Upper Tribunal for Scotland

2022UT21
Ref: UTS/AP/22/0004

DECISION OF

Sheriff Iain Fleming

ON AN APPLICATION TO APPEAL
IN THE CASE OF

Mr Mohammed Arshad, 584 Cathcart Road, Glasgow, G42 8AB
per AQA Property,
584 Cathcart Road, Glasgow, G42 8AB

Appellant

- and -

Mr Atif Aziz Khawaja, Mrs Samina Aziz Khawaja, 36 Garturk Street flat 0/2, Glasgow, G42 8JF

Respondents

FtT reference FTS/HPC/RP/19/2089

25 May 2022

Decision

The Upper Tribunal refuses the appeal.

Background

[1] On 9 October 2019 the First Tier Tribunal for Scotland (Housing and Property Chamber) (hereafter "the FtT") issued a decision requiring the appellant to comply with a Repairing Standard Enforcement Order (hereafter "the RSEO") relative to the property known as and forming Flat 0/2, 36 Garturk Street, Glasgow, G42 8JF being the subjects registered in the Land Register for Scotland under Title Number GLA125116.

[2] The RSEO required the landlord to:

i) Instruct an appropriate contractor to carry out the replacement or repair as necessary of all areas of defective pointing to the front and rear elevation of the building. (ITEM 1)

ii) Instruct a suitably qualified specialist contractor to make good or repair or replace the defective damp-proof course to the rear elevation of the building, and to provide evidence of that contractor's qualifications to the tribunal. (ITEM 2)

iii) Deliver to the tribunal, for approval, a specialist report from a suitably qualified building surveyor, who is a professional member or fellow of the Royal Institution of Chartered Surveyors, to address the requirements for a property of this form of construction to make the property wind and watertight and substantially free from rising or penetrating damp, and to comply with the Repairing Standard. This report should include investigation of any issues contributing to the rising and /or penetrating damp which may have originated from the flat above or elsewhere within the tenement building. (ITEM 3)

iv) Once a satisfactory report has been approved by the tribunal, to carry out such work as is recommended in terms of the report, provided that the tribunal confirms its approval of the works specified in the report. (ITEM 4)

v) Instruct a suitably qualified contractor to check whether the extractor fans within the house are in a reasonable state of repair and in proper working order. If any of these are found not to be operating satisfactorily, repair or upgrade the relevant fan/s, to ensure that they are in a reasonable state of repair and in proper working order. (ITEM 5)

vi) Once item 5 above has been completed, provide an up to date Electrical Installation Condition Report (EICR) in respect of the house, showing that all electrical installations, appliances and fixtures and fittings, and in particular the extractor fans, have been checked and are working safely. The EICR must be produced by either:

- a suitably qualified and registered SELECT or NICEIC contractor
- a member of NAPIT, or

• a contractor who is able to provide evidence that they are a 'competent person' i.e. a completed and signed checklist, as set out at Annex A on page 13 of the guidance by Scottish Ministers on Electrical Installations and Appliances in Private Rented Property, which can be found on the Chamber's website. (ITEM 6)

vii) Provide an up to date gas safety certificate in respect of the house by a Gas Safe registered engineer, showing that all gas installations and appliances, and in particular the boiler and radiators, have been checked and are in a reasonable state of repair and in proper working order. (ITEM 7)

viii) On completion of all the above works, ensure that all affected finishes and decoration are restored to an acceptable standard. (ITEM 8)

The FtT ordered that the works must be carried out and completed within the period of six months from the date of service of the RSEO. That six month period was extended on various occasions on the motion of the appellant.

[3] The statutory provision which governs failure to comply with a RSEO is section 26 of the Housing (Scotland) Act 2006(hereafter "the 2006 Act"), which provides as follows;

26 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.

[4] After further and extensive procedure a hearing was held on 7 October 2021 by telephone conference call. The appellant was represented by Mr Mo Bukhari of AQA Property Limited. The respondent was present on the telephone conference call, as was his representative Ms Malloy, a housing advisor at Govan Law Centre.

[5] During the telephone conference call the FtT heard evidence from both parties upon the issue of whether there had been compliance with each of the identified items specified within the RSEO. At the conclusion of the hearing the FtT held that there had been a failure to comply with items 2, 3, 4 and 6 of the RSEO. The appellant had complied with items 1 and 5 of the RSEO. The FtT was unable to make a determination upon whether the appellant had complied with item 8 of the RSEO, as this was consequent on those items numbered 2, 3 and 4 being addressed.

