Upper Tribunal for Scotland

2023UT09
Ref: UTS/AP/22/0024

DECISION OF

Sheriff O'Carroll

ON AN APPEAL
IN THE CASE OF

Mr Colin Colraine, Mrs Ann Marie Colraine, 40 Norwood Park, Bearsden, G61 2RZ
per Paterson Holms,
4 Roman Road, Bearsden, Glasgow, G61 2SW

Appellants

- and -

Mrs Lisa Bridges, 4 Finaven Gardens, South Baljaffray, Bearsden, G61 4SB

Respondent

FtT Case reference: FTS/HPC/EV/22/1828

23 January 2023

Decision

The Upper Tribunal allows the appeal against the decision of the FTS dated 18 August 2022 dismissing the appellants' application for an order of possession of the tenanted property; in terms of section 47 of the Tribunals (Scotland) Act 2014, remakes the decision; allows the application to be amended; grants an order for recovery of possession of the property at 4 Finaven Gardens, South Baljaffray, Bearsden, G61 2SW; Finds no expenses due to or by either party.

Reasons

1. *Introduction.* This is an appeal against the decision of the First-tier Tribunal for Scotland ("the FTS") to dismiss the appellants' application for an order for possession of the subjects of an assured tenancy located at 4 Finaven Gardens, South Baljaffray, Bearsden, G61 2SW ("the property") in terms of Rule 8(1)(a) of the Procedure Rules on the basis that the application was "frivolous or vexatious". Written reasons for that decision were provided on 18 August 2022. Essentially the reasons given were that the Appellants did not offer to prove that the contractual assured tenancy had been terminated by means of a notice to quit expiring on an ish, without which, the FTS concluded, the application was bound to fail. This appeal considers whether the contractual assured tenancy had been terminated as a matter of law, the grounds for recovery of possession and whether this Tribunal can and should remake the FTS decision.
2. *Procedural background.* The respondent chose not to participate in the process either before the FTS or this Tribunal in any way. The appeal was therefore unopposed. Nonetheless, I took the view that, at least in a case of this kind, the Upper Tribunal ought not to allow an appeal on the basis only that it is unopposed. There should be a sound basis for allowing the appeal and granting the order sought. The Appellants were represented throughout by Ms Quirk, solicitor. I am grateful to her for her assistance.
3. *Grounds for the application originally*. The tenancy commenced on 1 February 2014.It is an assured tenancy governed by the terms of the Housing (Scotland) Act 1988. Recovery of possession was sought on grounds stated in Schedule 5 to the 1988 Act being ground 1, (landlord wishes to resume occupation of former home); Ground 8 (3 months' rent arrears); Ground 12 (unpaid rent) and ground 14 (nuisance and annoyance). An AT6 was served in the proper form identifying those grounds, specifying rent arrears of £17,900 and providing some detail about the other grounds. Also served was a notice under section 33(1)(d) of the Act requiring repossession of the property by 31 December 2021. Also served was a notice

to quit expiring on the same date providing more than 40 days' notice with the statutory information included. There was also a covering letter dated 18 November 2021 from the solicitor concerned as regards all three documents and a certificate of posting of same date.

4. The written assured tenancy agreement between the parties was for an initial period of six months from 1 February 2014, which relocated tacitly thereafter. There was no provision for the tenancy to continue month to month thereafter. (The tenancy agreement was drawn up by the Appellants themselves without the benefit of legal assistance, it appears). Thus, the ish is 31 July and 31 January of each year. The difficulty that arose in this application to the FTS is that manifestly the notice to quit did not expire on an ish. Thus, in the normal case, such a notice would have no effect on the currency of the contractual tenancy which would continue unaffected.

5. The significance of that may be found in considering the structure of the Act as a whole and in particular sections 16 and 18 of the 1988 Act. If an assured contractual tenancy is brought to a lawful end, by whatever means (which might include a notice to quit expiring on an ish, the exercise of an irritancy clause, a tenant notice to quit etc), section 16 provides that a statutory assured tenancy comes into existence with similar terms and conditions to the contractual assured tenancy (excepting notably any term making provision for the tenancy to be brought to an end by the parties, for example a notice to quit or irritancy clause). A statutory assured tenancy is a type of assured tenancy: section 16(1)(a). The Act does not regulate the manner in which contractual tenancies may be brought to an end. That is left to the common law and certain statutory provisions.

