Upper Tribunal for Scotland

2024UT30
Ref: UTS/AP/22/0027

DECISION (No.2) OF

SHERIFF GEORGE JAMIESON

ON AN APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER)
IN THE CASE OF

Mr David Stainthorpe, Alandale, Ruthwell, Dumfries, DG1 4NN, per Walker and Sharpe, Solicitors, 37 George Street, Dumfries, DG1 1EB

Appellant

- and -

Ms Marion Carruthers and Mr Raymond Swan, 7 Runic Place, Ruthwell, Dumfries, DG1 4NW, per Pollock & McLean, Solicitors, 41 Castle Street, Dumfries DG1 1DU

First and Second Respondents

FTS case reference FTS/HPC/EV/21/2943

Paisley 25 April 2024

Decision

The Upper Tribunal for Scotland, having by decision dated 26 June 2023 quashed the decision of the First-tier Tribunal for Scotland ("FTS") dated 22 September 2022 refusing the appellant's application for an order for possession in terms of section 18(1) of the Housing (Scotland) Act

1988 and by Order No. 4 dated 6 November 2023 ordered that said decision be remade by the Upper Tribunal for Scotland ("UTS"):

1. Remakes the decision.
2. Decides that the appellant's application for a possession order in terms of section 18(1) of the Housing (Scotland) Act 1988 in respect of the house at 7 Runic Place, Ruthwell, Dumfries, DG1 4NW be granted but the date of possession in terms of that order be postponed in terms of section 20(2) (b) of the Housing (Scotland) Act 1988 to Monday 2 September 2024.
3. Subject to any conditions as may be imposed by the UTS in terms of section 20(3) of the 1988 Act, Orders the Respondents Ms Marion Carruthers and Mr Raymond Swan, 7 Runic Place, Ruthwell, Dumfries, DG1 4NW to remove themselves from said house on Monday 2 September 2024.
4. Directs that any application incidental to the foregoing order for possession whether for an order in terms of section 20(3) or 22(2) of the 1988 Act or otherwise must be made to the UTS and not to the FTS.

Representation in Connection with the Appeal

The appellant was represented by his solicitor Miss Dalgleish.

The respondents were represented by their solicitor Mr Bryce.

Introduction

[1] The First-tier Tribunal for Scotland ("FTS") refused permission to appeal in this case. I granted permission to appeal on the appellant's grounds of appeal 1 - 7. I determined the appeal on the papers by quashing the decision appealed against. I thereafter determined, after considering further submissions from the parties' solicitors, that the decision be remade by the UTS.

[2] To that end, I heard further evidence at a two day hearing of the UTS held within Dumfries Sheriff Court on 25 and 26 January 2024. I reserved judgment at the conclusion of that hearing.

Decision

[3] This is my Decision in respect of the appellant's application for a possession under and in terms of section 18(1) of the Housing (Scotland) Act 1988 ("the 1988 Act") in respect of the house at 7 Runic Place, Ruthwell, Dumfries, DG1 4NW. Having quashed the Decision of the FTS, the UTS may also make "such other order" as it considers appropriate in terms of section 47(2)(c) of the Tribunals (Scotland) Act 2014 ("the 2014 Act"). As will be explained below, I have exercised this power so that any orders sought by the parties, for example, in terms of sections 20(3), 20(4) and 22(2) of the 1988 Act must be made to the UTS and therefore not to the FTS.

[4] Further, the UTS has power in terms of section 47(3)(a) of the 2014 Act, on re-making the Decision of the UTS, "to do anything that the First-tier Tribunal could do if re-making the decision". Accordingly, for the purposes of this appeal to the UTS, and this Decision of the UTS in respect of the appeal, any statutory references to the FTS are to read as including the UTS.

Relevant Law

[5] Section 18(1) of the 1988 Act provides that the FTS "shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act." Section 18(4) provides that: "If the [FTS] is satisfied that any of the grounds in Part I or II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so."

