



**DECISION OF**

Sheriff T Kelly

**ON AN APPEAL  
AGAINST A DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND  
IN THE CASE OF**

Ms Rubina Haq,  
per Bannatyne Kirkwood France & Co,

Appellant

- and -

Mr Roman Gomez Herrero,

Respondent

FTS Case reference: FTS/HPC/RP/22/1367

Glasgow, 20 December 2024

**Decision**

The Upper Tribunal quashes the decision of the First Tier Tribunal for Scotland, Housing and Property Chamber dated 14 November 2023 and remits the application back to the First Tier Tribunal for reconsideration in light of this decision.

**Introduction**

[1] The respondent tenant submitted an application to the First Tier Tribunal for Scotland, Housing and Property Chamber (“FTS”) on 4 May 2022 averring that the landlord had failed to



comply with her duties under section 14(1) of the Housing (Scotland) Act 2006, that is that the property at 2/2, 27 Allison Street, Govanhill, Glasgow, G42 8NP (“the property”) did not meet the repairing standard. By decision dated 27 July 2022, the FTS determined that there was a failure to comply with the repairing standard. It made a Repairing Standard Enforcement Order (“RSEO”) in terms of section 24(2) of the 2006 Act.

[2] By decision dated 14 November 2023, erroneously noted on its decision as 14 November 2022, the FTS determined that the landlord had not complied with the RSEO. It made a Rent Relief Order for 30% of the rent payable. The FTS also decided that the landlord’s failure to comply should be notified to the local authority.

[3] By appeal form UTS-1 dated 2 September 2024 the appellant sought permission from the FTS to appeal its decision. On 27 August 2024 the FTS granted permission to appeal.

## **Ground of appeal**

[4] The appellant contended that the FTS had erred in law in deciding that section 26(3) of the 2006 Act afforded it a discretion in deciding whether the landlord had failed to comply with the RSEO.

## **Hearing: 10 December 2024**

[5] Prior to the hearing commencing, the respondent contacted the Upper Tribunal administration to advise that he was unable to attend. He produced a copy certificate stating he was unfit for work and asked that the hearing be postponed. The appellant, represented by Ms Woolley, Solicitor, opposed the application to postpone the hearing. She pointed to the time during which the application had been outstanding. The respondent had an opportunity to



intimate his position in writing in advance of the hearing.

[6] The Upper Tribunal decided to proceed in the absence of the respondent. In terms of rule 28 of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, it is empowered to do so where it is satisfied the party has been notified of the hearing and that it considers it is in the interests of justice to do so. This application has been in dependence for a significant period of time. Part of that time relates to a period during which nothing happened; the appellant delayed in marking an appeal. Proceeding with a hearing in the absence of a party is not a step to be taken lightly. It is in the interests of parties and the wider public interest that proceedings are conducted expeditiously as consistent with overall fairness. This is codified for the FTS in the overriding objective, see rule 3 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. In light of the issue to be determined and the backdrop of significant time having elapsed since the application was lodged, and since the decision of the FTS, it was in the interests of justice to proceed with the hearing.

### *Appellant*

[7] Ms Woolley spoke to a note of argument dated 1 November 2024 and lodged in advance of the hearing. She focused upon the terms of section 26(3)(b)(i) of the 2006 Act. The FTS was prevented from deciding that the landlord had failed to comply with the RSEO if the matters set out in section 26(3)(b)(i) were made out.

[8] Those factors had been addressed by the FTS. This could be inferred from the observations of the FTS at paragraph 14 that:

“The landlord has done her best and an accident above is not within her control”.



Similarly at paragraph 15 the FTS states that:

“The Tribunal recognized that the landlord has made efforts to comply with the order and that, to a certain extent, matters are out with her control”.

[9] Ms Woolley contended that it was clear from a reading of the terms of section 26(3) as a whole that the provisions were mandatory. A discretionary balancing exercise ought not to have been carried out. The decision should be quashed in terms of section 47(1), Tribunals (Scotland) Act 2014. The Upper Tribunal should remake the decision in terms of section 47(2) of the 2014 Act.

