

Housing and Property Chamber
First-tier Tribunal for Scotland



Repairing Standard Enforcement Order (RSEO): Housing (Scotland) Act 2006 Section 24

Reference Number: PRHP/RP/17/0060

RE: Property at Room 1, Flat 3, 1a Constitution Street, Dundee DD3 6NF

(hereinafter referred to as “the Property”).

Title Number: ANG22439 in the Land Register of Scotland

The Parties:-

Kristofer Watt, Room 1, Flat 3, 1a Constitution Street, Dundee DD3 6NF

(“the Tenant”)

And

Gordon Lees, 8 Grange Gardens, Monifieth, Dundee DD5 4NA

(“the Landlord”)

NOTICE TO

Gordon Lees, 8 Grange Gardens, Monifieth, Dundee DD5 4NA

(“the Landlord”)

Whereas in terms of their decision dated 7th June 2017, the First-tier Tribunal determined that the Landlord has failed to comply with the duty imposed by Section 14(1)(b) of the Housing (Scotland) Act 2006 (“the Act”) and, in particular, that the Landlord has failed to ensure that the Property is wind and water tight and in all other respects reasonably fit for human habitation.

The First-tier Tribunal now requires the Landlord to carry out such work as is necessary for the purposes of ensuring that the Property meets the repairing standard under section 13(1) of the Act and that any damage caused by carrying out of any work required under this Order are made good.

In particular, the First-tier Tribunal requires the Landlord:-

- 1) To instruct specialist roofing contractors to inspect the roof of the Property, in particular the roof area above the kitchen in the Property, to identify any works required to prevent further water ingress to same. To carry out all works identified in the specialist report in order to ensure that the Property is wind and water tight and reasonably fit for human habitation. The specialist contractor's report and all invoices for work carried out to be sent to the office of the First-tier Tribunal: Housing and Property Chamber.

The First-tier Tribunal order that works specified in this Order must be carried out and completed within the period of 2 months from the date of service of this Order.

A landlord, tenant or third party applicant aggrieved by the decision of the tribunal may seek permission to appeal from the First-tier Tribunal on a point of law only within 30 days of the date of 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.

Please note that, in terms of Section 28(1) of the Act, a landlord who, without reasonable excuse, fails to comply with a Repairing Standard Enforcement Order (RSEO) commits an offence liable on summary conviction to a fine not exceeding level 3 on the standard scale. A landlord (including any successor in title) also commits an offence if he or she or they enter into a tenancy or occupancy arrangement in relation to a house at any time during which a RSEO has effect in relation to a house. This is in terms of Section 28(5) of the Act.

IN WITNESS HEREOF, these presents typewritten on this page and the preceding page are executed by Rory A. B. Cowan, Legal Member of the First-tier Tribunal: Housing and Property Chamber at Glasgow on 7th June 2017 before this witness:

Signed **R Cowan**
.....

Date: 7th June 2017

Rory A. B. Cowan

D Gault

Witness Date: 7th June 2017

Name of Witness

116 16 Royal Exchange

Sq, Glasgow, G1 3AG Address of Witness

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: Housing (Scotland) Act 2006 Section 24 (1)

Chamber Ref: PRHP/RP/17/0060

Property at Room 1, Flat 3, 1a Constitution Street, Dundee DD3 6NF

("The Property")

The Parties:-

Kristofer Watt, Room 1, Flat 3, 1a Constitution Street, Dundee DD3 6NF

("the Tenant")

Gordon Lees, 8 Grange Gardens, Monifieth, Dundee DD5 4NA

("the Landlord")

Decision

The First-tier tribunal for Scotland (Housing and Property Chamber) ('the tribunal'), having made such enquiries as it saw fit for the purposes of determining whether the Landlord has complied with the duty imposed by Section 14 (1)(b) in relation to the house concerned, and taking account of the written representations by both the Tenant and Landlord and the evidence led on behalf of the Landlord at the hearing, determined that the Landlord has failed to comply with the duty imposed by Section 14 (1)(b) of the Act.