[6] The appellant sought the order for possession in terms of ground 6 of schedule 5 to the 1988 Act. So far as relevant to this appeal, ground 6 applies where:

> "The landlord who is seeking possession intends to demolish or reconstruct the whole or a substantial part of the house or to carry out substantial works on the house or any part thereof or any building of which it forms part."

[7] Ground 6 also requires certain conditions to be fulfilled in relation to the landlord who is intending to carry out the demolition, reconstruction or substantial works.

[8] The conditions relevant to this appeal are condition 6(a) (i) and condition 6(b).

[9] Condition 6(a) (i) is that the landlord intending to carry out the reconstruction works must have acquired his interest in the house before the creation of the tenancy.

[10] Condition 6(b) is that the landlord: "cannot reasonably carry out the intended work without the tenant giving up possession of the house because:

(i) the work can otherwise be carried out only if the tenant accepts a variation in the terms of the tenancy and the tenant refuses to do so;

(ii) the work can otherwise be carried out only if the tenant accepts an assured tenancy of part of the house and the tenant refuses to do so; or

(iii) the work can otherwise be carried out only if the tenant accepts either a variation in the terms of the tenancy or an assured tenancy of part of the house or both, and the tenant refuses to do so; or

(iv) the work cannot otherwise be carried out even if the tenant accepts a variation in the terms of the tenancy or an assured tenancy of only part of the house or both."

Issues for Determination by the UTS

[11] The following issues fall to be determined by the UTS:

1. Whether the appellant intends to carry out the reconstruction works on the house.

2. Whether those works cannot reasonably be carried without the respondents giving up possession of the house.
3. Whether the appellant acquired his interest in the house before the creation of the tenancy as required by condition 6(a) (i).
4. Whether any of the alternatives to eviction set out in condition 6(b) apply.
5. Whether the UTS considers it reasonable to grant a possession order.

[12] Only issues 1 and 5 are in contention in this appeal. The parties accept that the reconstruction works cannot reasonably be carried without the respondents giving up possession of the house. They accept the appellant acquired his interest in the house in 2010, prior to the creation of the tenancy in 2015. They accept that none of the alternatives to eviction set out in condition 6(b) apply.

Findings in Fact by the UTS

[13] I make the following findings in fact in terms of section 47(3) (b) of the 2014 Act. These findings in fact should be read alongside any findings of fact made by the FTS which are consistent with them:

1. The appellant is the owner and landlord of the house at 7 Runic Place, Ruthwell, Dumfries, DG1 4NW. He is 63 years of age. He is employed by Trading Standards, Dumfries and Galloway Council.
2. He acquired his interest in the house in 2010 before the creation of the tenancy.
3. He is legally entitled to carry out repairs and refurbishment to the house as the property owner, subject to any applicable requirements of planning and building legislation.
4. The respondents are the tenants of the house at 7 Runic Place, Ruthwell, Dumfries, DG1 4NW.

5. The first respondent is 57 years of age. She is not fit to work. She claims benefits.

6. The second respondent is 80 years of age. He is retired and previously operated his own plumbing and heating business. He has health problems.

7. The respondents have lived together as husband and wife for many years. They recently married.

8. The tenancy in question is an assured tenancy within the meaning of section 12 of the 1988 Act. The tenancy agreement is dated 4 July 2015 and commenced on that date for a period of six months. The tenancy has since continued in operation as a statutory assured tenancy in terms of section 16(1) of the 1988 Act.

9. The rent payable by the respondents under the tenancy agreement was agreed at £450 a month.

10. The house is subject to a Repairing Standard Enforcement Order ("RSEO") made on 20 March 2019 and varied on 11 September 2019 and a Rent Relief Order ("RRO") made on 31 December 2019 reducing the rent to £300 a month. The appellant has now carried out most of the works required by the RSEO.

11. Since November 2019 the respondents have not paid any rent to the appellant.

12. The second respondent wrote to the appellant in early 2020 advising that he and the first respondent would be withholding rent until the RSEO was lifted. Proceedings were still ongoing before the FTS regarding the RSEO in January 2024.

