Case No: CF074/2018CA

IN THE CARDIFF COUNTY COURT

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff CF10 1ET

Date: 18 April 2019

Before :

HIS HONOUR JUDGE JARMAN QC

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Between :

JAKE EVANS	**Appellant**
- and -	
GEORGE FLERI	**Respondent**

- -
- -

Miss Rachel Anthony (instructed by **Shelter Cymru**) for the **Appellant**
The **Respondent** appeared in person

Hearing date: 8 April 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. The short but very important point in this appeal is whether a landlord who is not a licenced landlord under Welsh housing law can serve and rely upon a notice (the section 21 notice) under section 21 of the Housing Act 1988 (the 1988 Act) and so to claim possession of a dwelling located wholly in Wales let under an assured shorthold tenancy.

2. That point has been exercising parties, practitioners and the judiciary in Wales since the passing of the Housing (Wales) Act 2014 (the 2014 Act) by the National Assembly for Wales (the Assembly). Unless stated to the contrary, refences in this judgment to Part 1 and to sections thereof are refences to this Act.

3. As set out in the overview of Part 1 contained in section 1(1), that Part regulates the lettings of dwellings subject to domestic tenancies and the management of dwellings by means of a system of registration and licencing.

4. By a claim form issued on 27 July 2018 on form NWB Wales for possession of 19 Archer Road Cardiff (the dwelling), the claimant Mr Fleri sought to rely upon a section 21 notice as against his tenant, Mr Evans. Mr Fleri completed and signed the claim form himself. Section 5 of the form was completed to say that the section 21 notice was personally delivered by Mr Fleri to Mr Evans on 2 May 2018. Section 9 of the form was completed to show that when the notice was given, the landlord was registered (and the registration number given), was not licenced, and had not appointed a licenced agent to be responsible for property management work in relation to the dwelling.

5. A number of documents were exhibited to the claim form, including a signed witness statement of Mr Fleri dated 26 July 2018. In that statement he said he had completed a certified landlord training course and paid the landlord licence fee in June 2016 and exhibited a confirmatory document for each of those assertions. He continued that thereupon he believed that he became a licenced landlord. However, when he contacted the authority designated by the Welsh Ministers as the licencing authority under section 3, Rent Smart Wales, to obtain his licence number to be inserted into section 9 of the claim form, he was told that he had not submitted his licence application and therefore was not licenced. He submitted this on 24 July 2018 and exhibited confirmation of receipt by Rent Smart Wales.

6. On 31 August 2018, Mr Fleri's claim was considered on the papers by District Judge Phillips. He struck out the claim on the basis that Mr Fleri was not a licenced landlord at the time of service of the section 21 notice. By an application dated 24 September 2018, Mr Fleri applied to set aside the order striking out his claim, on the grounds that as long as the landlord is a registered landlord, as he was and is, then a section 21 notice may lawfully be given.

7. That application came on for hearing before District Judge Phillips on 7 November 2018. Mr Fleri then represented himself, as he did before me. Mr Evans also appeared in person, but with the assistance of an officer of the housing team at Cardiff County Council. The latter argued that in order to be able to bring the claim, Mr Fleri was required by the 2014 Act to be registered and licenced when serving the section 21 notice.

8. Reliance on behalf of Mr Evans was placed upon section 7(1), which so far as material for present purposes provides:

> "The landlord of a dwelling subject to a domestic tenancy must not do any of the things described in subsection (2) in respect of the dwelling unless – (a) the landlord is licenced to do so under this Part for the area in which the dwelling is located…"

9. Various things are set out in subsection (2) including collecting rent and making arrangements to carry out repairs, and, by (2)(f) "serving notice to terminate a tenancy." Subsection (5) provides that a landlord who contravenes subsection (1) "commits an offence and is liable on summary conviction to a fine" (with no restriction as to level provided for).

10. Reliance on behalf of Mr Evans was also placed upon section 44, which is one of the supplementary provisions in Part 1 and is headed "Restriction on terminating tenancies." Subsection 1 provides:

> "A section 21 notice may not be given in relation to a dwelling subject to a domestic tenancy which is an assured shorthold tenancy if— (a) the landlord is not registered in respect of the dwelling, or (b) the landlord is not licensed under this Part for the area in which the dwelling is located and the landlord has not appointed a person who is licensed under this Part to carry out all property management work in respect of the dwelling on the landlord's behalf."