6. Section 18 of the 1988 Act deals with applications to the FTS for orders for possession of houses let on assured tenancies. Section 18(6) and 18(6A) partly regulate the circumstances in which a FTS may grant such orders. These sub-sections rather awkwardly attempt to make provision for proceedings seeking to recover possession of both statutory assured tenancies and contractual assured tenancies, distinguishing between the two, complicating matters with exceptions and provisos. The effect of the sub-sections is that if the contractual assured tenancy has been lawfully terminated, by any method, when the FTS comes to

determine whether to grant an order for possession, no restrictions on its powers arise from section 18(6). If the contractual assured tenancy has *not* been lawfully terminated when the FTS comes to determine whether to grant an order for possession, it has no power to do so if the grounds relied on are *only* one or more of the following: 1, 1A, 3 to 8, 8A, 9, 10, 17. If the contractual assured tenancy has *not* been lawfully terminated when the FTS comes to determine whether to grant an order for possession and one or more of the grounds relied on are as follows: 2, 11 to 14 and 16, the FTS has the power to grant an order for possession *only* if "the terms of the tenancy make provision for it to be brought to an end on the ground in question". If the ground relied on is ground 15 (anti-social behaviour), the intention of the legislature by section 18(6A) appears to be that the FTS has the power to grant an order for possession regardless of whether the contractual tenancy has been brought to an end and regardless of whether the terms of the tenancy make provision for the tenancy to be brought to an end on that ground.

7. Once the application was received by the FTS, the FTS noted that the notice to quit did not expire on an ish, made enquiries of the agent concerned, concluded that the notice was "invalid", that there was still in existence a contractual assured tenancy, concluded that section 18(6) did not save the application, and dismissed the application as "frivolous". On the application for leave to appeal (further representations then having been made) the FTS granted leave to appeal on the question of whether the tenancy agreement had in law been lawfully terminated in some other way. This Tribunal expanded the grounds of appeal, essentially to allow full argument on the original application, the grounds on which it was based and its competency.

8. *The grounds of the appeal*. The Appellants contend that in fact the lease had been terminated before the application to the FTS in the exercise of a contractual irritancy. The full argument that developed during the course of discussion at the appeal hearing, can be put as follows.

9. The relevant clause of the tenancy agreement reads in part*: "In the event of the tenant contravening any of the conditions of the lease or if the rent is not paid when scheduled, the landlord will be entitled to give the tenant notice terminating the lease…. In the event that the tenant does*

not vacate the property following termination of the lease, the landlord shall be entitled to proceed with [legal action]". The contractual obligations include those relating to timeous payment of rent which was £400 per week. By November 2021, the total rent arrears were about £18,100. The tenant was in no doubt as to the amount of rent arrears. The tenant was in no doubt that making payment was expected but failed to do so. The tenant was in no doubt through informal discussions between the parties and formal demands for payment that if payment was not forthcoming, the tenancy would have to be terminated. It was against that background that the solicitor for the Appellants served the notice to quit bringing the tenancy to an end on 31 December 2021, the section 33(1)(d) notice under the 1988 Act having a similar effect, the AT6 which specified the basis on which possession would be sought and which notice specified that *inter alia* grounds 8 and 12 relating to rent arrears of £17,900 would be founded on in proceedings to follow (as well as the landlords needing to resume occupation of the property).

10. There was no mechanism specified in the irritancy clause regulating the type or content of notice, method of service, time limits and so on. Statute does not regulate the operation of contractual irritancy clause. It is necessary to take a constructive, realistic and practical approach to the operation of a contractual clause which provides for the termination of a contract.

11. Against that background, the three notices, all being served simultaneously, when read together, against a factual background well-known and understood by both parties, clearly indicated to the recipient that as a result *inter alia* of very large rent arrears, the landlord had decided to terminate the lease with effect from 31 December 2021. The tenant knew that was being contemplated by the landlord and knew that the tenancy agreement provided that the tenancy could be terminated during its currency. The receipt of the formal notices confirmed the landlord's position and reasons. Although the service of a formal notice of irritancy in addition to the other documents would have put the landlord's position beyond any possible doubt, that was not necessary in the circumstances of this case to do so in order to give effect to the contractual provisions. There being no period of

notice specified in the irritancy clause, notice of greater than 40 days was given by the notices, which is the maximum notice that could be required by statute on any view. That protects the tenant to some extent. Further, and importantly, notwithstanding the termination of the tenancy, the tenant still enjoys considerable protection under the statute and security of tenure. Notwithstanding the huge rent arrears and the other grounds on which possession was sought, it would always be for the FTS to determine whether it was reasonable to grant the order sought and the tenant would have the opportunity always to plead his case.

