



DECISION

of

Upper Tribunal Judge Sheriff Pino Di Emidio

in the case of

Enzo Serapiglia, 7 Pannel Farm Cottages, Kilbarchan Road, Bridge of Weir, PA11 3RN

Appellant

and

Cameron McIntyre, c/o Ben Brown, 3/3 5 Hayburn Street, Glasgow, G11 6DE

Respondent

First-tier Tribunal Case Reference: FTS/HPC/EV/21/2042

20 February 2023

The Upper Tribunal, allows the appeal, quashes the decision of the First-tier Tribunal for Scotland dated 24 March 2022 and remits to a freshly constituted panel of First-tier Tribunal members to consider the application of new.

Note of reasons for decision

[1] This appeal concerns a challenge to a decision of the First-tier Tribunal for Scotland Housing and Property Chamber to grant an order for eviction on the discretionary ground of anti-social behaviour (Ground 14). The question that arises is whether the FtT has erred in law because it has failed to make adequate factual findings for its conclusions.

Procedural History

[2] The appellant was granted permission to appeal the decision of the FtT dated 24 March 2022. An order was granted for his eviction in terms of Ground 14 of Schedule 3 of the Private



Housing (Tenancies) (Scotland) Act 2016. The FtT found that he had engaged in relevant anti-social behaviour towards other persons and that it was reasonable to make the order.

[3] After the grant of permission to appeal by this Tribunal, the appellant withdrew certain other proposed grounds of appeal. The respondent, who was represented by Mr Ben Brown, was allowed a period of 28 days to make submissions and the appellant a further 28 days to reply. The respondent's submissions were brief and invited the UTS to refuse the appeal on the ground that the FtT's reasoning was fully considered. The reasoning process should not be over-analysed, on the model of *Meek v City of Birmingham District Council*, EWCA 18 February 1987 and *Fuller v London Borough of Brent* [2011] EWCA Civ. 267. The original productions before the FtT were re-submitted. The appellant failed to reply within the allotted period. He then submitted a request to be allowed to make further submissions late though no further written submission was provided. I have not allowed him further time. The appellant first requested a hearing on the appeal then changed his mind. The respondent submitted that no hearing was required. I have also decided that I can determine the appeal without a hearing.

Reasons for Decision

[4] The importance of making adequate findings in fact has been emphasised on many occasions. A recent example is to be found in *Midlothian Council v PD* 2019 UT 52 where the Lord Ordinary said the following:

"24. Written decisions should (a) state clearly what facts the FTT has found, (b) the evidence on which those findings in fact are based, and, (c) where there has been a matter of controversy relevant to the resolution of an important issue in the appeal, an explanation of why the FTT has reached the conclusion that it has on the matter.

"25. ... A finding in fact is not a narration of evidence. It an expression of a conclusion, formed on the basis of evidence.

"26.... Where there are competing bodies of evidence on a crucial issue, the basis on which one has been accepted and another rejected should be stated clearly. This need not be a lengthy exercise. It should be as concise as is consistent with clarity in the context of the case and the issues for determination. The narration of any relevant evidence and the reasons for



accepting or rejecting it should not be described as findings in fact, but included in a separate part of the decision.”

Issue 1 – the incidents relied on by the landlord

[5] The discretionary ground 14 set out of paragraph 14 schedule 3 of the 2016 Act is that the tenant has engaged in relevant anti-social behaviour. There required to be findings about the events relied on by the respondent landlord.

[6] The FtT purported to make findings in fact at paragraphs 76 to 92. Most of the content of these paragraphs are not findings in fact at all. At paragraphs 85 and 86 it stated:

“85. Between 29 April 2021 and 1st July 2021, the [appellant] was involved in incidents at Pannell Farm Kilbarchan Road Bridge of Weir which were likely to cause alarm, distress, nuisance, or annoyance to persons there including Iona Young and Robert McLellan.

“86. These incidents included shouting, being aggressive, refusing to move a motor car when requested, videoing persons carrying on work at the farm premises, flailing his arms around, circling around persons there, making comments that amounted to a threat to the safety of persons there, suggesting that new tenants at the farm would be “jeopardized” by him and kicking plant pots and throwing flowers around.”

[7] The FtT did not set the scene. It is not clear whether any part of the behaviour complained of took place within the area occupied by the appellant exclusively under his tenancy, or wholly on ground occupied by other tenants or by the respondent landlord. A short set of findings as to the layout of the site, the areas occupied under the various leases, the area occupied by the landlord and the areas used in common by the landlord and his various tenants would have set in context findings relating to the incidents which formed the basis of the landlord’s complaint.

[8] The respondent landlord relies crucially on four incidents. The FtT’s decision discloses that there were significant disputes as to the facts of each incident relied on by the respondent. It stated that it preferred the respondent’s witnesses Ms. Young, the sister of the respondent who was involved in the management of the tenancy, and Mr. McLellan, a tenant of nearby premises.



