Upper Tribunal for Scotland

[2021] UT 12
UTS/AP/20/0008

DECISION NOTICE OF SHERIFF F McCARTNEY

ON AN APPEAL

in the case of

MR DALE HUGHES, 104 Bellgrove St, Glasgow, G31 1AA

Appellant

and

GLASGOW CITY COUNCIL PRIVATE SECTOR, Department of Regeneration Services
Private Landlord Registration Unit, 231 George Street, Glasgow, G1 1RX
Per Legal Services (Litigation), City Chambers, George Square, Glasgow G2 1DU

Respondent

FTT Case Reference FTS/HPC/PR/19/0888

22 FEBRUARY 2021

Decision

The appeal is refused.

Introduction

[1] This appeal concerns the service of a Rent Penalty Notice ("the RP Notice"). The Appellant, together with another individual, owns and rents out a residential property within the Glasgow City Council area.

[2] Since 2006, for a landlord to rent out a privately owned property, the landlord must be included within a register held by the relevant local authority. This requirement arises in

terms of section 82 of the Antisocial Behaviour etc (Scotland) Act 2004 ('the 2004 Act'). In this case, whilst both the Appellant and his co-owner had been included within the register, the registration of the Appellant's co-owner lapsed. Accordingly, for a period, the co-owner was no longer registered with the local authority as a landlord. On 30 November 2018 as a result of that lapse in registration, the Respondents served a RPN. The effect of a RPN is that no rent is lawfully due from a tenant for the period of time for which it is in force. The RPN came into force as at 21 December 2018. On 12 February 2019 the Respondents revoked the RPN, by when the Appellant's co-owner was re-admitted to the landlord's register.

[3] The Appellant lodged an appeal with the First Tier Tribunal ("the FtT"). That appeal was lodged in terms of section 97(1) of the 2004 Act (para 12 of the Appellant's paper apart to his application to the FtT). Section 97 provides for two distinct types of appeal to the FtT, and reads as follows:

> "(1) A relevant person on whom a notice under section 94 is served may, before the expiry of the period of 21 days beginning with the date specified by virtue of subsection (4)(d) of that section in the notice, appeal to the [First-tier Tribunal]1 against the decision of the local authority to serve the notice.
>
> (2) Where, on the application of a person having an interest, a local authority makes a decision refusing to revoke a notice under section 95(2) , the person may, before the expiry of the period of 21 days beginning with the day on which the decision is made, appeal to the First-tier Tribunal against the decision.

[4] In section 97 (1), the reference to 'a notice' served in terms of section 94 refers a RPN. In section 97 (2), the reference to a refusal to revoke a notice in terms of section 95 (2) refers to the local authority refusing to revoke a RPN after having been asked by a person with an interest in the property. If an appeal under either part of section 97 is successful, the FtT can quash the RPN in whole, or for part of the period it was in force, and the rent again is due, including for the period by which the RPN is now quashed (section 94 (10)).

[5] The Appellant's position before the FtT was that the RPN had not been served on him, and he should not be penalized by the loss of rent. It was not disputed that the Appellant had not received the copy that had been posted out to him by the Respondents. His argument was that as he had not received the RPN (which the FtT presumed was a postal failure), that caused a delay in him prompting his co-owner to resolve the lapsed registration. The lack of service on him invalidated the RPN and the RPN should be reduced. The Respondents' position was that the notice was sent to both co-owners, although it was only the Appellant's co-owner who was not registered. Whilst there may have been a postal failure, the Appellant did not have a right of appeal in terms of section 97 (1), which only referred to landlords who were not registered. Instead, the Appellant's rights were protected by his ability to ask for the RPN to be quashed in terms of section 95 (2). If the local authority refused to do so, the Appellant then had a right of appeal under section 97 (2). The Appellant had asked for the RPN to be quashed on 12 February 2019, and on the 13 February 2019 it was quashed, with effect from 12 February 2019.