13. The respondents are currently withholding rent but paying £300 each month into a bank account.

14. The total amount of rent unpaid to the appellant and retained by the respondents at the date of the hearing before the UTS in January 2024 was £15,900. They have spent £422 from that account on the costs of a contractor.

15. The respondents intend to repay the rent arrears once the appellant has fully complied with the terms of the RSEO.
16. The respondents have previously mentioned to the appellant, directly and through their solicitor, that they would be interested in purchasing the house from the appellant.
17. The appellant served a notice to quit dated 30 April 2021, and an AT6 notice, on the respondents by recorded delivery on 1 May 2021.
18. The AT6 notice stated that the house was going to be reconstructed, extended and renovated, and a list of the proposed works was appended to the AT6. The notice to quit had a date of expiry of 4 July 2021.
19. On 24 November 2021, the appellant applied to the FTS for an order for possession based on Ground 6 of Schedule 5 to the 1988 Act.
20. On 24 November 2021, the appellant notified the local authority of those proceedings by a "section 11 notice" sent by email to Dumfries and Galloway Council.
21. The appellant's stepson, Connor Burgess, became engaged on 6 September 2020.
22. The appellant intends to carry out reconstruction works to the house with the eventual intention to transfer ownership of the house to Mr Burgess, who would purchase the property from him with the assistance of a mortgage.
23. The house is currently a three bedroom bungalow.
24. The appellant currently intends to build an extension to the house which will require the external wall at the back to be removed, and the entire kitchen and bathroom taken out.
25. Planning permission was granted for the reconstruction works on 27 July 2022.

26. The appellant has not yet obtained a building warrant but expects to obtain one without difficulty from Dumfries and Galloway Council.
27. There would be no kitchen or bathroom during the reconstruction works until the new ones were installed.
28. The house would be uninhabitable during the reconstruction works.
29. The appellant no longer intends to add a second story in the roof space upstairs.
30. The appellant instructed an asbestos survey in August 2022. He intends to have the asbestos removed at the same time as getting the extension done.
31. He also intends to install under floor hearing to replace the central heating system.
32. The estimated cost of the works now intended to be carried out by the appellant including VAT is £122,427.24.
33. The work, if carried out, would constitute a reconstruction of a substantial part of the house or any part thereof or any building of which it forms part, in line with the terms of Ground 6 of Schedule 5 to the 1988 Act.
34. The appellant originally intended to remortgage the house himself in order to fund the reconstruction works prior to selling the house to Mr Burgess.
35. He has now been gifted money by family which he will use to fund the works. He and his wife have £105,702.21 in savings which would be applied to the cost of the works. They are both in full time employment and will save the balance from their income or, if necessary, obtain a bank loan to meet the outstanding balance.
36. The respondents are concerned that they would face difficulties in obtaining suitable alternative accommodation if an order for possession were granted by the UTS.
37. They are happy and settled in the house. They have supportive neighbours. They want to continue to live in the house indefinitely.

Summary of the Evidence Heard by the UTS

[14] All three parties gave oral evidence. Each of those witnesses gave their evidence in chief by way of affidavit evidence and were cross-examined in the usual way. The appellant gave supplementary oral evidence. The first respondent confirmed in cross-examination that she and the first respondent were withholding rent in accordance with legal advice they had received from an advice agency in Glasgow. There were no other witnesses.

Appellant

[15] The appellant is 63 years old. He is employed by Trading Standards, Dumfries and Galloway Council. He exercises or in the past has exercised responsible positions within society. For example, he is currently a director of a local housing association and the treasurer of a local community council. He is an elder in the Church of Scotland.

[16] He owns the premises at 7 Runic Place, Ruthwell, Dumfries, DG1 4NW ("the house") which he lets to the respondents. He became the owner of the house in 2010. The tenancy commenced on 4 July 2015. It is an assured tenancy as no AT5 was served on the respondents.

[17] His position is the respondents disconnected the electric heating system within one month of them moving into the house. He states that the respondents agreed to install a new oil heating system and a log burner at their own expense. He agreed to this but they have never installed an oil heating system, only the log burner.

