STATEMENT OF DECISION TO VARY THE REPAIRING STANDARD ENFORCEMENT ORDER UNDER SECTION 25 OF THE HOUSING (SCOTLAND) ACT 2006 ("THE ACT").

Chamber Ref: RP/HPC/RP/18/0231

THE PROPERTY:

46, Fort Street, Ayr KA7 1DE being All and Whole: (I) 2 storey house at 46 Fort Street, Ayr, part of the subjects referred to in Disposition in favour of William Auld, recorded in the Division of the General Register of Sasines applicable to the County of Ayr on 12 November 1902 and (II) offices at 48 Fort Street, Ayr, referred to in Disposition in favour of Ayr Tyre Factors Limited, recorded in the said Division of the General register of Sasines on 4 January 1962.

THE PARTIES:

Mr Douglas Swan, residing at 46 Fort Street, AyrKA7 1DE ("the tenant")

and

Mrs Sally Ward, Ward Properties, Allestree Mews, Southwood, Troon KA10 7EL, per her agent Mr Colin Duck, Solicitor, The McKinstry Company, Queen's Court House, 39 Sandgate, Ayr KA7 1BE ("the landlord")

THE TRIBUNAL:

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

David M Preston (Legal Chair) and Donald Wooley, Surveyor (Ordinary Member)

Decision:

The tribunal hereby varies the Repairing Standard Enforcement Order dated 9 April issued on 12 April, both 2018 by extending the time limit specified therein for the works to be completed to a date two months from the date of issue of the Notice of Variation.

Background:

1. The RSEO dated 9 April 2018 was issued to the parties on 12 April 2018. The time limit specified for completion of the works was 8 weeks from the date of issue, being 7 June 2018. Following the expiry of the time limit a re-inspection of the property was carried out by the Ordinary (Surveyor) Member of the tribunal on 9 July 2018 and a report dated 10

July 2018, which is attached hereto as Schedule 1, was prepared by him and issued to the parties on 18 July 2018 with a request to the parties to confirm their views on the report, and on the issue of a Rent Relief Order.

2. In the Response Form submitted to the tribunal on 24 July 2018 the landlord indicated that she wished to attend an oral hearing in respect of the re-inspection report. Accordingly on receipt of the parties' representations on 1 August 2018 a hearing was scheduled for 10 October 2018 at 10:00 am in Russell House, King Street, Ayr KA8 0BQ. The hearing was intimated to the tenant by emails dated 31 August 2018, timed at 13:51 and 14:32. On 27 September 2018 the tenant telephoned the tribunal administration and requested a hard copy of the hearing details which was sent by letter dated 28 September 2018, although the letter did not contain the date of the hearing.

3. The tribunal was satisfied that the tenant had been given notice of the hearing, although in a slightly disjointed way. Taking the two emails of 31 August and the letter of 28 September as a whole, all the relevant details of the hearing venue, date and time have been provided. In addition it was open to the tenant to ask for clarification of the missing date from the letter of 28 September 2018.

4. At the scheduled time, the landlord was in attendance along with her agent, Mr Duck, Solicitor. The tenant did not attend. The hearing was convened at 10:05 to provide the tenant the opportunity of arriving late. At 10:05 the tenant had not arrived and he did not appear during the course of the hearing.

5. The tribunal was satisfied that the tenant was aware of the hearing and it determined that he had voluntarily waived his right to be present or represented and accordingly proceeded to hear the landlord's representations.

Tenant's Representations:

6. By email date 31 July 2018 the tenant submitted representations as requested. In addition by email dated 1 August he submitted a response to the landlord's representations of 31 July 2018. He confirmed that he agreed with the findings of the re-inspection report and that he considered that a RRO should be issued to reduce the rent payable by 90%.

7. In the tenant's opinion the work required within the RSEO in respect of the repairs to the roof and gutter areas to eliminate the ingress of water to the roof space and first-floor bedroom had only partially been completed or complied with and he called into question the quality of the work which had been carried out.

8. The tenant expressed concerns about the report from Kerelaw Building Preservation dated 22 May 2018 ("the Kerelaw Report") produced by the landlords. He stated that none of the work recommended in the report had been addressed.

9. The tenant said that no attempt had been made to repair or replace the defective double glazed units in the lounge and bedroom. In his representations dated 1 August 2018 in

response to the landlord, the tenant denied that Mr Gilmour had sought access on 4, 6, 21 and 24 April 2018.

10. The tenant confirmed that the requirement to produce a satisfactory Electrical Installation Condition Report had been completed and complied with.

11. The tenant made additional 'Site Observations' in which he provided his opinion as to the quality of the workmanship which had been carried out to the roof and gutters but conceded that the adequacy of the repairs would be evident "when we return to typical weather conditions for this location".

12. The tenant's representations contained a number of gratuitous assertions and allegations with regard to the conduct of the landlord and/or her agent, which the tribunal did not consider to be in any way useful to it in its deliberations.