[6] The FtT did not consider the Appellant had a right of appeal in terms of section 97 (1), noting that as the Appellant was registered at all times, he was not a relevant person for the purposes of that section.

Grounds of appeal

[7] Leave to appeal was granted by the FtT on grounds 3 and 4 (as originally numbered). Ground 3 had concerned the service of the RPN on the Appellant, but this ground was not insisted upon at the hearing and does not need to be considered further.

[8] Ground 4 reads:

> "The Appellant was at all times a registered relevant person. That means that either notice if valid would have a penal effect on the Appellant through the loss of his rent with no fault by him and no relief against his co-landlord (see s.94(3) – and see paragraph 25 of the tribunal decision). The tribunal erred in law in not granting the application setting aside both notices. Reference is made to Article 1 of the First Protocol of the ECHR: neither the Respondents nor the tribunal can endorse such expropriation of the Appellant's property."

The FtT did not give any reasons for granting leave on this ground of appeal, but simply noted that the ground raised, in its view, an arguable point of law.

The arguments

[9] Both parties lodged written submissions in advance of the hearing and spoke to their written submissions in some detail.

[10] The Appellant's argument can be summarised as follows. The FtT is a public authority and as such, cannot act incompatibly with the European Convention on Human Rights ("the ECHR"). The Appellant's share of the rent is a possession. The Appellant has no other right of relief to recoup the lost rent, including against his co-owner, by virtue of the terms of s94 of the 2004 Act which did not provide him with an appeal against the notice as a whole. The RPN is a restriction and a control on the use of his property. The Appellant is therefore a victim for the purposes of the ECHR. Depriving him of his share of the rent or controlling his use of his property is a breach of Article 1 Protocol 1 of the ECHR. Whilst it is accepted there is a legitimate aim behind the legislative scheme underpinning the requirement for landlords to be registered, there is a disproportionate effect on him as he has been properly registered at all times, and he has no right of relief against his co-owner. The margin of appreciation is not unlimited (*Bradshaw* v *Malta* Application no. 37121/15). Section 94 of the 2004 Act (which gives local authorities the power to serve a RPN) might protect tenants from rogue landlords, but that aim is not fulfilled by penalizing innocent

landlords such as in his situation. The Upper Tribunal should use section 3 of the Human Rights Act 1998 ("the HRA 1998") to read section 94 of the 2004 Act in an ECHR compliant way, relying upon the dicta of *Ghaidan* v *Godin-Mendoza* ([2004] AC 557). Either the RPN should be quashed only for the proportion of the rent due to the Appellant, or alternatively, if section 3 does not allow the Upper Tribunal to do so, the whole of the RPN should be set aside by declaring it, or the underpinning legislation, as incompatible with his human rights. The Appellant was neutral as to whether his arguments should be classed as a devolution issue, and unable to assist as to the position as to a declaration of incompatibility being issued by the Upper Tribunal.

[11] In response Mr MacDonald for Glasgow City Council argued the RPN as a whole should stand. No appeal had been taken by the co-owner of the property. That was not surprising, as it was not disputed that the co-owner's registration had lapsed. In these circumstances, an appeal by the co-owner could have no prospects of success. The rights conferred by the ECHR and, in particular, Article 1 Protocol 1 are not absolute. The Respondent acted at all times in accordance with Article 1 Protocol 1. There is a strong legitimate aim to the legislative scheme. It is not accepted that the Appellant has no right of relief against his co-owner; when the Appellant refers to a right of relief being excluded by section 94 (3) of the 2004 Act, that section refers only to payments by tenants and does not affect the position with a co-owner. That would be a matter for the Appellant and his co-owner to resolve.

Discussion

[12] The sole issue in this appeal is the Appellant's argument that the FtT erred by not setting the notice aside on the basis of a breach of his rights under the ECHR. The

Appellant's arguments regarding the ECHR had evolved from that put before the FtT when seeking permission. The Appellant now seeks for either the partial set aside of the RPN (in respect of only his share of the rent) or the RPN as a whole to be quashed. However, it is noted that the Appellant had not previously made any arguments regarding the ECHR to the FtT.