[18] Rent was paid until November 2019. The respondents made a repairing standards complaint to the FTS in around 2018 which resulted in the FTS making a Repairing Standard Enforcement Order ("RSEO") and, subsequently, a Rent Relief Order ("RRO") reducing the monthly rent to £300.

[19] The second respondent wrote to the appellant in early 2020 advising that he and the first respondent would be withholding rent until the RSEO was lifted. Proceedings are still ongoing before the FTS regarding the RSEO.

[20] The appellant's stepson, Connor Burgess, became engaged on 6 September 2020. The appellant wished to carry out works to the house with the eventual intention to transfer ownership of the house to Mr Burgess, who would purchase the property from him with the assistance of a mortgage. His stepson has subsequently married and he and his wife wished to occupy the house as their family home in the reasonably foreseeable future.

[21] The house is currently a three bedroom bungalow. The appellant wishes to build an extension to the house which will require the external wall at the back to be removed, and the entire kitchen and bathroom taken out. There would be no kitchen or bathroom until the new ones were installed.

[22] The appellant no longer intends to add a second story in the roof space upstairs because the cost of the works involved under a building warrant therefor would be excessive.

[23] Planning permission was granted for the works in July 2022.

[24] The appellant instructed an asbestos survey in August 2022. He intends to have the asbestos removed at the same time as getting the extension done.

[25] He also intends to install under floor hearing to replace the central heating system removed from the house.

[26] The estimated cost of the works now intended to be carried out by the appellant including VAT is £122,427.24.

[27] The appellant originally intended to remortgage the house himself in order to fund the reconstruction works prior to selling the house to Mr Burgess. He has now been gifted money by family which he will use to fund the works.

[28] He and his wife have £105,702.21 in savings which would be applied to the cost of the works. They are both in full time employment and will save the balance from their income or, if necessary, obtain a bank loan to meet the outstanding balance.

[29] The appellant has already paid out a total of over £6,000 to date for various surveys and architectural services, including the asbestos survey.

[30] He stated in additional oral evidence that he had not yet obtained a building warrant for the proposed works but expected to obtain a building warrant from Dumfries and Galloway Council without difficulty.

[31] He further stated that he intended to carry out the construction works immediately after obtaining possession of the house.

The second respondent

[32] The second respondent is 80 years of age. He is retired and previously operated his own plumbing and heating business. He states he has health problems.

[33] His position is that the appellant had not complied with the repairing standard in respect of the house, necessitating the RSEO which was still in force, and ultimately the RRO.

[34] He and his wife have been withholding rent and have currently set aside over £15,000 to meet their obligations towards payment of the abated rent.

[35] He does not believe the appellant has any intention of carrying out the works in question. He is concerned the appellant is using this as a way of getting himself and his wife out of the house because the appellant is not obtaining payment of the rent.

[36] He referred to the difficulties he would face in obtaining alternative accommodation. He was happy and settled in the house and wanted to remain there.

[37] He was concerned he and his wife would end up in a less desirable location as local housing associations only had limited stock. Private lets were hard to come by. He would pay the rent arrears once the appellant had fully complied with the terms of the RSEO.

[38] He disagreed that he removed the central heating system. His position is that was done by a relative of the appellant. He was unable to fit the oil-fired heating system as the appellant had not supplied the radiator and boilers.

[39] He was somewhat evasive in cross-examination about whether he had ever offered to buy the house from the appellant, or had the means to do so.

[40] He accepted the appellant was a good landlord, subject to their dispute about the repairing standard. He doubted the appellant intended to carry out the works "as up to now he has failed in all aspects he tried to do" in regard to complying with the RSEO.

[41] He denied the revised estimated cost of the works was reasonable, referring to it not being "a proper estimate".

[42] He stated he had no intention of leaving the house if he could help it.

First respondent

[43] The first respondent is 57 years of age. She did not keep good health. She is not fit to work and claims benefits. She and the second respondent have lived together as partners for many years now. They recently married. She too was of the opinion the appellant had no real intention of carrying out the works and was using this as a reason to get herself and her husband out of the house because he was not currently being paid rent by them. In cross-examination, she stated that she and her husband did not want to move out of the property which they had occupied for nearly 10 years. They would move out of the house if they got somewhere suitable, but where were they to go? The house was in a lovely situation and they had supportive neighbours. They loved living in the house.