The Tribunal consisted of:

Rory A.B. Cowan – Legal Member

Geraldine Wooley – Surveyor/Ordinary Member

Background

1. By application received on 16th February 2017 the Tenant applied to the First-tier tribunal: Housing and Property Chamber for a determination of whether the

Landlord had failed to comply with the duties imposed by Section 14 (1)(b) of the Housing (Scotland) Act 2006 ("the Act").

2. The application by the Tenant stated that the Tenant considered that the Landlord had failed to comply with his duty to ensure that the Property meets the repairing standard and in particular that the Landlord had failed to ensure that:-
 - (a) **the house is wind and water tight and in all other respects reasonably fit for human habitation,**
 - (b) **the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order,**
3. By letter dated 7th April 2017 the President of the Housing and Property Chamber intimated a decision to refer the application under Section 22 (1) of the Act to a tribunal.
4. The tribunal served Notice of Referral under and in terms of Schedule 2, Paragraph 1 of the Act upon both the Landlord and the Tenant.
5. Following service of the Notice of Referral, the Tenant made further written representations to the tribunal on 12th April 2017 and by email on 5th May 2017. The Landlord intimated written representations dated 28th April 2017 to the tribunal through his lettings agents.
6. The tribunal inspected the Property on the morning of 12th May 2017. The Landlord was represented by a Neil Dymock of Easylets, 7 South Tay Street, Dundee (the Agent) who was present during the inspection. The Tenant was also present at the inspection.
7. Following the inspection of the Property, the tribunal held a hearing at Caledonian House, Greenmarket, Dundee DD1 4QX. The Tenant did not attend. The Landlord was represented by the Agent.

Late Representations by the Tenant

8. After the inspection and the hearing, the Tenant submitted further representations by way of email dated 22nd May 2017 out with the time allowed for such representations. The Landlord and Agent were written to on 24th May 2017 asking them for comment on the Tenant's late representations and whether they had any objection to them being considered by the tribunal albeit late. On 30th May 2017 the Agent, on behalf of the Landlord, responded indicating they had no objection to the representations being considered by the tribunal albeit late.
9. In terms of Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, a tribunal can only consider written evidence out with any time limit it has set where the tribunal is satisfied that there is a good reason for it to do so. The representations by the Tenant dated 22nd May

2017 were submitted out with the time limit set by the tribunal. At the time of inspection, the ceiling in the kitchen was dry. Unusually, there had been little or no rain for a number of weeks leading up to the inspection and, as mentioned later, repairs had been carried out by the Landlord shortly before the date for lodging written representations. The Tenant was therefore not in a position to have known whether there would be further water ingress as at the date for lodging representations or the date of inspection. In the circumstances, and with the agreement of the Landlord via the Agent, the tribunal is therefore satisfied that there are good reasons to consider the representations dated 22nd May 2017 and the Landlord's response of 30th May 2017 in arriving at its decision.

Jurisdiction

10. As part of the application, the Tenant submitted a copy of his tenancy documents. These tenancy documents had been prepared by the Landlord's previous lettings agents. They were described as being a "Holiday Letting Agreement". The duration was expressed as being for 3 months from 6th October 2017 to 5th January 2017. It is understood that this term had been extended by mutual agreement but no further tenancy documents were produced. The tenancy agreement also specifies the level of rent, the Property itself and the parties to it. At the hearing, the Agent expressly accepted the tribunal's jurisdiction to deal with the application. However, standing the nature of the issue, the tribunal felt it appropriate to set out their position on the question of jurisdiction.

In terms of section 14(1) of the Housing (Scotland) Act 2006 the duty to ensure that a property meets the repairing standard under section 13(1) of the Housing (Scotland) Act 2006 only applies to a "landlord *in a tenancy*..." (emphasis added). In terms of section 194 of the Housing (Scotland) Act 2006 a tenancy is defined as including:

*"(a) a sub-tenancy,
(b) any occupation of living accommodation by a person under that person's terms of employment,
but does not otherwise include any occupation under an occupancy arrangement,"*

An occupancy arrangement is defined as meaning:

"an arrangement other than a lease under which a person is entitled, by way of contract or otherwise, to occupy any land or premises,"

That being the case, the tribunal's jurisdiction is specifically excluded where there is an occupancy arrangement that is not a lease. The question therefore for present purposes is whether the Tenant has a lease or some other occupancy arrangement which falls short of being a lease?