The relevant domestic law

[13] The legislation covering the registration of private landlords is found in Part 8 of the 2004 Act. These provisions have been in force since 30 April 2006.

[14] By section 82, each local authority must maintain a register of private sector landlords. In terms of section 83 (3) (c), the local authority is required to apply a "fit and proper" person test as to whether the individual can appropriately act as a landlord. Section 85 sets out a wide range of matters to be considered in the application of that test, including the question of commission of certain criminal acts or whether there has been unlawful discrimination in previous business dealings. An entry in the register lasts for a period of three years, after which time the local authority must remove that person (section 84 (6)). Accordingly, registration must be renewed every three years. The local authority have powers to remove a person from the register in some circumstances (section 89). There is a right to appeal against refusal to register or the removal from the register, both in terms of section 92.

[15] As such the 2004 Act sets out a framework to allow local authorities to regulate, to some degree, the private landlord market for residential tenancies. As has been noted "[t]he 2004 legislation adopts a strategy towards realising the goal of minimum standards whilst encouraging local efforts to adopt good practice" (*Residential Tenancies, Private and Social*

Renting in Scotland Robson, 4th ed, para 5-10). Various landlords have been removed or refused entry to registers held by a number of local authorities ((*Residential Tenancies, Private and Social Renting in Scotland* Robson, 4th ed, para 5-10 at footnotes 66 and 66).

[16] Where a landlord is unregistered, there can be both criminal and civil consequences. By section 93 of the 2004 Act, it is a criminal offence for a landlord to rent a property without being on the register. In relation to civil consequences, local authorities can serve a RPN on the landlord, which means that no rent is payable by the tenant for the period that the notice is in force (section 94).

[17] As noted above, the Appellant's appeal to the FtT was made in terms of section 97 (1) of the 2004 Act. That section refers to the service of a RPN under section 94 on a 'relevant person', who then has a right of appeal to the FtT against the decision of the local authority to serve the RPN. Section 94 reads:

> "(1) Where a local authority is satisfied that the conditions in subsection (2) are met in relation to a house within its area, the authority may serve a notice under this section on the persons mentioned in subsection (5).
>
> (2) Those conditions are—
> (a) that the owner of the house is a relevant person;
> (b) that the house is subject to—
> (i) a lease; or
> (ii) an occupancy arrangement,
> by virtue of which an unconnected person may use the house as a dwelling;
> (c) that the relevant person is not registered by the local authority; and
> (d) that, having regard to all the circumstances relating to the relevant person, it is appropriate for a notice to be served under this section.
>
> (3) Where a notice is served under this section, during the relevant period—
> (a) no rent shall be payable under any lease or occupancy arrangement in respect of the house to which the notice relates;
> (b) no other consideration shall be payable or exigible under any such lease or occupancy arrangement.
>
> (4) A notice served under this section shall specify—
> (a) the name of the relevant person to whom it relates;
> (b) the address of the house to which it relates;

(c) the effect of subsection (3); and
(d) the date on which it takes effect (which must not be earlier than the day after the day on which it is served).

(5) Those persons are—
(a) the relevant person;
(b) if the local authority is aware of the name and address of a person who has, by virtue of a lease or an occupancy arrangement such as is mentioned in subsection (2)(b), the use of the house to which the notice relates, that person; and
(c) if the local authority is aware of the name and address of a person who acts for the relevant person in relation to such a lease or an occupancy arrangement, that person.

(6) If—
(a) the local authority is unable to identify the relevant person, it may serve the notice under this section by publishing it in two or more newspapers (of which one shall, if practicable, be a local newspaper) circulating in the locality of the house to which the notice relates;
(b) the local authority is aware of the relevant person's identity but is unable to ascertain the relevant person's current address, it may serve the notice under this section by serving it on the landlord—
(i) at the house to which the notice relates; and
(ii) if it is aware of a previous address of the relevant person, at that address.

