to all parties.
9. Again, the landlords disputed the surveyor's findings of 13th December 2019. Reference is made to the terms of the landlords' written response dated 15th January 2020. Within the written response the landlords provided,

"1. Repairs were carried out to the living room windows 2 years ago. The air tight gasket was replaced and the windows were adjusted to allow an airtight seal.

2. The living room door onto the balcony requires the lock handle to be raised to lock it. This allows for an air tight seal. When the surveyor checked the door for a draught, he didn't use the locking mechanism to create the air tight seal.

3. The tenant has wall papered over the air vent, preventing air being allowed to circulate in the cavity. The surveyor failed to recognise this.

4. The gaskets on the living room balcony door were also replaced 2 years ago, as the tenant advised the surveyor at the meeting on 13th December 2019.

5. The flashing at the front of the exterior wall to the balcony has been sealed, however the tenant has put artificial grass on the balcony, preventing the water draining off the balcony as designed.

6. The exterior face of the brick infill below the living room window has been sealed with silicon.

The surveyor is ignoring the communal guttering that is not intact and presumably allowing water to enter the cavity of the building at high level which could result in dampness to our property and the adjacent properties."

10. A third hearing was assigned to take place in Edinburgh in late March 2020. Given the terms of the landlords' written response of 15th January 2020, the Tribunal issued direction dated, 8th March 2020. The direction requested, *inter alia*, vouching from the landlords of the works which they had undertaken at the property from January 2018.
11. There was no response to the direction of 8th March 2020 by the landlords.
12. Due to the national lockdown brought into force in March 2020, the hearing assigned to take place in late March 2020 was discharged. The hearing was rescheduled to take place by telephone on 21st September 2020.
13. In advance of the hearing on 21st September 2020, the landlords' Mr Anderson indicated that he had never had sight of the Tribunal's direction of 8th March 2020. The Tribunal issued a fresh direction dated 1st August 2020 renewing the request for, *inter alia*, vouching of any repairs undertaken and directing that the information be

produced no later than 28th August 2020. Reference is made to the terms of the direction.

14. The landlords failed to comply with the terms of the direction of 1st August 2020. No vouching of the repairs was forthcoming.

Hearing of 21st September 2020

15. At the hearing on 21st September 2020, Mr Anderson appeared for the landlords. There was no attendance on behalf of the tenant or third party. Reference is made to the terms of the Tribunal's direction of 28th September 2020 which narrates the evidence of Mr Anderson on behalf of the landlords.
16. In the course of his evidence, Mr Anderson submitted that he had carried out various works to the property since issue of the RSEO:- The windows to the living room had been repaired in May 2017; the gaskets and the lock on the door leading from the living room to the balcony had been replaced in May 2017; a bitumen seal had been applied to the flashing along the edge of the balcony and the exterior wall of the living room in May 2017. These works had all been carried out by the landlords' contractor, Stuart Hall. Finally, the landlords became aware of rot in the living room floor in December 2019. Mr Anderson insisted that the rot concerned only one floor board which was replaced by the landlords in May or June 2020.
17. The landlords' position was that these works satisfied parts 1-3 of the RSEO and that the RSEO should now be revoked.
18. The surveyor recognised that some works had been completed since issue of the RSEO. The surveyor commented that the work to the flashing had not been carried out to an acceptable standard as his inspection on 13th December 2019 had revealed damp meter readings at the balcony wall where this work had been done.
19. Mr Anderson disputed there was any water ingress at the property since his repairs had been completed. Mr Anderson submitted that he had received no complaints of water ingress from the tenants at the property.
20. He continued to dispute the surveyor's opinion of the cause of any water penetration to the property. Should there be any water penetration at the property (which he denied) it is the result of issues with the communal guttering. Mr Anderson insisted that, at previous inspections, he had pointed out to the surveyor that the downpipes at the side of the building don't reach the guttering allowing water to penetrate the property.
21. Mr Anderson insisted that the guttering was common property and it was not possible for the landlords to identify the other owners within the building and facilitate any necessary repairs.
22. Mr Anderson accepted that the landlords are obliged to meet the repairing standard duty set out in the Act. Mr Anderson accepted that there was no evidence before the Tribunal that he had attempted to co-ordinate any works with other owners.

23. Mr Anderson accepted that part 4 of the RSEO remained outstanding. The landlords had not re-pointed the exterior face of the brick infill below the living room window.
24. The landlords did not feel that there was anything further that they could do. The guttering and downpipes are the cause of any water penetration. In the absence of a factor to facilitate common repairs to address the issue with the gutters, the landlords were impotent to move matters forward. Mr Anderson submitted that this situation had arisen because of a complaint of water ingress to the flat below his property. The landlords had addressed that complaint by carrying out works in 2017. No further complaints had been made by the occupants of the flat below. The landlords continued to dispute the findings of the surveyor in each of his reports. As a result, it was submitted by Mr Anderson that the landlords were victims, left with a problem which was out-with their hands and financially penalised by the RRO in place.
25. Mr Anderson sought the opportunity to recover a technical report from an independent surveyor who would support this position. He expected this to be available within 2-3 weeks. Also Mr Anderson insisted that he had vouching of the works undertaken at the property. He provided an undertaking to the Tribunal to produce the vouching by Friday 25th September 2020.
26. Having allowed Mr Anderson's request to recover further information, the Tribunal issued a direction confirming what was expected of the landlords and the date by which the information should be submitted. Reference is made to the terms of the Tribunal's direction dated, 28th September 2020.
27. The direction was issued to all parties by email from the Tribunal's administration. The email address to which the direction of 28th September 2020 was issued to the landlords was that provided by Mr Anderson and from which he had communicated with the Tribunal's administration.
28. No response to the direction of 28th September 2020 has been forthcoming from the landlords.
29. By email of 14th October 2020 the Tribunal received a response to the direction from a representative of the third party, Mr Ross. Mr Ross responded, in so far as is relevant, in the following terms,

