Upper Tribunal for Scotland

2023UT20
Ref: UTS/AP/22/0027

DECISION OF

SHERIFF GEORGE JAMIESON

ON AN APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER)
IN THE CASE OF

Mr David Stainthorpe, Alandale, Ruthwell, Dumfries, DG1 4NN, per Walker and Sharpe, Solicitors, 37 George Street, Dumfries, DG1 1EB

Appellant

- and -

Ms Marion Carruthers and Mr Raymond Swan, 7 Runic Place, Ruthwell, Dumfries, DG1 4NW, per Pollock & McLean, Solicitors, 41 Castle Street, Dumfries DG1 1DU

First and Second Respondents

FTS case reference FTS/HPC/EV/21/2943

Greenock 26 June 2023

Decision

The Upper Tribunal for Scotland:

1. Allows the Appellant's appeal against the decision of the First-tier Tribunal for Scotland dated 22 September 2022 refusing the appellant's application for an order for possession in terms of section 18(1) of the Housing (Scotland) Act 1988.

2. Quashes that decision.

3. Reserves consideration of whether the UTS should remake the decision or remit the case for reconsideration by the First-tier Tribunal for Scotland.

Representation in Connection with the Appeal

The appellant was represented by his solicitor Miss Dalgleish.

The respondents were represented by their solicitor Mr Bryce.

Introduction

[1] The First-tier Tribunal for Scotland ("FTS") refused permission to appeal in this case. I granted permission to appeal on grounds 1 - 7 of the Appellant's Application for Permission to Appeal at a permission to appeal hearing on 22 March 2023. The parties' solicitors have consented to this appeal being determined without a hearing in terms of rule 24 of the Upper Tribunal for Scotland Rules of Procedure 2016.

Background

[2] The Appellant applied to the FTS for an order for possession of a house let on an assured tenancy in terms of section 18(1) of the Housing (Scotland) Act 1988.

Relevant Law

[3] Section 18(1) of the Housing (Scotland) Act 1988 provides that the FTS "shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act."

[4] Section 18(4) of the Act provides that : "If the [FTS] is satisfied that any of the grounds in Part I or II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so."

Ground of Possession

[5] The Appellant sought the order for possession in terms of ground 6 of schedule 5 to the 1988 Act. So far as relevant to this appeal, ground 6 applies where:

> "The landlord who is seeking possession intends to demolish or reconstruct the whole or a substantial part of the house or to carry out substantial works on the house or any part thereof or any building of which it forms part".

[6] Ground 6 also requires certain conditions to be fulfilled in relation to the landlord who is intending to carry out the demolition, reconstruction or substantial works. Condition 6(b), which is relevant to this case, is that the landlord: "cannot reasonably carry out the intended work without the tenant giving up possession of the house because:

(i) the work can otherwise be carried out only if the tenant accepts a variation in the terms of the tenancy and the tenant refuses to do so;

(ii) the work can otherwise be carried out only if the tenant accepts an assured tenancy of part of the house and the tenant refuses to do so; or

(iii) the work can otherwise be carried out only if the tenant accepts either a variation in the terms of the tenancy or an assured tenancy of part of the house or both, and the tenant refuses to do so; or

(iv) the work cannot otherwise be carried out even if the tenant accepts a variation in the terms of the tenancy or an assured tenancy of only part of the house or both."

[7] The Appellant's position before the FTS was that he intended to carry out substantial works on the house. The planned works were very extensive with the kitchen and bathroom being reconstructed; all asbestos tiles removed; and underfloor heating installed.

[8] The property did not have a heating system and the rooms would all be rewired. The property would be given a new water supply; all bathroom fittings would be replaced; a wall would be removed to allow for a new kitchen to be fitted; a vaulted roof would be installed in the new extension; an en suite bathroom would be installed; the hallway would be re-designed; the current living room would become a bedroom; and the attic space would be converted to a games room.

[9] The Appellant's further position before the FTS was that it would not be feasible for the Respondents to remain in the property while these works were being carried out. He referred, in this connection, to the property not having a heating system.