(7) The condition mentioned in subsection (2)(c) shall not be taken to be met where—
(a) the relevant person has made an application under section 83 to the local authority in whose area the house is situated; but
(b) the application has not been determined under section 84 by the authority.

(8) Except as provided in subsection (3), nothing in this Part affects the validity of any lease or occupancy arrangement under which an unconnected person has the use as a dwelling of a house during the relevant period.

(9) Where a local authority is aware of the name and address of a person mentioned in paragraph (b) or, as the case may be, (c) of subsection (5), failure to serve a notice on the person shall not affect the validity of the notice.

(10) In this section, "relevant period" means the period beginning with the date specified in the notice and ending with the earlier of—
(a) the revocation of the notice under section 95(2); or
(b) where the effect of the decision made on an appeal under section 97 is that rent or, as the case may be, other consideration is payable or exigible, that decision."

[18] For the purposes of the Part 8 of the 2004 Act a relevant person is effectively defined as a private landlord (see section 83 (8) which excludes social and public landlords from the scope of a relevant person). Section 97 (1) falls within Part 8 of the 2004 Act.

[19] By contrast, section 97 (2) refers to an interested person. It is also a very different appeal; the appeal in terms of section 97 (2) relates to the refusal of the local authority to revoke the RPN, after having been asked to do so by the interested party who is entitled to so ask in terms of section 95 (2). Section 95 (2) reads:

> "(2) If whether on the application of a person having an interest in the case or otherwise the local authority which served the notice is satisfied that the conditions mentioned in section 94(2) are no longer met in relation to the house, the authority shall, with effect from such day as it may specify, revoke the notice."

[20] The legislation does not define 'a person having an interest' for the purposes of section 97(2).

The ECHR

[21] The HRA 1998 incorporates much of the ECHR into domestic law. Whilst the HRA 1998 did not wholesale incorporate all of the ECHR and its protocols, Article 1 of Protocol 1 ("A1P1") is included and can now be relied upon directly before courts in Scotland (section 1 and Schedule 1 of the HRA 1998). In considering the meaning of the rights enacted under the HRA 1998, account is to be taken of the case law of the European Court of Human Rights and other decision making bodies of the Convention (section 2 of the HRA 1998). Section 3 of the HRA 1998 requires legislation to be read in a way that is compatible with ECHR. A declaration of incompatibility regarding domestic legislation can be made by certain courts, if the powers in section 3 do not allow the domestic legislation or legal framework to be read in a way that adheres to ECHR rights. Section 6 requires public

authorities (including courts) to act in accordance with Convention rights. By section 7 (1), only those who are victims can bring Convention arguments domestically, and by section 7 (7) victims are to be defined in the same approach as that taken by the European Court of Human Rights. That means that the prospective litigant must show he has been directly affected by the measure in question (*Klass* v *Germany* (1978) 2 EHRR 214), and has exhausted any effective domestic remedies that may apply in the circumstances. If a court is considering whether an Act of the Scottish Parliament is out with its legislative competence by breaching a right under the ECHR, then such an issue is a devolution issue (para 1 of Schedule 6 to the Scotland Act 1998). The categorisation of an issue as a devolution issue has implications for the procedure a court must follow before it can determine that question (para 5 of Schedule 6 to the Scotland Act 1998).

[22] A1P1 reads as follows:

> "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived or his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> 2. The proceeding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[23] A1P1 has three broad principles. Firstly the right to property is recognised under the ECHR, but that it is not an absolute right. Secondly if there is to be deprivation of property, or some other control of the use of property in its widest sense, the interference must be in the public interest and, thirdly, such interference must be in accordance with a clear legal framework.

[24] Caselaw from the European Court of Human Rights (the "ECtHR") has given A1P1 a wide definition of property going beyond physical items or corporeal property. It includes,

for example, goodwill of a business (*Van Marle* v *Netherlands* (1986) 8 EHRR 483) and a prospective claim for damages for negligence (*Pressos Compania Naviera SA* v *Belgium* (1995) EHRR 301).