*"Unfortunately, I have been unable to visit the property for the past few months. Therefore, I contacted the owner of the property below this flat and she confirmed the following:
I have not seen any improvement to the situation, still suffering water ingress when heavy rain. The walls and ceiling in my property are now in poor condition.(In her opinion due to lack of repairs carried out by Mr Anderson)."*

Reasons for decision

30. An RSEO was issued in February 2017. It provided works required for the property to meet the repairing standard as set out at section 14 of the Act.
31. The landlords submit that in May 2017 they repaired the windows within the living room; replaced the gaskets and the lock on the door leading to the balcony and applied a bitumen seal to the flashing along the edge of the balcony and the exterior wall of the living room. In addition, the landlords addressed an area of rot on the living room floor (albeit this was not part of the RSEO) in 2020.
32. Since issue of the RSEO in February 2017, the Tribunal's surveyor has undertaken inspections at the property on 19th May 2017, 11th December 2017 and 13th December 2019. The surveyor has issued reports of his findings following each of those inspections.
33. The Tribunal has requested evidence from the landlords of the repairs to which they refer. No such evidence has been produced by the landlords notwithstanding the undertaking provided to the Tribunal by Mr Anderson at the telephone hearing of 21st September 2020.
34. Should the landlords have undertaken the repairs to which they refer, the Tribunal's surveyor does not consider these repairs to be of a quality which satisfies the terms of the RSEO. The surveyor finds that the property continues to fail to meet the repairing standard.
35. In his most recent report of 13th December 2019, the surveyor found that,

"1. No repairs appear to have been carried out to the living room windows with the exception of the removal of the silicone sealant. The tenant still complained that the windows are not wind and water tight.

2. No repairs appear to have been carried out to the living room door/frame. Cold draughts were evident between the door and door frame and high Protimeter (damp meter) readings were recorded in the wall adjacent. The door was also noted to be poorly fitted within the frame.

3. The flashing at the foot of the exterior wall of the balcony has not been replaced. Moderate to high Protimeter (damp meter) readings were recorded in the wall adjacent and the flooring adjacent was found to be affected by rot.

4. The exterior face of the brick infill below the living room window has not been repointed."

36. The landlords dispute the findings of each of the surveyor's reports. At the most recent inspection of the property on 13th December 2019, Mr Anderson was present on behalf of the landlords.
37. The landlords insist that any water ingress to the property (which they deny exists) is the result of issues with the guttering; that this is common property and; that the landlords cannot be expected to facilitate the necessary repairs.
38. No evidence has been forthcoming to show that the landlords have attempted to co-ordinate the works to the common property with the other owners at the property.

39. The landlords' explanation that the guttering is the source of any water ingress into the property is inconsistent with the findings of the surveyor in each of his reports. Mr Anderson insisted that an independent report would support the landlords' position. The landlords provided an undertaking to the Tribunal at the hearing on 21st September 2020 that a technical report would be recovered from an independent surveyor. The Tribunal allowed the landlords a period of 3 weeks for that report to be recovered.
40. No report has been produced by the landlords. No explanation has been forthcoming from the landlords to explain this failure. No request has been made by the landlords for additional time to complete their investigations. The landlords have had ample time to recover a report.
41. By email of 14th October 2020, the third party provided information from the occupant in the flat below the property that the issue of water penetration into her flat continues. This is notwithstanding the landlords having received a complaint about the issue 4 years earlier.
42. Section 26 of the Act provides,

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."

43. The landlords have had ample time to address the terms of the RSEO. The 2017 order provided the landlords with a period of 42 days from the date of service to complete the relevant works. The period within which the order required the work to be completed has ended.
44. The Tribunal is not satisfied that the landlords have been unable to comply with the RSEO because of a lack of necessary rights despite having taken reasonable steps for acquiring those rights in terms of section 26 (3) (b) of the Act. There is no evidence before the Tribunal that the source of water ingress to the property is from the common guttering. Even if this were accepted, no evidence is before the Tribunal to show that the landlords have taken reasonable steps to acquire the rights necessary to enable them to comply with the terms of the RSEO.
45. There is no evidence before the Tribunal that the works required by the RSEO are likely to endanger any person.

Decision

46. The evidence before the Tribunal indicates that the landlords have failed to meet the terms of the RSEO. The Tribunal determines that the property continues to fail to meet the repairing standard as provided at section 13 of the Act. The Tribunal determines that the landlords have continued to fail to ensure that the house meets the repairing standard as they are obliged to do in terms of section 14 of the Act.
47. The Tribunal determines therefore that the landlords have failed to comply with the terms of the RSEO. Therefore the RSEO and RRO will remain in place and will not be discharged.
48. The landlords are encouraged to undertake all works required by the RSEO.
49. The decision of the Tribunal was unanimous.

Right of Appeal

50. 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. The party must seek permission to appeal within 30 days of the date the decision was sent to them.
51. 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.
52. Where such an appeal is made, the effect of the decision and of the order is suspended until the appeal is abandoned or finally determined, and where the appeal is abandoned or finally determined by confirming the decision, the decision

and the order will be treated as having effect from the day on which the appeal is abandoned or so determined.

S Sweeney

.....Legal chair, at Glasgow on 7th December 2020