11. Subsection (2) provides that subsection (1) does not apply for a period of 28 days beginning with the day on which the landlord's interest in the dwelling is assigned to the landlord.

12. Subsection (3) defines a section 21 notice as a notice under section 21(1)(b) or 4(a) of the 1988 Act. The former provision applies where an assured shorthold tenancy which was a fixed term tenancy has come to an end and the landlord serves a notice of not less than two months on the tenant requiring possession. The latter provision applies where there is an assured shorthold tenancy which is a periodic tenancy and the landlord serves a notice requiring possession on the last day of a period and not earlier than two months. In either case, it is not necessary to rely upon any default by the tenant, such as arrears of rent, which the landlord must prove to obtain possession under other sections of the 1988 Act. In respect of section 21 notices, however, provided the correct procedure is followed, the court must make an order for possession.

13. After hearing oral submissions for some 20 minutes, District Judge Phillips gave immediately an oral judgment. In his view section 7(2)(f) clearly provides that a landlord should not serve a notice to terminate a tenancy unless the landlord is licenced. He then considered section 44 and came to this conclusion:

> "8. That being the case, one would have thought that if one then looks at section 44 that the requirement for licencing would be very clearly set out in that part of the Act. Instead, there seems

> to be a conflict between what is set out at section 7 and what is set out at section 44…
>
> 9. I would have expected, instead of the word "Or" to appear in section 44, the word "And," but that is not what the section says. If one reads section 44 on its own then it appears to me that all that is necessary is for the landlord to be either registered or licenced. It is not an "And" position, it is an "Or," there is an alternative. That is unfortunate, to say the least, because there is clearly a conflict.
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> 10. The defendant says one should look at the intention behind the Act and in particular what is set out in Part 1. That is a fair point, I think. However, equally, one could say that section 44, which is headed; "Restriction on terminating tenancies", should be read very carefully and that it would be wrong, therefore to look any further than the section which specifically deals with any restriction that is placed upon the termination of tenancies.
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> 11. I think one can argue this in both ways, quite frankly, and I have to make a decision as to which I prefer. In my judgment, doing the best I can without any authorities before me and simply interpreting the Act, as I must, I conclude that section 44 of the Act is clear. It is an either/or situation. It is not a requirement that landlords need to be registered and licensed. Registration or licensing is sufficient…"

14. However, District Judge Phillips went on to say that he was going to give permission to appeal because there was a compelling reason to do so, namely the clear conflict between the two sections of the Act. He observed that if an appeal were pursued, citation of authority would be helpful.

15. Mr Evans filed an appellant's notice dated 28 November 2018, by which time he had the benefit of a legal aid certificate and representation by Shelter Cymru. Counsel, Miss Anthony. was instructed to settle the grounds of appeal, and to appear at the hearing of the appeal, which she did. There are two grounds of appeal. The first is that the district judge failed to apply section 7, and the second is that he mis-interpreted section 44.

16. When the appeal was called on for hearing, I raised with Mr Fleri at the outset whether it was appropriate to proceed to hear it that day, given that he was without legal representation and given that the grounds were based on points of law and statutory interpretation. However, he made it clear that given the time that had elapsed since he filed his claim form he wished to proceed and felt able to do so without such representation.

17. It is clear that central to the district judge's reasoning was the interpretation of the word "or" at the end of section 44(1)(a) and immediately before subsection (1)(b), and in particular whether that word should be given a conjunctive or disjunctive meaning. There are many reported cases on this issue. However, no case on the point was cited

to the district judge at the hearing before him, or, despite his encouragement to do so, before me on appeal.

18. In those circumstance, I considered it appropriate to adopt the approach of Jackson LJ in a case of contractual interpretation in *Royal Devon & Exeter NHS Foundation Trust v Atos IT Services UK Ltd* [2017] EWCA Civ 2196. Paragraph 9.2 of the contract there in question provided that the aggregate liability of the contractor in any claim arising in the first 12 months should not exceed the contract price "or" for any claim arising after the first 12 months of the contract the total contract charges paid in that 12 months. One of the issues before the Court of Appeal was whether that paragraph imposed one cap or two caps.