[6] The FtT, having determined that it had made such enquiries as were necessary for the purposes of determining whether the landlord has complied with the RSEO, decided that the landlord had so failed to comply in terms of section 26(1) of the 2006 Act and also that a notice of this failure should be served on the local authority in whose area the property is situated.

[7] The FtT thereafter considered whether a Rent Relief Order should be made in terms of section 27 of the 2006 Act. It determined that given the extent of the landlord's failure to comply with the RSEO, despite having been given a total of 2 years within which to do so, such an order should be made.

[8] Thereafter the FtT considered the amount by which the rent payable under the tenancy should be reduced and determined that an appropriate reduction would be to reduce the rent payable under the tenancy by 90% until the RSEO had been complied with.

[9] The FtT issued a written decision extending to 67 paragraphs on 25 October 2021. On 22 November 2021 an email was received from the appellant's representative stating that he wished to appeal against the decision. Upon clarification it was clear that the appellant wished to appeal against both the decision that the appellant had failed to comply with the RSEO and the imposition of the Rent Relief Order. What was being

sought by the appellant was revocation of the decision that the landlord has failed to comply with the RSEO and revocation of the Rent Relief Order.

[10] The FtT granted permission to the appellant to appeal on 5 January 2022. It identified two points of law as follows: (1) the landlord cannot carry out damp proofing treatment while the tenant is still living in the property and (2) the damp proofing works cannot be carried out for health and safety reasons. The FtT determined that each of these points were arguable in terms of section 46(4) of the Tribunals (Scotland) Act 2014.

[11] Permission to appeal having been granted the respondent provided a written response which set out their position and indicated that they were "content to provide further written submissions to the Upper Tribunal for Scotland without the need for an oral hearing". When this proposition was suggested to the appellant his representative responded by indicating "we would like to continue to an oral hearing and object to any other".

[12] Accordingly, on 25 April 2022, by Cisco WebEx, the Upper Tribunal heard the appeal. The appellant was represented once again by Mr Mo Bukhari of AQA Property Limited and the respondent was represented by Mr Dailly, Solicitor-Advocate of the Govan Law Centre. The Upper Tribunal heard from both parties. In making its decision the Upper Tribunal has had regard to the previous decisions of the FtTs who have heard this case, the written representations of both parties and the oral submissions of both parties.

Reasons for decision

[13] The background to the matter is to some extent non-contentious. The tenancy is a short assured tenancy. Before the FtT on 7 October 2021 it was accepted on behalf of the appellant that major works required to be done to the property and that the appellant (landlord) was willing to carry out the work. However, it was the appellant's position that it would be necessary for the respondent to move out before the work could be carried out (FtT decision, paragraph 30). The appellant relied upon section 26(3) of the 2006 Act and submitted that the landlord would be unable to comply with the order because of a lack of necessary rights of access despite having taken reasonable steps for the purposes of acquiring those rights, and that the work required by the order was likely to endanger any person within the property.

Additional Evidence.

[14] The first issue which the Upper Tribunal required to consider is the application by the appellant to rely upon new evidence. The appellant seeks to introduce an email dated 3 November 2021 from Advance Preservation Specialists. The application to allow new evidence was opposed by the respondent.

[15] Any application for fresh evidence requires to be considered in terms of regulation 18(4) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016. Read shortly fresh evidence may only be led in an appeal if the Upper Tribunal is satisfied that the evidence could not have been obtained with reasonable diligence at the FtT stage. Secondly, the Upper Tribunal requires to be satisfied that the evidence is relevant, will probably have an important influence on the hearing and is apparently credible. Alternatively, the Upper Tribunal requires to be satisfied that the interests of justice justify the evidence being led. Mr Dailly opposed the application for admission of fresh evidence. He submitted that it could not be said that a letter in similar terms could not have been obtained with reasonable diligence prior to the hearing and referred to the authorites of *Ketley v Revenue and Customs Commissioners* 2021 UKUT 218 and *Ladd v Marshall* [1954] 1 W.L.R.1489 in support of his submission.