[44] She confirmed that she and her husband had accumulated and retained around £15,000 in a separate bank account to transfer to the appellant once he complied with his duties under the RSEO, minus £422 spent on the costs of a contractor.

Joint Minute of Admissions

[45] The parties very helpfully entered into an extensive joint minute of admissions, particular terms of which I have incorporated into my findings in fact where appropriate, or which I refer to in my discussion below on whether the appellant intends to carry out the reconstruction works.

[46] The amount of the rent arrears at the date of the joint minute in November 2023 was £15,300.

[47] The parties' solicitors agreed at the hearing in January 2024 that the amount of rent arrears had increased to £15,900 at the date of the hearing in January 2024. I have therefore recorded that amount in my findings in fact rather than the amount stated in the joint minute of admissions.

Making my Findings in Fact

[48] Lord Sumption remarked in *S Franses Ltd v Cavendish Hotel (London) Ltd* [2019] A.C. 249, paragraph 21 in relation to "intention" cases that:

> "We have to proceed on the footing litigants are honest or, if they are not, that they will be found out by the experienced judges who hear these cases."

[49] In this case, I found the appellant to be a credible and reliable witness. He gave his evidence in a straightforward and coherent manner. There was nothing in the manner in which he gave evidence to me that indicated he was insincere or attempting to deal dishonestly with the UTS.

[50] He led no evidence from an employee from building standards of Dumfries and Galloway Council to confirm that he would be granted a building warrant for the proposed works.

[51] However, I accepted his evidence that such warrant would be granted based on his revised intention as to the extent of the reconstructions works. He had been asked by Dumfries and Galloway Council to instruct an additional report in relation to his original proposals, and did so, but he decided not to proceed with the roof extension as part of the proposed reconstruction of the house because of the cost involved (see paragraph 8 of his affidavit).

[52] He explained that the granting of a building warrant was not a discretionary decision of Dumfries and Galloway, as with planning permission; it would be granted if his proposed works were sound. There was no evidence placed before me to suggest this was not the case.

[53] I have not made findings in fact in relation to whether or not the respondents removed the central heating system or whether they failed to install the oil-fired heating system because the appellant did not provide radiators and a boiler, as these matters do not seem to me to be relevant to the two issues I require to determine in this appeal.

[54] Although the second respondent did not present favourably as a witness, interrupting the proceedings at points, and refusing to answer certain questions put before him by Miss Dalgleish, this does not, in my view, detract from the credibility and reliability of the evidence given by him or his wife.

[55] I am in particular prepared to accept they have retained rent in the sum of £15,900 minus the £422 spent on a contractor without specific vouching of that sum.

[56] The findings in fact I have made in this case are therefore based on the combined evidence of the parties and the contents of the joint minute of admissions. It may reasonably be inferred from the respondents' evidence that their wish is to live in the house indefinitely.

Submissions

[57] I consider the parties' submissions in connection with my discussions below on whether: (1) the appellant intends to carry out the reconstruction works; and, if so, the ground of possession thereby being established; (2) I consider it reasonable for the UTS to make an order for possession under section 18(1) of the 1988 Act.

Intention to Carry Out the Works

[58] The appellant's intentions have changed in relation to the extent of the reconstruction work he now wishes to carry out in respect of the house as he is not now in a position to finance the roof extension. However, I have to determine the question of his intention to carry out the reconstruction works at the date of the hearing before me in January 2024, rather than any earlier date (*S Franses Ltd v Cavendish Hotel (London) Ltd* [2019] A.C. 249, paragraphs 13 and 25).

[59] The test is whether the landlord has a: "firm and settled intention to carry out the works", the landlord's purpose or motive in this respect being irrelevant, save as material for testing whether such a firm and settled intention exists (*S Franses Ltd v Cavendish Hotel (London) Ltd* paragraph 16, per Lord Sumption). This approach applies to ground of possession 6 in schedule 5 to the 1988 Act (*Charlton v Josephine Marshall Trust* 2020 S.C. 297, paragraphs [14] and [15]).