[10] In its findings in fact, the FTS recorded that the cost of the works was anticipated to be £146,850.97

Appeal to the UTS

[11] The Upper Tribunal for Scotland ("UTS") may only allow an appeal on a point of law arising from the decision of the FTS. A "point of law" includes any situation where the FTS has made findings in fact for which there was no evidence; or where the FTS has taken a wrong approach to the case, such as by taking into account manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal could properly reach.

[12] In considering this appeal, I have read and taken into account the decision of the FTS appealed against.

[13] I have also read and taken into account the grounds of appeal set out in the Appellant's Application for Permission to Appeal, the Respondents' Response to the Appellant's Notice of Appeal (described as "Grounds of Opposition") and the Appellant's Reply to that Response.

Ground of Appeal 1

[14] Ground of appeal 1 is that at paragraph 47 of its decision, the FTS erroneously found in fact that the Appellant's stepson had obtained a mortgage offer in principle to fund the works subject to the Appellant obtaining vacant possession.

[15] This conclusion materially affected the thinking of the FTS as it stated at paragraph 61 of its decision that there were "substantial questions" over the Appellant's intention to carry out the works as it was more likely than not that the Appellant would transfer title to the property to his stepson who would then obtain funding to proceed with the works.

[16] The Appellant's position is the FTS made this finding in fact without any evidential basis for doing so. His position is he did not state to the FTS that he intended to transfer title to his stepson following vacant possession. Rather, he intended to transfer the property to his stepson at a later date after the works had been completed. His stepson had obtained a mortgage offer in respect of the transfer of the property at a later date after the works had been completed.

[17] The Respondents' position is the Appellant did state in evidence before the FTS his intention to transfer the property to his stepson who had obtained a mortgage offer in principle to fund the

works on the house. The Respondents therefore submitted that the FTS had made the correct finding in fact in respect of this matter.

[18] The Appellant's Reply is that he did not give any evidence before the FTS that he intended to transfer the property to his stepson following vacant possession, or that the works would be funded by his stepson by means of a loan secured over the property. He intended to carry out the works on the house with a view to it being a home for his stepson and family in the future.

[19] This contention is supported at paragraph 15 of the decision of the FTS where it records that the Appellant "went on to say that *he* was looking to [carry out the works on the house] in order that his stepson and future family could live there for the rest of his life"; and also at paragraph 16 of its decision where the FTS records the Appellant stating to it that "it was *his* intention to carry out all the work" (emphasis added). The FTS therefore seems to have understood the Appellant's evidence was that he, the Appellant, intended to carry out the works.

[20] The Appellant conceded in his evidence before the FTS that he wanted the property for his stepson and for his family (FTS decision, paragraph 26). At paragraph 30 of its decision, the FTS recorded the Appellant's evidence on the cost of funding the works as being that his stepson had received a mortgage offer in principle for £160,000 subject to vacant possession and the Appellant would transfer the title to the property as a gift to his stepson. This contradicts the Appellant's evidence as recorded at paragraphs 15 and 16 of the decision of the FTS that *the Appellant* intended to carry out the works.

[21] The FTS placed significant weight on these matters in considering an essential matter before it - the Appellant's intention to carry out the works.

[22] This is evident from its discussion at paragraph 57 of its decision where "it appeared" to the FTS "that it would be the [Appellant's stepson] who would in fact be granted the mortgage and [the Appellant] confirmed he intended to gift the property to his stepson".

[23] At paragraph 61 of its decision, the FTS recorded that "it appears" "that on obtaining vacant possession title to the property would be transferred to [the Appellant's] stepson who would then obtain funding to proceed with the [works]".

[24] In my opinion, these conclusions are in the nature of speculation as the FTS did not clearly establish the full facts about the mortgage application; about how the works were to be funded; and by whom: it proceeded on the basis of a conclusion or inference from what "appeared" to be the situation to the FTS. The FTS recorded the Appellant's evidence about his intention to carry out the works. This intention was supported by evidence the Appellant had obtained planning permission and had applied for a building warrant. The FTS did not discuss the whole evidence in the round in reaching its conclusion on the Appellant's intention to carry out the works. In these circumstances, I consider the FTS wrongly approached the exercise of making its findings in fact in relation to the essential question of the Appellant's intention to carry out the works himself. This error vitiates its decision and the appeal is accordingly allowed on ground of appeal 1.