[9] The narration of the evidence discloses that the appellant had a list of grievances. He was concerned about noise from the premises of his neighbour Mr McLellan where he operated a welding business. The narration of Mr. McLellan's evidence appears to proceed on an acceptance by him that there was a certain amount of noise from his welding business. The FtT has noted that the appellant thought Mr. McLellan's operations had caused damage to his car. He had thought this was a peaceful location but the arrival of the business had caused him significant disturbance. Some of his conduct seems to have been driven by these concerns about his neighbour's business activities, but there are no findings about whether there was a proper basis for these concerns. On the face of it, this was a matter that impacted on the assessment of the incidents relied on by the landlord and ought to have been the subject of a reasonably detailed set of findings.

[10] The appellant also told the FtT he had been subjected to discriminatory abuse. Some of the evidence of Ms. Young, as narrated by the FtT, seems to be based on a fear that the respondent had criminal connections due to his family background who might harm her or her brother's other tenants. She also denied any suggestion that the appellant had such connections. The FtT was entitled to accept some parts of the evidence and reject others but there is no attempt to explain why it concluded that there was a reasonable basis for her fears given these differing aspects of her evidence.

[11] As regards at least one incident, that of 1 July, the FtT appears to have found that only some parts of the appellant's behaviour founded on by the respondent were worthy of criticism. The FtT does not explain why some parts of the evidence of witnesses were accepted and others rejected. It has failed to state what any conclusions were reached based on an assessment of the reliability or the credibility of the witnesses' evidence.

[12] The FtT has gathered all four incidents relied on by the landlord together without making detailed findings about each occasion, even though its earlier narration discloses that it heard



ample evidence about each of them. These incidents were capable of constituting a course of conduct. In the absence of specific findings about them, the reader is left without a clear idea of what the findings of the FtT were on each incident. This failure was not a mere formal error. The appellant's conduct is central to the respondent's case. It would not have imposed an excessive burden to make findings about each incident.

Issue 2 – whether it was reasonable to make the order

[13] The question of reasonableness depended on the conclusions of the FtT on a number of other aspects of the conduct of the appellant which were the subject of dispute. The FtT has treated the question of reasonableness as a question of fact at paragraph 92. As was explained in *Edinburgh City Council v Forbes* 2002 Hous. L.R. 61 by Sheriff Principal Nicholson QC at para 7-16:

“A decision on such a matter [i.e. the question of whether it is reasonable to pronounce an order] will of course be influenced by reference to established or admitted facts, but reasonableness is not itself a fact but instead a concept or conclusion determined by an exercise of judgment.”

Sheriff Principal Scott QC quoted this passage with approval in *Glasgow West Housing Association Ltd v Harasimowicz* 2012 Hous. L.R. 77 at 79. The treatment of the issue of reasonableness as a finding in fact is also an error of law.

[14] The FtT's task was to consider whether, in all the circumstances, granting an order for possession is reasonable, not the most reasonable course of action, nor one within a range of possible actions; if it so decides, it must grant the order (*East Lothian Council v Duffy* 2012 S.L.T. (Sh. Ct.) 113 at paragraphs [71] and [72], per Sheriff Braid (as he then was)).

[15] The FtT stated at paragraph 105 that its decision on the reasonableness issue was a “finely balanced” one. It required to take account of all relevant considerations and properly to weigh and balance them. The FtT failed to state what it thought the relevant facts going to the question of reasonableness actually were in circumstances where the incidents relied on were multi-



faceted. The FtT made a finding at paragraph 84 that the appellant had long standing difficulties with mood and anxiety. It narrated at paragraph 45 evidence as to trauma suffered by him. It recorded a submission made by his representative at paragraph 76 as to his personal issues. Despite this finding, at paragraph 103 it states:

“No evidence was presented to suggest any effect that an eviction order might have on the [appellant’s] wellbeing.”

There was no real engagement with this part of the evidence in the findings made as to reasonableness at paragraph 105. The appellant’s evidence about his health and past history of trauma was before the FtT and was the subject of an express finding, presumably because the FtT thought it was relevant. On the face of it, this matter was relevant to the assessment of the question of reasonableness but it does not seem to have been taken into account.

[16] In these circumstances, the FtT failed to set out the factual basis for its conclusion on both the first and second parts of the statutory test it required to apply in a Ground 14 case. As a result, the FtT has erred in law because it has misdirected itself and its decision will be quashed. I will remit to the FtT for a fresh hearing before a freshly constituted panel of tribunal members.

Observation

[17] The FtT also referred to the case of *Manchester City Council v Pinnock* [2011] 2 AC 104 which is a public law case. The decision may be of limited utility in a case of this kind where the application to the FtT relates to a private residential tenancy and where the FtT requires to reach a decision on the reasonableness of the order sought by the landlord (see *Stalker on Residential Tenancies* (2nd ed. EUP 2021) at pages 376 to 380). I express no further view on the issue given the reasons for my decision to allow the appeal.

Appeal provisions

[18] 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

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permission to do so from the Upper Tribunal for Scotland 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 Pino Di Emidio
Judge of the Upper Tribunal for Scotland