[16] The email from Advance Preservation Specialists is apparently credible. However, the email follows upon a quote which the appellant had received from Advance Preservation Specialists dated 4 February 2021. No reason was initially advanced as to why this could not have been provided to the FtT, although Mr Bhukari did indicate that at the time of the FtT hearing he thought it was "50/50" as to whether the contractors would carry out the necessary works while the tenants (respondents) remained within the property.

[17] It appears that the email of 4th February in any event simply restates a factual position which was accepted by the FtT. The appellant's attention was invited to paragraph 30 of the FtT decision wherein he apparently told the FtT that it would be necessary for the tenant to move out before the necessary work could be carried out. Further, in terms of paragraph 31 of the FtT decision, it is clear that ever since a report had been produced in 2018 it would be necessary for the respondent to move out to allow the work to be carried out. Accordingly, the email which is advanced simply seems to restate a position which was already accepted by the FtT.

[18] Mr Bukhari indicated that at the time of the FtT hearing on 7 October 2021 he was assuming that there was a possibility that his contractors would carry out work at the property even if the tenant was present. It was drawn to his attention that in terms of paragraph 30 the FtT had concluded, on the basis of his submissions, that the necessary works could not be carried out unless the tenant moved out. Mr Bukhari appeared to indicate that the FtT had misunderstood him. I specifically enquired with Mr Dailly as to whether it was his information that paragraph 30 misconstrued the position that was put before the FtT. He replied in the negative. Mr Dailly was specifically asked whether there was a factual error and indicated in his professional opinion, and having regard to his position as an officer of the court, no such error was apparent. While there are options available to the Upper Tribunal in the event of a factual dispute the Upper Tribunal is of the view that the only appropriate course is to accept the written decision of the FtT. Such a course is not prejudicial to the interests of the appellant.

[19] I accept the submission of the respondent that it could not be said that a letter in similar terms could not have been obtained with reasonable diligence prior to the hearing. There is no prejudice to the appellant in refusal of the fresh evidence since the position which it seeks to advance is one which was factually accepted by the FtT in October 2021. The fresh evidence would have had no impact on the outcome of the hearing. The application for additional evidence to be allowed is refused.

Section 26(3)(b) of the 2006 Act

[20] Under the heading "Access Issues" the FtT addresses the evidence which was placed before it within paragraphs 30 to 37 of its written decision. Having heard submissions from Mr Bukhari the FtT thereafter addresses within paragraphs 51 to 54 whether the appellant had demonstrated that he was unable to comply with the order for the reasons set out in section 26(3)(b) of the Act. The FtT concluded that the appellant had not demonstrated that he had taken reasonable steps for the purposes of acquiring rights of access. The FtT concluded that the fact that the tenant may have to move out of the property is not an adequate excuse for failing to deliver a dampness report to the FtT within the extended timescale (paragraph 51). It recognised that some effort had been made by the appellant to secure alternative accommodation for the tenant but the FtT was not persuaded by the evidence before it that any "serious efforts" (paragraph 53 of FtT decision) had been made by the appellant in this regard. In particular it specified within paragraph 54 that no written evidence of any offers of accommodation to the tenant or any other assistance to the tenant had been provided to the FtT.

[21] At the hearing of the appeal the appellant stated that his contractors had now carried out the majority of works on the property but they were refusing to carry out the works which related to dampness because the tenant was still on the property. It was maintained by the appellant that he had on three occasions asked the tenant to move out. He had been offered similar properties, but he remained within the tenancy. The works cannot be carried out if the tenant is still in the property because it would be adverse to the health and safety of the tenant for that to be done. Before the FtT the appellant had stated that the landlord had carried out all of the works that it was possible to carry out while the tenant was still living in the house. It was not possible to carry out the major works required, which involved the use of dangerous chemicals, and required walls and floors to be stripped back, while the tenant and his family were living in the house.

[22] In response Mr Dailly founded principally upon his written response lodged on behalf of the respondents which argued that the parties are subject to a short assured tenancy under the Housing (Scotland) Act 1988. If it were the case that the appellant could not agree with the respondents that he would meet their costs for temporary accommodation or arrange for the provision of same it was open to him, within the last 2 years, to have raised proceedings before the FtT either under mandatory ground 6 or discretionary ground 9 of schedule 5 of the Housing (Scotland) Act 1988 (hereafter "the 1988 Act"). Ground 6 allows for compulsory removal to carry out substantial works subject to paying tenant's expenses as assessed in accordance with section 22 of the 1988 Act. Ground 9 allows for removal subject to alternative suitable accommodation being provided. It was emphasised that the appellant had failed to obtemper the RSEO since 9 October 2019.