[25] Whilst it is clear that the right to peaceful enjoyment of property is not an unfettered right, the ECtHR sets much weight on procedural safeguards where property rights are interfered with. Firstly there are those set out within the text of A1P1 (that is that the interference must be in the public interest and must be within a clear legal framework). Additionally, the ECtHR has applied the doctrine of proportionality to A1P1. Proportionality requires an examination of the restriction in question and whether it is "proportionate to the legitimate aim pursued" (*Handyside* v *United Kingdom* (1976) 1 EHRR 737). Proportionality considers the balance between the individual's rights against the wider objective being pursued. In other words, in considering the question of proportionality, the court should consider whether a less restrictive measure, interfering with the right in question to a lesser degree, would still safeguard the public interest.

Discussion

[26] The Appellant rents out a property with his co-owner. He described the relationship between them as a "loose business association" (para 16 of the FtT decision). He argued before the FtT (and before the Upper Tribunal) that he had no remedy against his co-owner and thus had to rely on the ECHR to provide him with a remedy. I return to that point later.

[27] The FtT found that the RPN was served both on the co-owner and the Appellant by the local authority. It accepted that although the RPN was properly posted by the local authority, as a matter of fact the Appellant did not receive his copy. The co-owner did not appeal his RPN and does not appear to have told the Appellant about the RPN, given that

the Appellant discovered the matter later following the non-payment of rent by the tenant. In those circumstances, the Appellant's appeal relates only to the notice served against him. He did not seek to appeal his co-owner's RPN (see paragraph 18 of the FtT's decision, where the FtT found in fact that the RPN served on the co-owner was not the subject of an appeal, and paragraph 26 where it commented that both owners would need to have appealed the RPN).

[28] The Appellant's grounds of appeal to the Upper Tribunal do not seek to challenge the FtT's decision that the Appellant had no right of appeal in terms of section 97 (1), as he was not a relevant person. It is clear from reading section 94 with section 97 (1) that the appeal in terms of section 97 (1) only arises where the proposed appellant is not registered with the local authority. There is no ground of appeal directed towards that part of the FtT's reasoning. I consider that is the correct approach. The Appellant would have a right of appeal under section 97(2), but in effect it would amount to challenging the local authority for its refusal to revoke the RPN. I note that the RPN was revoked as soon as the Appellant contacted the local authority, the co-owner at that stage being again re-registered and accordingly there was no delay in the revocation for the Appellant to challenge.

[29] The Appellant accepts he had not raised any human rights issues before the FtT. His written appeal to the FtT does not mention the issue of human rights. He did not raise the issue of A1P1 in the hearing before the FtT. Accordingly, it is unsurprising that the FtT's decision does not deal with any arguments under the ECHR.

[30] In England, the Court of Appeal have declined to deal with appeals even although permission has been granted by the tribunal below (see *Office of Communications* v *Floe Telecom Ltd (in administration)* [2009] EWCA Civ 47 at para 18 and *Secretary of State for Work and Pensions* v *Hughes (A Minor)* [2004] EWCA Civ 16 at para 15. Whilst it is competent to

allow a ground for appeal to be considered in a statutory appeal on a matter not argued before the first instance tribunal, it can give rise to difficulties; see *Advocate General for Scotland* v *Murray Group Holdings Limited* 2016 SC 201 at para 39. As Lord Drummond Young set out, the Court of Session should be cautious to allow a new ground of appeal to be argued not raised in the FtT or Upper Tribunal, particularly where additional findings in fact are required. The court should not do so if unfairness results. Lord Drummond Young's comments arose in the context of a statutory appeal before the Court of Session, where the case had already been considered by both the First-tier and Upper Tribunals. Notwithstanding that different context, is a helpful reminder of the issues that can arise when new matters are raised on appeal.