[60] In addition, in determining whether the appellant intends to carry out the proposed reconstruction works, I must have regard to whether the appellant is in a position to satisfy me that his intention will be fulfilled shortly after the date of the hearing; there must be both a genuine desire to carry out the works, and a reasonable prospect of actually bringing about that result, such that the landlord has an intention rather than a mere aspiration. (Stalker, *Evictions in Scotland*, 2nd edition, 2021 page 277 and cases there cited).

[61] He must also show that he has the means and ability to carry out the proposed reconstruction works. Accordingly, evidence as to the existence of planning permission, the necessary financial backing, arrangements regarding contractors, architectural drawings and so on will bolster the landlord's case (Stalker, *Evictions in Scotland*, 2nd edition, 2021 page 277 and cases there cited).

[62] In this case, the appellant's intention to carry out the reconstruction works was, in fact, bolstered by documentary evidence, and the joint minute of admissions accepting the accuracy thereof, confirming that the appellant had relevant architectural drawings, had been granted planning permission for the proposed reconstruction works, had the available capital to finance most of the cost of the reconstruction works, the means to obtain the additional funding, and a quotation from a contractor willing to carry out the reconstruction works.

[63] I was satisfied he had been honest about his intention to carry out the reconstruction works in his evidence to the UTS and that unlike in *S Franses Ltd v Cavendish Hotel (London) Ltd* this intention was not conditional on obtaining a possession order to remove the respondents from the house.

[64] In other words, I was satisfied that he genuinely intended to carry out the reconstruction works and that he would do so even in the event the respondents voluntarily moved from the house. It was not his intention, therefore, to obtain the possession order solely as a means of obtaining possession of the house and not to thereafter proceed with the reconstruction works.

[65] The respondents submitted, however, even if the appellant's intentions in this regard were honest, they could not practically be put into effect and therefore amounted to a mere aspiration on his part.

[66] They referred in this regard to a number of factors.

[67] These included the appellant's delays in complying with the RSEO over a five year period as giving rise to doubts about whether the appellant could in practical terms organise the work in question within a short time after obtaining a possession order, the lack of complete funding for the proposed reconstruction works, the possibility that costs would have risen since the estimate had been obtained, the general nature of the estimate which might result in actual additional costs the appellant could not afford, and the lack of a building warrant.

[68] The appellant submitted, in response, that the test of "intent" was not so high as to require the him to have satisfied every part of the proposed reconstruction works, save for the physical renovations themselves, as it was not unreasonable to expect the precise details and finishings to be subject to deliberation and possible variation as the reconstruction works progressed.

[69] I agree with this submission as I am only required to determine this matter on the normal civil standard of proof on the balance of probabilities; the UTS should not, therefore, impose too high a standard on the appellant.

[70] In this case, while I take into account the uncertainties highlighted by the respondents, I am satisfied on the evidence before me that it is more likely than not that the appellant will be able to finance the works and obtain a building warrant therefor.

[71] He and his wife have the majority of capital required for the works and, both being in employment, the means to make up any shortfall. I also accept on the appellant's evidence that is more likely than not that he will obtain a building warrant for the proposed reconstruction works.

[72] In these circumstances, I am satisfied that the appellant had a firm and settled intention to carry out the works in accordance with the test set out in *S Franses Ltd v Cavendish Hotel (London) Ltd* at the date of the hearing before me in January 2024.

[73] He has therefore established ground of possession 6 in schedule 5 to the 1988 Act.

Is it Reasonable to Grant an Order for Possession?

[74] The UTS must establish, consider and properly weigh the "whole of the circumstances in which the application is made" (*Barclay v Hannah* 1947 S.C. 245 at 249 per Lord Moncrieff) when deciding whether it is reasonable to grant an order for possession.