[23] Mr Bukhari maintained that he thought that it would be "unfair" if the RSEO was to remain in place. His clients were able and willing to carry out the work. He had been asking the tenant for over 2 years to move out. He had offered the tenant a property which was "right across the landing" or other property within the Govanhill area and no effort had been made to move out.

[24] In order to succeed the appellant will require to show an error of law by the FtT. *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 SC (UKSC) 15) concerned an appeal from the Tax & Chancery Chamber of the First Tier Tribunal under section 13 of the Tribunals, Courts & Enforcement Act 2007. An appeal to the Upper Tribunal was available "on any

point of law arising from the decision made by the First Tier Tribunal…". The appeal thereafter to the Court of Session is "on any point of law arising from a decision made by the Upper Tribunal". It was in this context that the Inner House examined what was meant by "a point of law". It identified four different categories that an appeal on a point of law covers:
(i) General law, being the content of rules and the interpretation of statutory and other provisions;
(ii) The application of law to the facts as found by the First Tier Tribunal;
(iii) A finding, where there was no evidence, or was inconsistent with the evidence; and
(iv) An error of approach by the First Tier Tribunal, illustrated by the Inner House with examples: "such as asking the wrong question, or by taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tax tribunal could properly reach." ([41]-[43]). As will be evident from the decision in this case the error of law identified must impact adversely upon the appellant for the appeal to be successful. This process is not an academic critique of the approach of the FtT.

[25] The submissions of Mr Dailly accurately state the legal position as far as the appellant is concerned. If it is the case that agreement cannot be reached between appellant and respondent it will be necessary for the appellant to invoke the terms of the 1988 Act. The appellant has not done so.

[26] Consideration was given by the FtT to this matter in some detail. As far as the question of access is concerned, the FtT addressed this issue within paragraphs 51 to 54 of its decision. Although the FtT does not specifically refer to the Housing (Scotland) Act 1988 it is clear that no agreement was reached between the parties.

[27] Although it is the case that permission to appeal has been granted in relation to two points of law, the submissions which were made by the appellant were confined to restating the factual position that was before the FtT; namely that the landlord could not carry out damp proofing treatment while the tenant was still living within the property and secondly that the damp proofing works cannot be carried out for health and safety reasons. It is the contention of the appellant that the FtT erred in law in making the legal decision to hold that the RSEO had not been complied with on the basis of the factual matrix presented to the FtT and that section 26(3) of the 2006 Act was not properly applied.

[28] The provisions of section 26(1) of the 2006 Act provide that it is for the FtT to decide whether a landlord (in this case the appellant) has complied with the RSEO. In the event that the landlord is unable to comply with the order due to a lack of necessary rights of access, despite having taken reasonable steps for the purpose of acquiring those rights, or if the work required by the order will endanger any person the FtT may not decide that the landlord has failed to comply with the RSEO. (Section 26(3) of the 2006 Act)

[29] The property is a short assured tenancy. If it is the case that the appellant and the respondent cannot agree what should take place in circumstances in which it is clear that remedial works cannot be carried out to the property while the tenants remain therein the appellant's remedy is contained in the terms of the 1988 Act. Mandatory ground 6 referred to within schedule 5 of the 1988 Act allows for compulsory removal to carry out substantial works subject to paying tenant's expenses as assessed in accordance with section 2 of the 1988 Act. Ground 9 allows for discretionary removal, subject to alternative suitable accommodation being provided.

[30] For those in the position of the appellant it is the case that if the local authority for the area in which the tenancy is situated certifies that suitable alternative accommodation will be provided for the tenant, this is conclusive proof that such accommodation will be available. If not, the Housing (Scotland) Act 1988 provides as to the nature of the accommodation which requires to be provided. Four conditions are provided. Firstly, the accommodation must be reasonably suitable to the needs of the tenant and his family as regards proximity to place of work. Secondly, the accommodation must be similar with regard to rental and the extent of the accommodation afforded by houses provided in the neighbourhood by any local authority for persons whose needs as regard extent are, in the opinion of the FtT, similar to those of the tenant and his family. Thirdly, the accommodation must be reasonably suitable to the means and needs of the tenant and his family as regards extent and character and fourthly, where furniture is part of the tenancy contract, the alternative furniture must be similar to the furniture provided in the initial premises or be reasonably suitable to the needs of the tenant and his family.