Under Scots Law, all that is required create a lease is agreement to the 'cardinal' or essential elements of a lease. These are:

- a) Rent;

- b) Parties;
- c) Subjects; and
- d) Duration (a 12 month term can be implied where the other elements are agreed).

As such, unlike under English Law (where there is a very developed concept of licence), in most cases where a person is entitled to occupy premises in return for rent there will be a lease rather than some other form of occupancy arrangement. Indeed, in terms of the Requirements of Writing (Scotland) Act 1995, any lease for 12 months or less does not need to be in writing at all. The Housing (Scotland) Act 1988 (sections 30A and 30(1)) does require a residential landlord to issue written terms of a tenancy to a tenant and for those terms to be probative (self-proving), but a failure to do so does not mean there is no lease.

In the present case, it is clear that the 'Holiday Letting Agreement' identifies all the required elements of a lease. The nature of the agreement can therefore be categorised as one of lease rather than some other form of occupancy arrangement.

It is appreciated that there may be further questions raised as a result of this analysis. In particular, whether the lease is an assured tenancy under the Housing (Scotland) Act 1988, which is the default position in law for residential tenancies involving natural persons (it cannot be a short-assured tenancy as the initial duration of the tenancy was for less than 6 months and/or because there was no form AT5 served before the creation of the tenancy).

In terms of schedule 4 paragraph 8 of the Housing (Scotland) Act 1988, where the purpose of the tenancy is for a holiday let, such a tenancy is excluded from the provisions of that Act. Further, in order to be covered by the definition of an assured tenancy under section 12 of the Housing (Scotland) Act 1988, the property let must be the tenant's only or principal home. The Tenant at the inspection indicated that the purpose of the tenancy was to allow him to attend university in Dundee, but that he had his main residence in Edinburgh. The question of what is or what is not a tenant's only or principal home or what is or is not a holiday let is a question of fact to be determined with reference to the particular set of circumstances applicable to any case. No evidence was led on these points at the hearing.

There therefore may be a legitimate question over whether the tenancy in question is an assured tenancy or some other form of non-Housing (Scotland) Act tenancy. That is not a question the tribunal require to answer for the purpose of this application. It is sufficient that the tribunal has determined that the tenancy is a tenancy for the purposes of section 14(1) of the Housing (Scotland) Act 2006.

11. At the hearing on behalf of the Landlord it was submitted as follows:

- a) That the broken window catch/handle had been repaired and was "100% resolved". A copy of an invoice dated 21st April 2017 from "Window Man" of 116 Main Street, Invergowrie was produced to vouch for the repair.

- b) That the storage heater in the kitchen had been replaced with a new electric panel heater and that the Tenant was happy with the replacement. Invoices for the purchase of the new panel heater and for installation of same were produced from Peco Electrics of 130 Hilltown, Dundee dated 11th November 2016 and David Hart Electrical Contractor dated 28th February 2017.
 - c) That in relation to the water ingress into the kitchen of the Property, further repairs had been instructed and roofing contractors had again attended on 28th April 2017. That since those repairs, no further report of water ingress had been received. A note dated 1st May 2017 from Mark Dickson (the roofing contractor) was produced to confirm the further work and repairs carried out under guarantee which involved replacing a cracked roof tile and a repair to the valley gutter.
12. After the hearing, the Tenant submitted by way of email dated 22nd May 2017 further written representations to the effect that, following heavy rainfall on 20th May 2017, there had been further water ingress at the same or similar point as previously complained of. Photographs were submitted of the water ingress.
13. The Landlord (via the Agent) responded by email of 30th May 2017 acknowledging there had been further water ingress and that they had carried out further repairs. An undated handwritten note from their roofing contractor along with photographs of the roof were produced.