[31] It is the role of the FtT to make the findings in fact required to enable the proper consideration of the legal issues arising. Appeals to the Upper Tribunal are on a point of law only. I note that permission was granted by the FtT on a point not previously raised before it. In terms of section 46(3)(a) of the Tribunals (Scotland) Act 2014, the FtT must be satisfied that there were arguable grounds, on points of law, for each of the grounds for which permission was granted (section 46 (4)).

[32] Is the Upper Tribunal bound to determine an appeal, in circumstances where the FtT have not considered the arguments but granted permission to appeal nevertheless? The answer might be found in the way the Upper Tribunal rules provide discretion to the Upper Tribunal to determine the best way to deal with the cases before it. In terms of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 ("the Rules"), the Upper Tribunal is given extensive case management powers. By Rule 7 (2), the Upper Tribunal can make an order regulating the conduct of proceedings before it, including an order amending, suspending or setting aside an earlier order, which does not appear to be limited

to an order made by the Upper Tribunal. It has wide case management powers in terms of Rule 7 (3), including dealing with a preliminary issue arising (Rule 7 (3) (f)). By Rule 10 (3) that the Upper Tribunal can dismiss all or part of an appeal before it where the Upper Tribunal considers there is no reasonable prospect of success, but only when the proceedings have been transferred from the FtT. Before doing so, the Upper Tribunal must raise the proposed dismissal with the parties (Rule 10 (3)). That power only applies to cases which have been transferred from the Upper Tribunal. Such powers are likely to allow the Upper Tribunal to determining, at an early stage, whether a particular appeal has an arguable point of law and how best to resolve that point.

[33] The role of the Upper Tribunal in this appeal is consider what is said to be the error of law in the FtT's decision on the issue of the ECHR. That is difficult if the FtT were not asked to consider the arguments the Appellant says arise under the ECHR. The Appellant accepts he did not ask the FtT to consider those arguments. There was no reason given as to why such arguments could not have been put to the FtT. The FtT were not able to consider a matter not put in issue before it. It is difficult to see how the FtT can have erred in law in circumstances where the argument was never ventilated before it. It cannot err if it has not considered and ruled on an issue. If that was the correct approach, the appeal would fail.

[34] The purpose of the HRA is not necessarily on whether human rights have been procedurally taken into account, other than perhaps where Articles 6 and 8 are invoked. Rather the focus is with the substance as to whether there has been a breach of a person's human rights (*Belfast City Council* v *Miss Behavin' Ltd* [2007] HRLR 26). It might be that, viewed from that perspective, the Upper Tribunal should be more concerned as to the Appellant's argument to have suffered a breach of A1P1 rather than his failure to raise it before the FtT. Accordingly from that perspective, it is appropriate to consider the merits of

the appeal and the human rights argument raised. However, given that the FtT granted permission without hearing the arguments over the ECHR, I have carefully considered whether further findings in fact are required to determine matters. I have concluded that I can deal with matters on the basis of the information before me.

[35] In a general sense, I consider A1P1 is engaged by the civil penalty scheme as found in section 94 of the 2004 Act. A statutory scheme providing for the lawful withholding of rent due to the service of a RPN is, on the face of it, an interference with the right to collect rent from a tenant occupying a property. The question of whether A1P1 is engaged in this case is not, however, so clear cut.

[36] In reality the FtT considered that the notices were not divisible, and one owner appealing without the other owner taking his or her own appeal would be not alter the outcome (para 25 of the FtT's decision). It is unhelpful that the FtT did not make findings in fact as to the precise legal relationship of the arrangement between the Appellant and his co-owner. However, from the available written information and the discussion at the hearing before the Upper Tribunal, it was a matter of agreement that the flat is rented out as a business arrangement for profit. The Appellant confirmed the property was owned in his and his co-owner's personal names. Given that, the Appellant accepted it was likely that there is a de facto partnership between him and his co-owner (see section 1 of the Partnership Act 1890, which defines partnership as "the relation which subsists between persons carrying on a business in common with a view to profit"). The Appellant advised there is no written partnership agreement, but the two owners have a business relationship in relation to the renting of the property for profit.