Landlord's Representations:

13. By email dated 31 July 2018, the landlord agreed with the findings of the Re-inspection Report. The remaining representations related to the reasons for the landlord not completing the required works in terms of the RSEO and in relation to the issue of a Rent relief Order ("RRO").

14. Mr Duck confirmed that the work required at point 1 of the RSEO had been completed in mid-April, shortly after the RSEO had been issued. This had been under way at the time of the inspection and was the reason for the scaffolding. The tribunal pointed out that the re-inspection report had identified that there were still a number of missing or damaged slates, as detailed therein. The Ordinary (Surveyor) member confirmed that, as identified in the report, at the time of the re-inspection there was no evidence of water ingress.

15. At the hearing the landlord accepted that, with hindsight, there had been no reason for the delay in instructing the Kerelaw Report, as required at point 2 of the RSEO. Mr Duck explained that this had been on the advice of Mr Stewart of Shepherd, Chartered Surveyors and had not been in an effort to delay the implementation of the RSEO. He emphasised that his client had been acting in good faith, but she now accepted that Kerelaw could have been instructed sooner.

16. In any event: the RSEO had been issued on 12 April 2018; point 1 had been attended to by mid-April; the Kerelaw Report and had been obtained on 22 May 2018; and the EICR (point 4 of the RSEO) had been obtained by 31 May 2018. On receipt of the Kerelaw Report, Mr Gilmour had been instructed to quote for the work and he had sought access on dates in May but had been refused by the tenant.

17. Details were provided of five dates during April 2018 on which the landlord's tradesman, Mr Gilmour, had attended the property but had been denied access. At the hearing the landlord advised that the purpose of these visits had been for Mr Gilmour to undertake the work required in respect of the double glazed units (point 3 of the RSEO)

18. Details were also provided of further requests for access in May and June which were also denied. At the hearing the landlord clarified that the dates in May on which access was requested by Mr Gilmour were for the dual purpose of attending to the double glazed units, which he had been unable to attend to in April, as well as assessing the work required by the Kerelaw Report. He was to assess the work required, confirm what he would be able to do and provide an estimate of the cost. At that stage he had only been instructed to repair the double glazing units and to provide an estimate for the works.

19. In relation to the observation in the Re-inspection Report that the Kerelaw Report had been restricted in its scope, which the landlord accepted, Mr Duck advised that the intention was that Mr Gilmour would address the 'missing' areas in his estimate. In particular, he would address the removal of plasterwork and other necessary work in the vicinity of the boiler.

20. Mr Duck explained that the reason for the lateness of the application to extend the time limit was because the landlord had effectively run out of time, which the landlord put down to the tenant's lack of cooperation.

21. In view of the tenant's refusal to agree dates provided by the landlord or Mr Gilmour, by email dated 15 June 2018, he was asked to provide dates which were suitable to him. No response was received to that request.

22. At the hearing it was clarified that Mr Gilmour was the landlord's preferred contractor as he was known to her. The landlord informed the Tribunal that he is a self-employed contractor and, if his quotation were to be accepted, he would be instructed to carry out the work as a scheduled contract at times to be agreed with the tenant. If Mr Gilmour's quotation had not been acceptable, another contractor would have been invited to provide a quotation.

23. Further details were given of the landlord's continuing efforts since the expiry of the time limit to gain access. It was also emphasised that steps had been taken to recover possession due to the non-payment of rent, but these had run into technical difficulties with which this tribunal was not concerned. However the landlord had hoped to have possession by 8 June 2018 and had anticipated that work could have commenced the following week. This had not proved possible.

24. Mr Duck submitted that the tribunal should not issue a Notice of Failure. He submitted that he had demonstrated that his client had taken reasonable steps and had made efforts to implement the RSEO but had been prevented from doing so by the actions of the tenant. He said that his client had been consistent in her efforts in contrast to the tenant who had been erratic and difficult. The tenant had submitted the application and had wanted the repairs to be carried out as a matter of extreme urgency due to the effects of the problems on his health. He has however refused to cooperate in relation to further investigation of the timber works and dampness issues and, more recently, has not replied to requests for access which post-dated the expiry of time limit specified in the RSEO.

25. Mr Duck submitted that there was no restriction as to when an application for an extension can be made. In terms of section 25(1) the tribunal was able to vary the RSEO "at any time" and that section 25(3)(a) provides that where the tribunal considers that the work required "has not been, or will not be" completed within the time specified, a variation can be issued. He submitted that accordingly an application for extension can be made both before and after the deadline has expired.

26. Mr Duck further submitted that in terms of section 26(3)(b), the tribunal may not decide that a landlord has failed to comply with the RSEO where the landlord is unable to comply because of a lack of necessary rights (of access or otherwise) despite having taken reasonable steps for the purpose of acquiring those rights. He said that although the landlord did, technically have a right of access to her property, the tenant had obstructed her in exercising that right, which he said would be covered by the expression 'or otherwise'.

27. If the tribunal was not with him on the above, he argued that there should be no RRO or that it should be minimal. He said that the problems had only affected one upstairs room in the property and that there were other rooms available to the tenant. Accordingly any effect on the tenant's enjoyment of the property was minimal. Similarly the double glazing problems related to blown seals and that there was no heat loss. It was within the tribunal's discretion to take these matters into account when deciding on the level of restriction.