[75] Its decision on reasonableness is not in itself a finding in fact, but instead a concept or conclusion determined by an exercise of judgment (City of *Edinburgh Council v Forbes* 2002 Hous. L. R. 61, at paragraph 7-16, per Sheriff Principal Nicholson QC). Its assessment as to whether it is reasonable for the UTS to make an order for possession must take account all relevant circumstances as they exist at the date of the hearing (*Cumming v Danson* [1942] All ER 653 at 655). It may take into account in assessing reasonableness whether the parties' intentions are subjectively reasonable and it must "objectively balance the rights and interests of both parties" (*Manson and Downie v Turner* (2003 UT 38 at paragraphs 41 and 42; see also *City of Glasgow District Council v Erhaigonoma* 1993 S.C.L.R 592).

[76] The relevant circumstances on the appellant's side are his legal right to use and dispose of his property as he thinks fit within the constraints of planning and building law, and his subjectively reasonable wish to reconstruct the house for transfer to his stepson for use as a family home. Those on the respondents' side are their long period of occupancy of the house, emotional attachment to it, the age of the second respondent, the reduced state of their health, their difficulties in finding a house to rent of equivalent amenity, the loss of their supportive neighbours, and their subjectively reasonable wish to live in the house indefinitely.

[77] I am not persuaded by the respondents' submission that the existence of the RSEO for the last five years is a factor to weigh in their favour in the UTS assessing the reasonableness of making a possession order.

[78] The UTS is not in a position to adjudicate on the rights and wrongs regarding the appellant's failures to meet the repairing standard. The appellant appears, however, to have engaged with that long process, which was still ongoing at the date of the hearing before me in January 2024, and which might be nearing a conclusion as he had met most of his obligations under the RSEO by the date of that hearing. The obverse of this is, of course, the fact the appellant has not yet received payment of rent since 2019. There are therefore considerations weighing on both sides in relation to the making of the RSEO. I accordingly consider this to be a neutral factor which does not affect the balancing exercise in this case.

[79] I also consider it irrelevant to the UTS's assessment of reasonableness whether the second respondent realistically offered and could have afforded to purchase the house from the appellant at some point in the past. This factor has no bearing on the balancing exercise now to be carried out by the UTS.

[80] Further, though I accept the respondents have health issues, I did not hear any medical evidence to allow me to make specific findings about their health problems. Little weight can therefore be attached be to those considerations in assessing the reasonableness of granting an order for possession.

[81] Ultimately, the subjectively reasonable intention of the appellant to reconstruct the house and eventually transfer ownership to his stepson to benefit his stepson and his stepson's wife, and the diminution in the standard of living of the respondents if they are required to remove from the house that they enjoy living in, deserve equal consideration. These are therefore countervailing circumstances.

[82] Accordingly, I consider the deciding factor to be that the appellant exercises a right of property, whereby he can use or dispose of the house as he thinks fit. I therefore agree with the appellant's submission that those interests must take precedence over the wishes of the respondents to continue in occupation of the property indefinitely.

[83] The proper balance between the parties' interests can in my opinion appropriately be struck in this case by postponing the date for possession to allow the respondents time to find alternative accommodation, and the appellant time to complete his plans by instructing the contractor, finalising his financial arrangements and obtaining his building warrant. I have so ordered.

Further Issues and Procedure

[84] The parties' solicitors were ultimately agreed that, in the event I granted an order for possession of the house under section 18(1) of the 1988 Act, then the date of possession be postponed for a period of four months from the date of the order in terms of section 20(2)(b) of the 1988 Act.

[85] They also agreed that the UTS should not make an order under section 20(3) of the 1988 Act at this time in relation to payment by the respondents of arrears of rent, rent and payments in respect of occupation after the termination of the tenancy (hereafter collectively "rent"):

[86] Section 20(3) is in these terms:

> "On any such… postponement as is referred to in subsection (2) above, the First-tier Tribunal, unless the Tribunal considers that to do so would cause exceptional hardship to the tenant or would otherwise be unreasonable, shall impose conditions with regard to payment by the tenant of arrears of rent (if any) and rent or payments in respect of occupation after the termination of the tenancy and may impose such other conditions as the Tribunal thinks fit."