12. In support of this argument, the agent for the Appellants produced two further documents. The first was a sworn affidavit of the appellant Ann Colraine dated 1 June 2022. In summary, that vouched for the long and increasing history of rent arrears from 2015, continuing unsuccessful efforts by the Appellants to obtain timeous payment of rent and payment towards the rent arrears, the composition of the tenant's household (4 working adults), the lack of good reason for non-payment. It also spoke to the property having been originally the family home that was then let to the respondents while the Appellants lived elsewhere, that the Appellants needed to return to the property for reasons relating to [specified] severe financial pressures and [specified] severe family illnesses. At present the Appellants live in insecure rented accommodation and have had to move several times because they cannot yet return to the family home. That exacerbates the family health problems which also include a considerable amount of [specified] emotional and mental distress. The respondent's family also caused nuisance and annoyance to neighbours, which is continual, involving parties and police call outs. The respondent has been offered suitable alternative accommodation by the local authority (following service of the relevant statutory notice on the local authority by the Appellants), but have refused it. The respondent understands clearly that the Appellants need to recover possession of the property and she accepts that an order for her eviction is likely to be made at some point but she intends to stay in the property until that order is made.

13. The second document produced was an annotated statement of the rent account showing the accumulation of arrears over the years together with repeated attempts by the Appellants to obtain agreements over repayment of arrears and a long history of failures by the respondent to cooperate with those attempts. The arrears were over £23,000 by June 2022 according to the affidavit sworn by the Appellant. The rent statement states that the arrears had reached £25,100 by 8 July 2022. (I observe that there is no suggestion that housing benefit was in payment at any time, unsurprisingly perhaps given there were four working adults in the household; so no question of rent arrears due to delays in payment of that benefit arise).
14. Therefore, it is argued, the FTS at first instance erred in determining that the appeal was frivolous. There is a sound basis for the application. That decision ought to be overturned and the appeal ought to be allowed.
15. Furthermore, an order for recovery of possession should be made, enforceable in the usual way. Although section 2 and schedule 2(1) to the Cost of Living Protection (Scotland) Act 2022 introduces temporary measures restricting enforcement of orders for eviction, that is subject to various exceptions including, in the case of assured tenancies, those specified in schedule 2(1)(5)(c), read together with the amended grounds for recovery of possession introduced on a temporary basis by schedule 2(5)(4). The new temporary additional grounds 1A and 8A are modifications to the existing grounds 1 and 8, upon which *inter alia,* the application is founded. Reading short, in the case of ground 1A, if the reason why possession of the property for the resumed residence of the landlord for more than 3 months is because of financial hardship, the ground is satisfied. In the case of ground 8A, if the rent arrears at the date of the section 19 notice or the commencement of proceedings exceed 6 months' rent, the ground is satisfied. It is clear from the material before the Tribunal that the exceptions apply in this case due to the large size of the arrears and the very significant financial difficulties being faced by the Appellants which lead them to want to return to the former family home.

16. *Decision.* It is entirely understandable that at first instance, the FTS determined that the application, as then presented, had no reasonable prospects of success and that the application was dismissed as frivolous, in the sense that it had no reasonable prospects of success. That is because the true grounds of the application, in this admittedly rather complex and difficult area of law and practice, had not been adequately explained at the outset. To the credit of that FTS, once clarification was advanced after a decision had been made, it recognized that there was an arguable ground of appeal and correctly granted leave to appeal.
17. On closer examination of the law and facts in this case as developed during the course of this appeal, the true basis of the application was revealed. The real argument presented by the Appellant is set out above at paragraphs 9 to 14 above.
18. In my view, that argument is correct, on the facts of this case. I accept that in the particular circumstances of this case, for the reasons explained in the Appellant's revised and developed argument, the contractual tenancy agreement had been lawfully terminated by the Appellants prior to the application to the FTS, the irritancy clause having been triggered by the events stated in the Appellant's argument. No special form of notice giving effect to the irritancy clause was prescribed by the contractual tenancy. Nor is such specified as a matter of law. The notices relied on, in the particular circumstances of this case, given their content, against a background well-known to both parties, were apt to have the effect of triggering the irritancy clause, bringing the tenancy to an end on 31 January 2021 as a result of the respondent's breach: non-payment of rent. The notice period specified was more than would have been required by a notice to quit.
19. This decision is not a finding that in cases where no specific irritancy notice has been served, an irritancy clause may be exercised by service of other notices: each case will turn on its own facts. Obviously, it might have been preferable for all concerned had the irritancy clause been drafted with greater precision and the clause triggered by explicit reference in an irritancy notice. But in my view, in the circumstances of this case, in the absence of a contractually specified mode as to the exercise of contractual irritancy,

standing the absence of legal restrictions as to how contractual irritancies may be triggered, that shortcoming does not prevent the clear and obvious intention of the landlord, which must have been clearly understood by the tenant, from being given effect.