19. In dealing with that issue, Jackson LJ, with whom the other member of the court, Lewison LJ, agreed said this:

> "37. The other word to which the judge attaches significance is "or" at the end of paragraph 9.2.1. In my view, that does not assist. Sometimes the word "or" is disjunctive in that it appears between two alternative scenarios which cannot both apply. But sometimes "or" is conjunctive, not disjunctive. It appears between two scenarios, both of which may apply. See for example the heading of Part 5 of this judgment. There are many reported cases over the years in which the courts have construed "or" conjunctively.
>
> 38. Perfectly understandably, neither counsel has cited a raft of cases in which the courts have construed the word "or" in particular contexts. I will not launch into a review of authorities which neither counsel has cited. Suffice it to say there is no juridical objection to construing the word "or" conjunctively. There is a perfectly good reason for the use of "or" to separate paragraphs 9.2.1 and 9.2.2. They are mutually exclusive in the sense that each refers to a discrete period of time, and the two periods do not overlap."

20. I provided copies of these extracts to the parties at the appeal hearing in the present case for comment. The observations of Jackson LJ were made in the context of contractual interpretation, but in some of the many cases he refers to the same question was considered in the context of statutory interpretation. Moreover, it has also been held by the Court of Appeal, that as a matter of statutory interpretation, the word "and" may be used disjunctively as well as conjunctively (*see Re H (a minor) (foreign custody order: enforcement)* [1994] Fam.105).

21. In my judgment it cannot be said that the word "or" at the end of section 44(1)(a) is clearly used in the disjunctive sense, because the two situations it separates are not mutually exclusive. It is not the case that a landlord must either be registered or licenced. A landlord may be registered but not licenced or may be both. Accordingly, the word "or" in this context is capable of two meanings, and its use does not, of itself, provide a great deal of assistance in determining the intention of the Assembly in enacting the 2014 Act as to which of the two meanings it should bear.

22. It follows that the search for such intention must be extended beyond section 44. In my judgment two rules of statutory interpretation are likely to be particularly pertinent in determining whether the Assembly intended a disjunctive or conjunctive meaning of section 44. The first is that regard must be had to other parts of the 2014 Act which have a bearing on the issue.

23. The second is that regard may be had to the enacting history. In particular in this case, that latter includes statements made to the Assembly by the promoter of the Housing Wales Bill (the Bill), the late Carl Sargeant, who was then the Minister for Housing and Regeneration (the Minister), when introducing the Bill. It also includes Explanatory Memoranda to the Bill prepared by the Department for Sustainable Futures of the Welsh Government. Two such memoranda were laid before the Assembly, one dated November 2013 when the Bill was first introduced, and the other dated June 2014. The second memorandum was prepared after the Communities, Equality and Local Government Committee (the Committee) reported on the Bill in March 2014.

24. Turning firstly to other sections of the 2014 Act, the requirement for a landlord to be registered is set out in section 4 as follows, so far as material:

> "(1) The landlord of a dwelling subject to, or marketed or offered for let under, a domestic tenancy must be registered under this Part in respect of the dwelling…
>
> (2) A landlord who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale."

25. The requirements for an application for registration are set out in section 15(1) as follows:

> "An application for registration is to be made to the licencing authority for the area in which the application relates is located; and the authority must register the landlord within the prescribed period if the application –
>
> (a) is made in the form required by the authority,
>
> (b) includes such information as is prescribed,
>
> (c) includes such other information as the authority requires, and
>
> (d) is accompanied by the prescribed fee."

26. The requirement for the landlord to be licenced is set out in section 6(1), in respect of the carrying out of letting activities, and in section 7(1), as outlined above, in respect of the carrying out of property management activities.

27. Section 8 provides a number of exceptions to the requirements in sections 6(1) and 7(1) (as well as in 7(3) which relates to the checking of the condition of a dwelling on the ending of a tenancy). These include (a) where the landlord has applied for a

licence, until it is determined either by the authority or on appeal; (b) for a period of 28 days when the landlord's interest is assigned; and (c) if the landlord takes steps to recover possession within that period for as long as the recovery of possession is diligently pursued. Further exceptions are where the landlord is a registered social landlord or a fully mutual housing association.

28. The licence application requirements are dealt with in section 19. Subsection (1) sets out identical requirements to those in section 15(1) in respect of registration. However, for licence applications, additional requirements are set out in section 19(2) as follows:

> "Before granting a licence a licencing authority must be satisfied-
>
> (a) That the applicant is a fit and proper person to be licenced (see section 20);
>
> (b) That requirements in relation to training specified in or under regulations made by the Welsh Ministers are met or will be met (as the case may be)."