[37] The FtT did not explore the Appellant's assertion that he has no remedy against his co-owner. That might have been helpful, given that a partner can be liable for losses

incurred by the partnership due to that partner's lack of skill or care (see *Blackwood* v *Robertson* 1984 SLT (Sh Ct) 68, and also *Ross Harper & Murphy* v *Banks* 2000 SLT 699 where at para 30 the standard was said to be one of "reasonable care in all the relevant circumstances"). The precise nature of what that standard might be would be fact specific. It would depend on the particular business practices, the nature of the business and past business dealings in the conduct of the partnership business. Before the Upper Tribunal, the Appellant repeated his assertion that the law provided no remedy to claim any losses from his co-owner, but could not provide authority for that proposition. The Appellant conceded he had not attempted to take any steps to remedy his situation, other than the lodging of the appeal with the FtT.

[38] Generally speaking, the ECHR does not usually provide a remedy where one exists in domestic law. There is, put simply, no need to consider whether there has been a breach of the ECHR (and thus HRA 1998) if the Appellant can pursue a remedy on the basis of domestic law as it stands. A litigant who has a remedy available in domestic law is generally not a victim for the purposes of Article 35 of the ECHR, and thus section 7 of the HRA 1998. Whilst the Appellant may not have had a remedy to reduce the RPN, he may have had a remedy to recompense him for losses by another route. As such, the focus on the ECHR and the HRA seems to miss an important step in the consideration of the legal issues arising. As such, I am not persuaded that the Appellant's A1P1 are engaged by the service of the RPN, because I do not consider he has shown that he is a victim for the purposes of the HRA 1988.

[39] As such, that would deal with the issue. If the Appellant's ECHR rights are not engaged, then the question of whether his property has been lawfully appropriated or

otherwise in terms of the ECHR does not arise. But, should I be wrong in that assessment, it is appropriate to deal with the substantive arguments in relation to A1P1.

[40] If the Appellant's A1P1 rights are engaged, the court must consider whether there has been an interference with that right. Interference is wide ranging; it can include by deprivation of the property or asset, control of it, or some other measure that affects the right to peaceful enjoyment. Assuming that the act or omission in question engages one of those limbs of A1P1, the analysis then moves on to consider whether the interference was lawful, pursued a legitimate aim, and whether it was proportionate.

[41] There is little doubt that the operation of a RPN is a deprivation of property and thus an interference. The Appellant conceded that the interference was lawful (in respect that the terms of the 2004 Act are clear; the interference is prescribed by a clear legal framework). The Appellant also conceded that the measures in the 2004 Act pursued a legitimate aim, in respect of the overall purpose of the scheme of regulation set out in the 2004 Act. That leaves the question of the proportionality between the aim sought to be realised and the interference.

[42] The relevant facts in this case are as follows. The RPN was served against both co-owners, albeit that the Appellant's copy went astray in the post. The Appellant conceded that his co-owner did not realistically have grounds to appeal against the notice served on him, given that the co-owner's registration had lapsed. The period of operation of the RPN was for no more than the period that the co-owner was unregistered. When the co-owner re-applied for registration as a landlord, the RPN was revoked and rent again fell to be due. The RPN was in force for less than 2 months. The sum of withheld rent is relatively modest, at £932.05.

[43] The Appellant's argument is that the notice relative to him should be reduced. He argues it would be disproportionate not to reduce the notice as it applied to him. He asked the Upper Tribunal to reduce the RPN as applying to him, leaving half of the rent due, arguing that s3 of the HRA 1998 should be used to interpret the scheme set out in the 2004 Act to achieve this end.