Ground of Appeal 2

[25] Ground of appeal 2 is that at paragraph 58 of its decision, the FTS stated without supporting evidence that the Appellant would have no intention of carrying out the works if the Respondents could remain as tenants.

[26] The Respondents' position is this statement was a logical conclusion based on the Appellant's own evidence that he intended to renovate and extend the property for the benefit of his stepson.

[27] The Appellant concedes in his Reply that he gave evidence that he would not carry out the works if the Respondents remained as tenants. This makes sense and is not suspect because the Appellant is entitled to use his property as he sees fit subject to any legal restriction on that use. It is understandable he would prefer to benefit his family rather than his tenants by carrying out the works.

[28] However, in my opinion, the FTS still erred in law on this point. The issue for its consideration was whether the intended works could not reasonably be carried without the Respondents giving up possession of the house. The Appellant could therefore legitimately intend to carry out the works with vacant possession; but not without such possession.

[29] The FTS's decision was thus materially influenced by taking into account a manifestly irrelevant consideration; accordingly the appeal is also allowed on ground of appeal 2.

Ground of Appeal 3

[30] Ground of appeal 3 is that the FTS erroneously concluded at paragraph 62 of its decision that the Respondents would be rendered homeless by granting an order for possession as this finding contradicted Mr Swan's evidence to the FTS (which was not recorded in its decision) that he intended to purchase the house from the Appellant.

[31] The Respondents accepted Mr Swan gave this evidence to the FTS, but submitted the FTS had been correct to record that an order for possession would render the Respondents homeless as Mr Swan did not confirm to the FTS that he actually had funds to purchase the house.

[32] The Appellant's Reply noted that although Mr Swan had stated only his intention to purchase the house to the FTS, the FTS had not further explored this statement with him to establish whether he could afford to do so. The Appellant therefore sought permission from the UTS to adduce evidence, not before the FTS, that Mr Swan had, in fact, approached the Appellant in October 2022 asking what price he would be willing to accept for the house.

[33] In my opinion, it is not necessary for the UTS to explore this factual question. The FTS was of the opinion the Respondents would be made homeless as a result of granting an order for possession. It referred at paragraph 62 of its decision to the "resulting outcome" of the Respondents' homelessness if an order for possession were granted. However, the supposed inevitability of this result was potentially contradicted by Mr Swan's evidence that he intended to purchase the house.

[34] The FTS therefore erred in law by not recording this apparent contradiction, seeking to explore it with Mr Swan, and explain its conclusion based on the totality of the evidence on this matter.

[35] The FTS thus erred in law in its approach to this matter. The appeal is accordingly allowed on ground of appeal 3.

Ground of Appeal 4

[36] Ground of appeal 4 is that the FTS erred at paragraph 53 of its decision by making a finding in fact that the Respondents were elderly. While Mr Swan is to be regarded as elderly because he is currently aged 80 (born 10 May 1943), the First Respondent is currently 57 years of age (born 4 April 1966) and is therefore not to be regarded as elderly.

[37] The Respondents submitted that any error in this regard by the FTS was immaterial to its decision and therefore was not an error of law on its part.

[38] The Appellant submitted in his Reply that the FTS's finding in fact that both Respondents were elderly was not based on the evidence and therefore amounted to an error of law on its part.

[39] In my opinion, the FTS erred in law in two respects: first, by making a finding in fact that the Respondents were "elderly", which finding was not supported by the evidence, and was contradictory of the evidence; secondly by erroneously referring to the respondents as an "elderly couple" in its discussion of the reasonableness of granting an order for possession at paragraph 62 of its decision. The appeal is therefore allowed on ground of appeal 4.