29. Section 20 (1) provides that in deciding whether a person is a fit and proper person, the licencing authority must have regard to all matters it considers appropriate. Subsection (2) provides that among the matters to which the licencing authority must have regard is any evidence within subsections (3) to (5). Such matters including the commission of offences involving dishonesty, violence or drugs, the practice of unlawful discrimination or harassment, or the contravention of any provision of the law relating to housing or landlord and tenant.

30. The Regulation of Private Rented Housing (Training Requirements) (Wales) Regulations 2015 (2015 No.1366 (W.134) were made by the Welsh Ministers to specify general and specific training requirements which need to be met in order to qualify for a licence. Under regulation 4, these include the statutory obligations of, and the contractual relationship between, landlord and tenant, the role of letting agents, and best practice in the letting of dwellings.

31. In my judgment it is immediately apparent that the application process for a licence is far more stringent than that for registration. In respect of the former, there are additional requirements to show that the applicant is a fit and proper person and has undergone the necessary training. This is reflected in the fees charged for the respective applications. The current fee published under the Regulation of Private Rented Housing (Information Periods and Fees for registration and licencing) (Wales) Regulations 2015 for an online application for registration is £33.50 and that for licencing is a total of £183. There is a further fee of £30 for the Rent Smart Wales online training course.

32. It is noteworthy too that the fine for failing to register does not exceed level 3, whereas the fine for an unlicensed landlord who serves a notice to terminate a tenancy is not so limited. In both cases there is express provision of a defence of reasonable excuse for not being registered or not being licenced, as the case may be.

33. In the course of the appeal hearing, Mr Fleri submitted that section 7(2)(f) provides that a landlord must be licenced to serve a notice to terminate but does not say that such a notice is invalid or cannot be relied upon. Whilst that is true, it is clear in my judgment that in respect of a section 21 notice, it is intended to place restrictions on the terminations of tenancies in the circumstances described in section 44. Mr Fleri also submitted that a section 21 notice is not a notice within section 7(2)(f), but in my judgment, as the heading to section 44 indicates, such a notice effects a termination of the tenancy. Section 21 (1)(a) of the 1988 Act contemplates that after termination of a fixed term assured shorthold tenancy, an assured shorthold periodic tenancy (whether statutory or not) may be for the time being in existence, but nevertheless then provides for the service of a notice under section 21(1)(b). Section 21(4) contemplates the existence of an assured shorthold tenancy which is also a periodic tenancy in providing for notice under section 21(4)(a).

34. The question may be asked why section 44 was necessary given that the service of any notice to terminate a tenancy by an unlicensed landlord is made illegal by section 7(2)(f). But it is clear that the latter section is subject to a number of exceptions in section 8 which do not apply (save for one) to the restriction set out in section 44. It is unsurprising that section 21 notices are specifically dealt with by section 44, given that such notices may be served without any default on the part of the tenant.

35. It would be surprising if the intention had been to make the serving of a notice to terminate a tenancy by an unlicensed landlord a criminal offence and yet allow that landlord to obtain a possession order in reliance upon such a notice. Moreover, it would be surprising if the intention were that a section 21 notice can be served by a landlord who is registered but not licenced. That would mean that a landlord who is not a fit or proper person and who has not undergone training could serve and rely upon such a notice. It would mean that a landlord who has committed offences, for example of violence or harassment, could serve such a notice. It does not mean that such a notice cannot be served on behalf of an unlicensed landlord, because section 44 (1)(b) makes it clear that the landlord may appoint a person who is licenced to carry out all property management work in respect of the dwelling on the landlord's behalf.

36. In my judgment, on a reading of the 2014 Act and in particular Part 1 thereof, it is highly unlikely that such a result was intended by the Assembly. It is far more likely that what was intended was that to be able to give a section 21 notice a landlord must be both registered and licenced so as to give a higher degree of protection to the tenant than the low level of protection afforded by registration alone.

37. Miss Anthony referred me to the documents mentioned in paragraph 23 above. When the Minster introduced the Bill, he said this:

> "The Bill sets out requirements with respect to the registration and licencing of landlords and agents operating within the private rented sector. This will help improved standards in the private rented sector, make more information available on landlords for local authorities and tenants and lead to raised awareness by landlords of their rights and responsibilities."