28. Mr Duck submitted that in the circumstances the progress with the work was satisfactory as provided for in section 25(3)(a) and that in any event, and in addition his client was prepared to provide a written undertaking as provided for in section 25(3)(b)that the work will be completed within two months, provided she can get access to the property. Such an undertaking dated 12 October 2018 was received by the tribunal and is attached hereto as Schedule 2.

29. As a general observation Mr Duck referred to the difficulties encountered by the landlord. He referred to the tone of the correspondence from the tenant which was abusive and, on occasion, bordering on sinister and threatening to the landlord and her family. There were also personal insults directed at Mr Duck. He said that tradesmen who had attended the property had also reported that the tenant had been unpleasant to deal with to the extent that Mr Gilmour had refused to attend further.

Reasons

30. We carefully considered the written representations made by or on behalf of the parties and the oral representations and submissions made on behalf of the landlord.

31. Our deliberations related to the landlord's failure to comply with the RSEO within the specified time limit.

32. It was accepted by both parties that point 4 of the RSEO had been completed. In relation to point 1, as far as could be reasonably ascertained, we found that the position was as outlined in the Re-inspection Report. Work had been carried out to the roof, although

there were still some damaged and missing slates, but no evidence was presented to us as to whether or not there was still an issue relating to water ingress.

33. The tribunal accepted the landlord's position in relation to the delay in instructing the Kerelaw Report. She had acted on the advice of Mr Stewart and not on her own initiative. Her actions therefore had been reasonable and not arbitrary or contrary.

34. In his representations of 31 July 2018 the tenant called into question the reliability of the repairs carried out to the roof and gutters. He did not assert any further water ingress had occurred. Indeed he said that the test would come when we return to typical weather conditions, which would confirm his concerns. As at the date of the hearing we were aware that there had been periods of extensive rainfall and storm conditions since the re-inspection, but no evidence was presented of on-going problems.

35. We accepted that the landlord had made reasonable efforts to implement the RSEO. Mr Gilmour had been refused access on a number of occasions. There was an issue in relation to the dates on which access had been allegedly sought in April 2018. The landlord's position that the access requested on 4, 6, 21 and 24 April had been denied by the tenant and there was no further evidence available. However we were satisfied that there was no doubt that access had been denied on the May dates (18, 25, 26 and 2 June). We were also satisfied that the tenant had failed to provide dates which were suitable to him as requested by the landlord. On balance, therefore we accepted the landlord's position that her efforts to implement points 2 and 3 of the RSEO had been genuine and had been frustrated by the actions of the tenant.

36. We accepted that the terms of section 25 enabled us to consider the question of a variation by extending the time limit at this stage. The section clearly allows such a step "at any time" which must include the period both before and after the time limit specified in the RSEO. By way of explanation, the earlier refusal of the application to do so was because, on the information provided, we had considered that an application could have been made before the expiry and that the failure to do so had not been adequately explained. We were conscious of the fact that it had always been open to the landlord to make a Right of Entry application which would establish her ability to access the property. We accepted on balance, however, that the landlord had effectively run out of time following the Kerelaw Report and taking into account the tenant's refusal of access to Mr Gilmour following thereon.

37. We considered the tenant's criticisms of the quality of workmanship and the extent of the reports. However these are matters for the landlord and so long as the work carried out results in the property meeting the repairing standard, the choice of tradesmen is entirely a matter for the landlord. The only reason that the tenant has had sight of any reports regarding the condition of the property is because they form part of the application process. Had it not been for that the landlord would be under no obligation to provide the tenant with them.

38. The tenant appears to have taken the view that because the work had not been completed within the time limit in the RSEO, then the landlord's failure had crystallised and could not be remedied. For the reasons stated above, that is wrong. We accepted

the landlord's assertion that at the outset the tenant had required the work to be carried out urgently. If that was the motivation for the application we would have expected him to give every assistance to the landlord and her tradesmen to achieve that.

39. We have disregarded the tone and nature of the correspondence from the tenant in our deliberations which we agree was unnecessarily aggressive and abusive and did nothing to progress the matters at issue.

40. In all the circumstances we determined to issue a Minute of Variation to extend the time limit provided for in the RSEO to complete the works by a period of two months from the date of issue of the Minute of Variation, as requested by the landlord in her written undertaking and subject to her obtaining reasonable access to the property for that purpose. In the event that reasonable access continues to be denied to the landlord and her tradesmen for the purpose of carrying out the work we will consider any further extension as appropriate to allow for a Right of Entry application to be made if necessary.

41. We would make it clear that the RSEO is regarded as a whole and although some of the requirements may have been completed, we will not issue a partial Certificate of Compliance. In relation to point 1, in the event that further water ingress occurs as a result of the condition of the roof, we would require that further attention be paid to its age and condition.

In terms of section 46 of the Tribunals (Scotland Act, 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.

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.

D Preston

... Chairman 23 October 2018