Ground of Appeal 5

[40] Ground of appeal 5 is that the FTS erred in law at paragraphs 58 and 61 of its decision by taking into consideration the Appellant's failure to demonstrate what practical measures he might have taken to allow the works to be carried out while the Respondents remained in occupation of the property.

[41] The Appellant's position is he had no obligation in this regard in terms of condition 6(b) in schedule 5 to the 1988 Act. The function of the FTS, in considering condition 6(b), was solely to ask itself whether the intended works could not reasonably be carried out without the Respondents giving up possession of the house.

[42] The Respondents submitted that, on the evidence before it, the FTS had been entitled to consider that the Appellant had not shown vacant possession was required in order for the Appellant reasonably to carry out the intended works.

[43] The Appellant, in his Reply, noted that the intended works would have left the property without a mains water supply or electrical supply and included the removal of asbestos from the flooring and walls throughout the property. The internal walls were to be removed and rebuilt, with around 40% of the external walls.

[44] The extent of the works therefore meant that the various alternatives to eviction set out in condition 6(b) would not be applicable in the circumstances. Moreover, the FTS at paragraph 61 of its decision had itself opined that it was "perhaps unlikely" that the Respondents could have remained in the property throughout the duration of the works.

[45] In my opinion, the FTS erred in law in three respects: first, it erred in applying the law by imposing an obligation on the Appellant to consider how the works might be carried out without the Respondents giving up vacant possession when no such obligation appears in condition 6(b) of schedule 5 to the 1988 Act; secondly, by reaching a conclusion not warranted by the evidence; and, thirdly, by arriving at a decision no reasonable tribunal could properly reach.

[46] On the second and third of these points, if it was unlikely on the evidence that the works could not be carried out without vacant possession, then the FTS ought to have concluded on the balance of probabilities that *in fact* the works could not reasonably have been carried out without the Respondents giving up possession of the house. The FTS's use of the qualification "perhaps" in respect of the word "unlikely" demonstrates its unwillingness to make a direct finding in fact on this matter.

[47] By electing not to make a finding in fact consistent with the evidence on this point, the FTS therefore arrived at a decision no reasonable tribunal could properly reach.

[48] For these reasons, I accordingly allow the appeal on ground of appeal 5.

Ground of Appeal 6

[49] Ground of appeal 6 is that the FTS erred in law at paragraph 59 of its decision by including in its assessment of whether the Appellant intended to carry out the works its observation that the intended works went "far beyond" what "might be necessary" to satisfy a Repairing Standard Enforcement Order ("RSEO") in respect of the property.

[50] The Respondents submitted that this consideration was in fact relevant to the FTS's assessment of whether the Appellant intended to carry out the works.

[51] The Appellant submitted, in Reply, that this issue had no relevance to the question whether the Appellant intended to carry out the works for the purposes of ground of possession 6.

[52] In my opinion, the FTS also erred in law on this point for two reasons.

[53] First, the only relevant issues for consideration in respect of ground of possession 6 in this case were: (1) whether the Appellant intended to carry out substantial works to the house; (2) whether those works could not reasonably be carried out without the Respondents giving up possession of the house; and (3) that none of the various alternatives to eviction referred to in condition 6(b) applied to the case. Ground of possession 6 does not import any condition on a landlord to limit the works to those that would secure compliance with a RSEO.

[54] Secondly, the existence of a RSEO is not a bar to the FTS granting an order for possession under section 18(1) of the 1988 Act (*Charlton v Josephine Marshall Trust* 2020 S.C. 297).

[55] Accordingly, for these reasons, the FTS's reference to the works in this case going "far beyond" what "might be necessary" to satisfy the RSEO was a manifestly irrelevant consideration in assessing whether the Appellant intended to carry out the works.

[56] I therefore allow the appeal on ground of appeal 6.

Ground of Appeal 7

[57] There are three distinct aspects to ground of appeal 7.

First Aspect

[58] The first aspect of ground of appeal 7 is that the FTS erred in law in its assessment of the reasonableness of granting an order for possession by taking into account its belief that the Appellant was using the proposed works as a means of regaining the property for his family. It referred at paragraph 59 of its decision to the Appellant wanting to regain possession of the house so he could "provide a benefit for his stepson"; and that it "seemed" to the FTS that the Appellant was "seeking to use the proposed [works] as a means of obtaining possession in order to secure his primary aim which is to regain the property for his family".