20. As regards the effect of the successful triggering of an irritancy clause, I observe as follows. The effect of a termination of a contractual assured tenancy, by whatever means, does not remove the statutory protection afforded to assured tenants. Such a tenant still enjoys an assured tenancy, albeit a statutory assured tenancy. Certain notices normally require to be served before commencing legal proceedings (as they have been in this case). That tenancy cannot be brought to an end except on the order of the FTS. The FTS must still perform its function of determining the substantive questions before it, such as whether there a defined statutory ground is satisfied and whether it is reasonable to grant decree and so on. The tenant has the opportunity before the hearing to make arrangements for repayment of any rent arrears which will always be an important consideration for the FTS in such cases. The parties are entitled to a hearing before the FTS. Those are among the indices of security of tenure. These statutory safeguards provide an effective guard against attempted oppressive use of an irritancy clause.
21. It follows that I allow the appeal against the decision of the FTS to dismiss the original application on the basis that the application is frivolous.
22. *Future procedure.* As for future procedure, in terms of section 47 of the Tribunals (Scotland) Act 2014, this Tribunal may remit the matter to a FTS or may remake the decision and in doing so, this Tribunal may do anything that the FTS could do and may make such findings in fact as the FTS could have done. In my view, considering the protracted nature of the proceedings thus far, the very large and increasing rent arrears, the hardships presently being suffered by the Appellants, that there is sufficient material before the Tribunal to make adequate findings in fact without the need for a hearing on the evidence, (the Appellants' factual contentions being undisputed), it is appropriate for this Tribunal to remake the decision. I do so in the following way.

23. First, it is necessary to consider the grounds on which the Appellant seeks possession now: grounds 1, 8, 12 and 14 (as originally pleaded) and the new grounds introduced by the 2022 Act: grounds 1A and grounds 8A. The Appellants seek an order which permits for recovery of possession under the new grounds. There are two technical difficulties with that approach. The first is that the original application to the tribunal does not refer to grounds 1A and 8A. Obviously, that could not have been done at the time that the application was made to the tribunal since the 2022 Act was not then law. If that Act had been in existence at that time, the application would no doubt have founded on those additional grounds. I cure that difficulty by exercising my discretion to allow amendment of grounds on which possession is sought by the substitution of ground 1A for ground 1 and ground 8A for ground 8.
24. The second difficulty is related. The section 19 notice served on the respondent did not refer to ground 1A or ground 8A: neither ground was law at that time either. I deal with that difficulty by this Tribunal exercising its power under section 19(2) of the 1988 Act to allow amendment of the section 19 notice so as to substitute those grounds for grounds 1 and 8. That is reasonable to do so in all the circumstances of the case in my view.
25. I now make the following findings in fact based on the uncontested material contained in the affidavit of the Appellant, the productions and related material and reasonable conclusions and inferences drawn from that material.
    1. The parties entered into a contractual assured tenancy on 31 January 2014
    2. An essential term was that rent was payable in advance at £400 per week.
    3. The tenancy contained an irritancy clause allowing the landlord to terminate the tenancy should rent remain unpaid or any term of the tenancy be breached by the tenant.
    4. The tenant fell into rent arrears from 2015 onwards, the amount of which gradually rose to £18,100 by November 2021, which is greater than 6 months' rent.
    5. The accumulation of rent arrears was not attributable to housing benefit payment problems.

6. Despite frequent efforts by the landlord over some years to achieve timeous payment and repayment of arrears, the tenant failed fully to cooperate.
7. The contractual assured tenancy was validly terminated as of 31 December 2021 in exercise of the landlord's right under said irritancy clause.
8. As at the date of the raising of the proceedings at the FTS in July 2022, the rent arrears were in excess of £24,000 which is greater than 6 months' rent.
9. At the date of the service of the AT6, the rent arrears were about £18,100, which is greater than 6 months' rent
10. No sound reason has been advanced at any time by the tenant for the rent arrears. There is no reasonable prospect of those rent arrears being repaid or of the passing rent being paid at the contractual rate.
11. The landlord is suffering financial hardship and intends to alleviate that hardship by occupying the property for more than 3 months.
12. The landlord has substantially complied with pre-action protocol requirements
13. The relevant local authority offered to make alternative accommodation available to the tenant but that was refused by the tenant.
14. Grounds 1A and 8A of schedule 5 to the Housing (Scotland) Act 1988 as amended by the 2022 Act are satisfied.
15. It is reasonable in terms of section 18(4) to the 1988 Act to grant an order for recovery of possession on grounds 1A and 8A of schedule 5 to the 1988 Act, as amended.

26. I find therefore that the Appellant is entitled to an order for possession of the property on grounds 1A and 8A of the 1988 Act as amended by the 2022 Act.
27. It is unnecessary for me to make any further findings of fact or to consider the remaining grounds relied on by the Appellants.
28. I will pronounce a separate Order giving effect to my decision on recovery of possession. I am not asked to make any order as regards payment of the rent arrears. The Appellants do not seek an order for expenses.

*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.*