## **Decision**

[10] The FTS decided that a finding in terms of section 26 of the 2006 Act as to whether the landlord had complied with the RSEO, was one that ought to be made in the round having regard to the whole facts and circumstances, and particularly having regard to the factors mentioned in section 26(3)(b)(i). The determining factor for the FTS was that the tenant had had to live with water ingress for a significant period of time. For the FTS, this meant that the discretion it decided was available to it in terms of section 26(3) ought not to be exercised in the landlord’s favour. It decided that the landlord had failed to comply with the RSEO.

[11] The FTS went on to make a determination about whether the landlord had committed an offence under section 29 of the Act. The FTS decided that the landlord’s failure to comply with the RSEO required to be intimated on the local authority. These were not matters that arose for consideration in terms of the application.

[12] Section 26 of the 2006 Act read short provides:

**“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.

...

(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.

[13] The FTS is prevented from finding that there has been a failure to comply with a RSEO where there is an inability on the part of the landlord to comply with the RSEO due to a lack of necessary rights, which include access. The FTS requires to be satisfied that there is a causal link between the failure to comply and a lack of necessary rights. The FTS has to decide that the inability arises despite reasonable steps being taken with the view to those rights being acquired.

[14] If it arrives at that conclusion for those reasons, section 26(4) has application. It 26(4) provides:

“(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.



[15] The error of law on the part of the FTS is in it deciding that section 26 imbues it with a discretion as to whether there has been a failure to comply with the RSEO. This is no discretionary exercise. If the matters mentioned in section 26(3) are made out, the FTS is prevented from deciding that there has been a failure on the part of the landlord to comply with the RSEO. In looking at the matter as a whole, and having regard to an irrelevant consideration, namely that the tenant has had to live with water ingress for a significant period, the FTS has fallen into error.

[16] In deciding that it was bound to intimate that decision to the local authority in terms of section 26(4) the FTS erred. Section 26(4) applies where the FTS is prevented from making a decision that the RSEO has not been complied with by the landlord because of the matters set out in section 26(3)(b)(i). In that event intimation must be made upon the local authority. In holding that intimation of the failure to comply must be intimated upon the local authority in terms of section 26(4), notwithstanding the reason for that failure, the FTS has overlooked the opening words of sub-section (4).

[17] It is clear that in misdirecting itself, the FTS has not applied itself fully and properly to the issues set out in section 26(3)(b)(i). Rather, the FTS has essayed the various steps taken by the landlord to carry out repairs at the property with a view to bringing to an end the cause of the dampness. These are detailed at paragraph 4 of the FTS decision.

[18] At the point of a re-inspection on 20 September 2023 investigations were continuing. It was with a view to finding out what was happening that steps had been taken by the landlord to communicate with the local authority with a view to the relevant statutory notices being served in order that access could be obtained. Notwithstanding the terms of the passages I was taken to by



the appellant's solicitor, it is not clear to me that the FTS ascertained the position fully in relation to whether the landlord's inability to comply with the RSEO arose because access had not been afforded to the upper flat. Whether reasonable steps having been taken by the landlord to secure a right of access is not beyond doubt.

[19] The appellant's solicitor submitted matters had moved on in relation to further enquiries and investigations. It is appropriate that that matter is enquired into by the FTS having regard to the statutory provisions and in order that it can be updated fully in relation to the present position.

[20] The matter is therefore remitted to the FTS for it to decide whether there has been a failure on the part of the landlord to comply with the RSEO and whether the FTS is prevented from making a decision regarding the landlord's failure to comply because of the application of section 26(3)(b)(i). If that has application then the local authority require to be formally appraised of the position in terms of section 26(4).

## **Conclusion**

[21] The FTS has erred in law in deciding that section 26(3) of the 2006 Act affords to it a discretion to decide whether the landlord has complied with the RSEO. The matter is remitted to the FTS to determine whether there has been a failure to comply with particular regard to whether any inability to comply arises because the landlord lacks the necessary access rights and whether the landlord has taken reasonable steps to secure those rights.

## Upper Tribunal for Scotland

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*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Sheriff Kelly

Member of the Upper Tribunal for Scotland