[59] The Respondents submitted that the FTS correctly took this factor into account in its assessment of the reasonableness of granting an order for possession.

[60] The Appellant, in Reply, submitted that this conclusion of the FTS ignored the totality of the evidence as to the Appellant's intention to carry out the works and the FTS had consequently failed to explain why it had found the Appellant's evidence as to his intention to carry out the works as being incredible.

[61] I agree with the Appellant that the FTS failed adequately to explain its belief that the Appellant was not actually intending to carry out the works. The inference to be drawn from its conclusion was that the Appellant's application to the FTS for a possession order was a dishonest attempt to regain possession of the house. It behoves a fact finder in those circumstances clearly to set out in its decision its reasons for arriving at such a conclusion. In this connection, the FTS did not adequately explain why it found the appellant's oral evidence about his intention to carry out the works to incredible, particularly when he had lodged documentary evidence bolstering the *bona fide* of his wish to renovate the property (Stalker, *Evictions in Scotland*, 2nd edition, page 277), and particularly when there was nothing suspect, in itself, about an owner of property wishing to exercise his right to dispose of that property at a future date in a *bona fide* manner.

[62] The FTS therefore had regard to a manifestly irrelevant consideration by taking this conclusion into account in its assessment of the reasonableness of granting the order for possession; the appeal is accordingly allowed on the first aspect of ground of appeal 7.

Second Aspect

[63] The second aspect of ground of appeal 7 refers to two competing factors identified by the FTS when carrying out its "balancing exercise" in relation to the reasonableness of the FTS granting an order for possession. At paragraph 62 of its decision, the FTS stated that it did not consider it should give more weight to the Appellant's "desire to assist his stepson" than to the interests of the Respondents in avoiding homelessness and remaining in the house they had already occupied for seven years.

[64] The Appellant submitted that the FTS had thereby disregarded the legal test in connection with the reasonableness of granting an order for possession as the scope of the FTS's discretion in this matter did not extend to matters remote from the application of the law; accordingly, the FTS had had regard to a manifestly irrelevant consideration when it took into account the Appellant's desire to assist his stepson in exercising its discretion in relation to the reasonableness of granting an order for possession.

[65] The Respondents submitted that the Appellant's wish to benefit his stepson was a very relevant and proper consideration to have been taken into consideration by the FTS in exercising its decision on reasonableness.

[66] The Appellant, in Reply, submitted that as he had not stated in his evidence that he sought to recover the house in order to transfer it to his stepson, then the FTS ought not to have taken this matter into account in exercising its discretion in relation to the reasonableness of granting an order for possession.

[67] In my opinion, as discussed in relation to the first aspect of ground of appeal 7, the FTS had not been entitled to conclude for the reasons that it did in its decision that the Appellant intended to transfer the property to his stepson on obtaining an order for possession. I therefore agree with the Appellant that the FTS was not entitled to take this factor into account in determining the reasonableness of granting an order for possession. I accordingly allow the appeal on the second aspect of ground of appeal 7.

Third Aspect

[68] The third aspect of ground of appeal 7 also relates to the balancing exercise carried out by the FTS in its assessment of the reasonableness of granting an order for possession.

[69] The Appellant's position in this regard was developed in his Reply. It is that the FTS failed to refer to and take into account other relevant considerations in the case in the exercise of this discretion, such as the substantial rent arrears accrued by the Respondents, which were currently in excess of £13,000, with no rental payment having been made by the Respondents since 2019.

[70] This submission is not specifically referred to in the Appellant's Application for Permission to Appeal. It is more fully developed in the Appellant's Reply. It is not discussed in the Respondents' Response to the appeal. The UTS has not formally granted the Appellant permission to advance this submission in accordance with rule 18(1) (a) of the Upper Tribunal for Scotland Rules of Procedure 2016. However, the point is simply an extension of the Appellant's criticisms of the manner in which the FTS went about considering the balancing exercise in connection with being satisfied whether it was reasonable for it to grant an order for possession. The point is an obvious and instantly verifiable one. No prejudice can accrue to the Respondents in the UTS considering this additional aspect of ground of appeal 7.