[87] An order under section 20(3) may be recalled under section 20(4) of the 1988 Act.

[88] The parties' solicitors considered an order as to payment of rent under section 20(3) to be unreasonable at this time standing there were continuing proceedings before the FTS in connection with the RSEO which impacted on that matter. The respondent's solicitor also submitted that the making of an order under section 20(3) of the 1988 Act for payment of rent by the respondents might result in exceptional hardship to them. Neither party proposed at this stage that I make the possession order subject to any other conditions not relating to payment of rent, such as the appellant obtaining his building warrant.

[89] The UTS appears to have a wide discretion to make orders under sections 20(3) and 20 (4) of the 1988 Act at any time prior to the execution of the possession order, including further orders under 20(3) (see *Knowsley Housing Trust v White* [2009] A.C. 636). Other orders which would normally be made by the FTS in connection with a possession order include:

- an order in terms of section 216(4) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 ("the 2017 Act") to dispense with or vary the period of 14 days for the charge for removing required by section 214 of the 2007 Act; and
- an order in terms of rule 41C (3) of the FTS Housing and Property Chamber Rules of Procedure 2017 varying or dispensing with the period of notice of 48 hours for service of the date of removal by a sheriff officer.

[90] I am of the opinion that the UTS is the more appropriate *forum* to consider the making of any orders incidental to the order for possession as:

- this tribunal is already familiar with the case;
- it would be in a position to deal with any such applications (if made); and
- this would avoid the potential for further delay associated with any application for permission to appeal from the FTS to the UTS.

[92] Accordingly I make an order in terms of section 47(2)(c) of the 2014 Act that the parties must apply to the UTS for any competent order incidental to the order for possession. This includes any of the orders referred to in the foregoing paragraphs, and any other order not so mentioned. Any such incidental application to the UTS must be made under and in terms of rule 8 of the Upper Tribunal for Scotland Rules of Procedure 2016.

Payment of Removal Expenses

[91] Section 22 of the 1988 Act provides that:

> **Payment of removal expenses in certain cases.**
>
> (1) Where the First-tier Tribunal makes an order for possession of a house let on an assured tenancy on … Ground 6 in Schedule 5 to this Act … the landlord shall pay to the tenant a sum equal to the reasonable expenses likely to be incurred by the tenant in removing from the house.
>
> (2) Any question as to the amount payable by the landlord to a tenant by virtue of subsection (1) above shall be determined by agreement between the landlord and the tenant or, in default of agreement, by the First-tier Tribunal.

[92] The parties' solicitors informed me that, in the event that I granted an order for possession of the house, the parties would be likely to agree on removal expenses in the sum of £2,000. They agreed that if that did not happen, then the UTS should consider any application made under section 22(2) of the 1988 Act.

[93] I therefore direct that the terms of rule 67 of the FTS Housing and Property Chamber Rules of Procedure 2017 shall apply to any such application to the UTS under section 22(2) of the 1988 Act.

[94] Accordingly, the application must be signed and dated by the party or the party's solicitor and include:

(i) the name, address and registration number (if any) of the landlord;

(ii) the name, address and profession of any representative of the landlord;

(iii) the name and address of the tenant;

(iv) the name, address and profession of any representative of the tenant; and

(iv) the details of the tenant's claim for removal expenses, reasons for disagreement and proposals for settlement.

[95] This concludes my Decision in respect of the appeal.

Further Appeal

[96] A party aggrieved by this decision may apply in writing to the UTS for permission to appeal to the Court of Session on a point of law within 30 days of the date on which this decision was sent to that party. Any such written application must: (a) identify the decision of the Upper Tribunal to which it relates; (b) identify the alleged error or errors of law in this decision; and (c) in terms of section 50(4) of 2014 Act, state the important point of principle or practice that would be raised in the further appeal or any other compelling reason for allowing a further appeal to proceed.

George Jamieson
Sheriff of North Strathclyde
Judicial Member of the Upper Tribunal for Scotland