[31] The FtT concluded as follows in terms of paragraphs 53 and 54 of its written decision;

"The tribunal also considered whether the landlord may have an argument under section 26 (3) (b) in relation to his purported failure to comply with items 2 and 4 of the RSEO within the extended timescale allowed. The tribunal did not consider that the landlord had clearly demonstrated that he had taken

reasonable steps for the purposes of acquiring rights of access. While it appeared that some effort had been made to secure alternative accommodation for the tenant, the tribunal was not persuaded by the evidence before it that any serious efforts had been made by the landlord in this regard.

No written evidence of any offers of accommodation to the tenant or any other assistance to the tenant had been provided to the tribunal. While the landlord now appeared to have raised eviction proceedings, this only appeared to have been done recently. The tribunal does not therefore consider that the landlord has demonstrated that he was unable to comply with items 2 or 4 of the RSEO in terms of section 26(3) (b)."

[32] It is clear from the decision of the FtT that it concluded that the appellant had not "*clearly demonstrated that he had taken reasonable steps for the purposes of acquiring rights of access"* and later that the FtT was not persuaded that "*serious efforts*" towards the provision of alternative accommodation for the respondent while the necessary repairs are being carried out had been made. In terms of paragraph 54 of the FtT decision the FtT comments that no written evidence of any offers of accommodation to the tenant or any other assistance to the tenant had been provided to the FtT.

[33] I am not entirely satisfied that the FtT did not err in law inasmuch as it appeared to determine that the statutory test was one of whether the appellant made "*serious efforts*" towards provision of alternative accommodation. That is not the test. The landlord requires to have taken reasonable steps for the purposes of acquiring necessary rights of access. In terms of section 26(3) of the 1988 Act the FtT requires to be satisfied on the submission of the landlord or otherwise that the landlord is unable to comply with the RSEO despite having taken reasonable steps for the purposes of acquiring rights of access. Reasonable steps means that the landlord must reach agreement with the tenant or utilise the statutory provisions of the 1988 Act, with all of the safeguards provided therein. There is no basis for consideration of a test of "*serious efforts."* Such an error, however, favoured the appellant. Quite simply, given the information available before the FtT, it did not consider that the appellant had demonstrated that he was unable to comply with items 2 or 4 of the RSEO in terms of section 26(3)(b) of the Act. In order to come within the ambit of section 26(3) (b) the appellant must either reach agreement with the respondent or invoke the previously referred to sections of the Housing (Scotland) Act 1988. The appellant did not do so. In reaching its conclusion that the appellant does not fall within the parameters of section 26(3) the FtT was quite correct, although not for the reasons given. The error in law favoured the appellant and accordingly the appeal must fail. Upon the factual basis presented to it the FtT could not have decided otherwise.

[34] Permission to appeal was also granted in relation to the issue as whether the work required by the order was likely to endanger any person within the property. The same considerations apply. It is for the appellant to reach agreement with the respondent or to raise proceedings before the FtT for eviction to allow the works to be carried out. The statutory provision allows protection to those in the respondents position inasmuch as the criteria for alternative accommodation are specified. In the absence of agreement or the use of the statutory provisions the appellant is not in a position to found on this provision. Again, if there was an error of law in the decision of the FtT, it favoured the appellant.

[35] The FtT also made a Rent Relief Order. If it is the case that such a finding is made that the landlord has failed to comply with a RSEO the FtT requires to consider whether to impose a Rent Relief Order. Paragraph 65 details the considerations of the FtT. The conclusion of the FtT was that a Rent Relief Order should be imposed and an appropriate reduction would be to reduce the rent payable under the tenancy by 90% until the RSEO had been complied with. Paragraph 65 discloses the reasoning of the FtT and no error of law is apparent. The decision to impose the Rent Relief order and the level of the rent reduction are both explained within the FtT decision. It was within the discretion of the FtT to act as it did. The FtT explains the criteria which it applied in reaching its determination. No error of law is apparent.

[36] Such error of law as is apparent favoured the appellant. There is no basis upon which to interfere with the decision of the FtT. The appeal is refused.

Sheriff Iain Fleming
Member Upper Tribunal for Scotland