[44] I am not persuaded that it is necessary to do so. I do not consider the operation of the RPN scheme is disproportion on the Appellant. There is a strong policy purpose underlying the scheme of registration. If the Upper Tribunal were allow an appeal against one notice but not the other, it would undermine the civil penalty scheme for unregistered landlords, allowing landlords who are not registered to be involved in the letting of private tenancies, albeit with the potential for proportions of rent to be withheld. But the aim of the scheme is not directed to controlling rent; rather the aim of the scheme is to modernise and regulate who can let out flats, and to encourage higher standards in the private rented market. It would undermine the purpose of the legislation to allow persons who would not pass the fit and proper person test to be part owners and landlords in private tenancies. Whilst there would still be disincentives against landlords not being registered, the aim of the legislation was to improve housing standards, increase the transparency and allow a degree of informed choice for tenants when entering a tenancy (*Residential Tenancies, Private and Social Renting in Scotland* Robson, 4th ed, para 5-10). There would be nothing to prevent the non-registered owner from playing the dominant part in the day to day management of the tenancy, and thus risking the aims of the legislation being undermined.

[45] Against that background, the Appellant accepts his co-owner had allowed his registration to lapse. He accepts the RPN was revoked as soon as a fresh application for registration by his co-owner was approved. He accepts the need to be registered as a

landlord would be a matter that he and his co-owner could have covered in a partnership or other business agreement. He accepts that the legislation has a clear legitimate aim. It is difficult to see where it can be said that the operation of the RPN has been disproportionate. Whilst the Appellant relied upon *Bradshaw* v *Malta,* he accepted the facts were very different to the present circumstances, but that in any event, that the public interest being protected in the circumstances of that case were very different to the present circumstances.

[46] As I am not persuaded there is a breach of A1P1, s3 of the HRA does not assist the Appellant. In those circumstances, there is no requirement to read the 2004 Act in a certain way to prevent a breach of A1P1. But in any event, the Appellant was unable to point to the particular section within the 2004 Act that should be read differently. The 2004 Act allows a RPN to be reduced, and the rent to become due where the RPN has been erroneously served and there is a successful appeal against removal from, or refusal to, the register. The Appellant was in neither of those positions. His co-owner had a right of appeal, which was not exercised (perhaps because, as the Appellant conceded, his co-owner was at fault for the lapsed registration). It seemed to me that what the Appellant was really asking the Upper Tribunal to do was not to rely on s3 to read the 2004 Act differently, but rather re-write the 2004 Act to give the Appellant the outcome that he wishes; that is to split the operation of a RPN to a particular owner, rather than the RPN applying to a property as a whole.

[47] The Appellant's alternative argument was that the Upper Tribunal should issue a declaration of incompatibility to declare the RPN as ineffective. Given I am not persuaded there is a breach of A1P1 on the facts of this case, I am not persuaded that such arguments have any merit. The 2004 Act provides a scheme of appeal in relation to a RPN. The Appellant was served with a RPN insofar as the Respondents were concerned, albeit that it was not his act or omission that lead to the notice being served. He became aware of the

notice despite the difficulty with him receiving his copy by post. His co-owner had a right of appeal against the notice, which the co-owner did not exercise. If the co-owner had substantive grounds to appeal the RPN and had done so successfully, the rent would have again fallen due. The operation of the RPN is the penalty available to local authorities for a failure to register, designed to encourage compliance, against a background of reported difficulties with private landlords in certain local authorities (see for example footnotes 65 and 66 in *Residential Tenancies, Private and Social Renting in Scotland* Robson, 4th ed at para 5-10).

[48] In those circumstances, there is no breach of the Appellant's A1P1 rights. As such, there is no necessity to consider the matter of a declaration of incompatibility any further. The Upper Tribunal cannot issue such a declaration (s4 (5) of the HRA 1988), but in any event, given the decision on the question of a breach of A1P1, that does not need to be considered any further.

[49] For the sake of completeness, whilst I was not asked to do so by either party, I do not consider that a devolution issue arises that should be intimated in terms of the Scotland Act 1998, given my decision on the substance of matters.

[50] Accordingly the appeal fails.

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.