Summary of the issues

14. The issues to be determined are whether:
- a) the house is wind and water tight and in all other respects reasonably fit for human habitation,
 - b) the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order,

Findings of fact

- c) The tribunal finds the following facts to be established:-
- The Tenant has a tenancy for the purposes of section 14(1) of the Act.
 - That the tenancy commenced on or around 6th October 2016.
 - The Property is situated within the top floor of a modern brick built building with concrete tiled roof with lead flashings and valley guttering. The Property forms part of former university halls of residence. It was constructed circa 2000. The Tenant has sole use of room 1 within the Property and access to communal areas such as the kitchen accessed by way of a communal hallway.
 - That the Landlord's duties under section 14(1)(b) of the Act apply to the communal kitchen.
 - The Property is served by electric storage and panel heaters of an indeterminable age.
 - The Property has no gas supply.

- The storage heater in the kitchen of the Property had been replaced with a new electric panel heater which was fully operational.
- That repairs and redecoration had been carried out to the ceiling of the communal kitchen within the Property.
- That repairs had been carried out to the roof of the Property on 28th April 2017.
- That despite the repairs on 28th April 2017, there was evidence of continuing water ingress on or around 20th May 2017 to the ceiling in the kitchen of the Property where the earlier repairs had been carried out.
- That the handle in the kitchen window had been replaced and was working fully.

Reasons for the decision

d) Given the tribunal's findings on inspection and taking into account the application form, subsequent written representations from both the Landlord and Tenant (including the late representations dated 22nd May 2017 and the response of 30th May 2017) as well as the submissions on behalf of the Landlord at the hearing, the tribunal was satisfied that the installations in the Property for space heating were in a reasonable state of repair and in proper working order for the following reasons:

- The electric storage heater in the kitchen had been replaced with a new electric panel heater.
- That the Tenant at inspection indicated that he was happy with the replacement panel heater and that it was fully functional.

The tribunal was also satisfied that the handle/catch on the kitchen window had been replaced and functioned fully.

As such, the tribunal was satisfied that in relation to these matters the Landlord was not in breach his duties under section 14(1) of the Act and accordingly no orders are made in relation to these complaints.

The tribunal was not satisfied that the Property was wind and water tight and in all other respects reasonably fit for human habitation for the following reasons:

- That despite further repair work by the Landlord on or around 24th April 2017, the kitchen ceiling showed further signs of water ingress following heavy rainfall on or around 20th May 2017.

Decision

- e) The tribunal accordingly determined that the Landlord has failed to comply with his duties imposed by Section 14 (1)(b) of the Act.
- f) The tribunal therefore decided to make a Repairing Standard Enforcement Order (RSEO) as required by section 24(1).
- g) The decision of the tribunal was unanimous.

- h) The Surveyor Member of the tribunal took several photographs which form the schedule attached to this decision.

Observations

- i) The tribunal acknowledge that the Landlord, through the Agents, appears to have instructed further works to the roof of the Property. Notwithstanding the terms of the Repairing Standard Enforcement Order, the Landlord can request that re-inspection by the tribunal take place earlier than after the 2 months allowed for works to be carried out has expired. Standing the history of repairs to the roof and subsequent water ingress after heavy rain, it may make sense for the Landlord to wait until there has been further heavy rainfall after any repairs have been carried out before requesting early re-inspection (if that is what they chose to do), but that is a matter for the Landlord.

Right of Appeal

- j) 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.
- k) 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.

R Cowan

Signed

Date7th June 2017.....

Chairperson



Housing and Property Chamber
First-tier Tribunal for Scotland



Room 1 Flat 3
1a Constitution St
Dundee DD3 7NF

Inspection and Hearing 12 May 2017

Indications of
water ingress in
kitchen ceiling.
Damp meter
readings 4-7.9 in
this area.



External rear
elevation
showing kitchen
window



Detail of downpipe
outside kitchen
window



Window in kitchen –
catch replaced and in
working order



New panel heater installed