38. The Committee in its March 2014 report considered at paragraph 90 that the "fit and proper person requirement" is an essential element of the licencing process. It went on

to say that in the context of raising standards, the test will need to be applied rigorously in order to ensure that only suitable applicants are successful and to prevent disreputable landlords from re-entering the sector. At paragraph 105, it also considered that the training of landlords and agents will be essential to professionalise and improve standards within the private rented sector.

39. The report then went on to consider effective enforcement and noted the rent stopping orders then provided for in the Bill, but was concerned about their potential to impact negatively on tenants and expose them to retaliatory acts. It recommended that the Minister amend the Bill to replace these with rent repayment orders which were already an established means of enforcing the licencing of houses in multiple occupation, as it concluded that those were likely to be a more suitable enforcement tool and were less likely to impact negatively on tenants.

40. At paragraph 129 the report continued as follows:

> "Further to this, and in order to provide additional protection for tenants, we believe that an unlicensed landlord should be prevented from serving a 'no-fault eviction notice', as is currently the case for Houses in Multiple Occupation licencing and selective licencing.
>
> We recommend that the Minister amends the Bill to include provisions equivalent to those in the Housing Act 2004 to prevent an unregistered landlord or agent from serving notice under section 21 of the Housing Act 1988 to evict a tenant."

41. The Minister accepted that recommendation and section 44 was inserted into the Bill. In the June 2104 Explanatory Memorandum, the note dealing with that section says this:

> "Under this section, a notice issued under section 21 of the Housing Act 1988 may not be issued in respect of an assured shorthold tenancy as long as the landlord is not registered, or the landlord is neither licenced nor has appointed a licenced agent to carry out all property management work. This serves to protect tenants from illegal eviction when landlords wish to remove tenants in order to not need to comply with the provisions of this Part."

42. In that this note also uses the word "or" it provides little further assistance. However, two things are clear. First, section 44 was inserted into the Bill in response to the Committee's recommendation, which was based on the conclusion that an unlicensed landlord should be prevented from serving a no-fault eviction notice. Second, the note goes on to say that the section serves to protect tenants from illegal eviction, when landlords wish to remove tenants to obviate the need to comply with the provisions of Part 1. In my judgment that can only sensibly be read as including the need to obtain a licence in order to serve a notice terminating the tenancy.

43. In my judgement this enacting history lends support to the conclusion which I have already arrived at from a reading of the 2014 Act and Part 1 in particular, that the

intention was that to serve a section 21 notice a landlord had to be registered and licenced. It is clear from that history that section 44 was intended to give further protection to tenants from the giving of such notice by unlicensed landlords.

44. Mr Fleri submits that he had done all he needed to in order to obtain a licence and in effect should be treated for present purposes as licenced. He made a complaint to Rent Smart Wales, who accepted in response that it was not clear from a navigation of its website that the application needed to be submitted. Many applicants made the same mistake, but improvements have been made to the site since. To that extent, Mr Fleri is entitled to some sympathy.

45. However, Rent Smart Wales in its response also points out that under the regulations referred to in paragraph 31 above, an important declaration must be included in the application for registration or an application for a licence in the following words;

> "I/we declare that the information contained in this application is correct to the best of my/our knowledge. I/we understand that I/we commit an offence if I/we supply any information to the licensing authority in connection with any of its functions under Part 1 of the Housing (Wales) Act 2014 that is false or misleading and which I/we know is false or misleading or am/are reckless as to whether it is false or misleading."

46. As Mr Fleri did not submit the application for a licence, it follows that he did not make such a declaration in respect of it. In my judgment Mr Fleri was not licenced when he served the section 21 notice and knew that he was not when he commenced his claim. He has argued that he does not need to be, but in my judgment that is not the correct interpretation of section 44. It follows that District Judge Phillips was correct to strike out the claim on 31 August 2018, but not to set aside that order on 7 November 2018.

47. The appeal from the latter order must be allowed and that order quashed. The result is that the claim remains struck out under the order made on 31 August 2018. The parties are invited within 14 days of handing down of this judgment, to file an agreed consent order dealing with all consequential matters, or to file and exchange written submissions on any outstanding matters which will then be dealt with on the papers, or, if the view is that a further oral hearing is necessary to deal with such matters, to state that such is the case and to request a hearing date.