[71] In my opinion, by not discussing the amount of rent arrears and any possible reasons therefor at paragraph 62 of its decision, and other potentially relevant factors, the FTS plainly did not establish, consider and properly weigh the "whole of the circumstances in which the application is made" (*Barclay v Hannah* 1947 S.C. 245 at 249 per Lord Moncrieff) when deciding whether it was reasonable to grant an order for possession.

[72] The FTS did refer to the Respondents withholding rent at paragraph 59 of its decision and found in fact at paragraph of its 41 decision they were withholding rent until the Appellant fulfilled his obligations in terms of the RSEO.

[73] However, the FTS did not discuss at paragraph 62 of its decision the relevance of these findings to the reasonableness of making, or not making, an order for possession; nor did it consider whether the withholding of rent was a relevant factor in light of the decision of the Inner House of the Court of Session in *Charlton v Josephine Marshall Trust* 2020 S.C. 297, which allows the FTS to grant an order for possession under section 18(1) of the Housing (Scotland) Act 1988 notwithstanding the existence of a RSEO.

[74] I am therefore satisfied that the FTS did not comply with its duty to establish, consider and properly weigh the "whole of the circumstances in which the application is made" (*Barclay v Hannah* 1947 S.C. 245 at 249 per Lord Moncrieff) when deciding whether it was reasonable to grant an order for possession; I accordingly allow the appeal on the third aspect of ground of appeal 7.

General Observations

[75] Although the FTS was aware of the appropriate questions for its consideration in this case (see paragraph 56 of its decision), I am of the opinion it did not adequately answer those questions for the reasons set out in this decision.

[76] The first question was whether the Appellant intended to carry out the works. The Appellant gave evidence to the FTS that he intended to carry out the works, supported by documentary evidence that he had applied for planning permission and a building warrant at significant cost to himself.

[77] He explained his intention to the FTS to transfer ownership of the house to his stepson at a later stage. His evidence about the funding of the works may or may not have been properly understood by the FTS. This will need to be clarified by the UTS or the FTS when it further considers this case.

[78] The second question was whether the works could not reasonably be carried out without the Respondents giving up possession of the house. The FTS thought this was unlikely, which on the balance of probabilities, suggests the FTS ought to have answered this question in the affirmative. Despite this, the FTS imposed an obligation on the Appellant, which is not permitted by the 1988 Act, to demonstrate whether he could have taken practical measures to renovate the property while allowing the Respondents to remain in occupation. This approach was contradictory and one that no reasonable tribunal should have adopted.

[79] Allied to this second question was whether any of the alternatives to eviction set out in condition 6(b) applied. The Respondents do not suggest these alternatives would be feasible in the circumstances of this case; but any future decision by the UTS or FTS will require to address and make findings in fact in respect of this matter.

[80] The third question was the reasonableness of granting the order for possession. In this connection, the FTS did not in this case establish, weigh and consider all relevant factors bearing on the exercise of that discretion. The Appellant's ultimate desire to transfer the property to his stepson after the Appellant carried out the works (if that be the factual position) is a legitimate exercise of the Appellant's right to dispose of his property as he sees fit.

[81] Rent arrears in this case are very substantial. That may well be a relevant factor to take into account in assessing the reasonableness of granting an order for possession.

[82] The reasons for the Respondents withholding rent to compel the Appellant's compliance with the RSEO, if that is an accurate and relevant consideration for the UTS or FTS, might also require to be taken into account in assessing the reasonableness of granting an order for possession.

[83] The ages of the Respondents, and the state of their health, may be relevant considerations in assessing the reasonableness of granting an order for possession, but more specific findings about their health problems will be required for the UTS or FTS to decide what weight to attach to these considerations in assessing the reasonableness of granting an order for possession.

Specific Observations on the Appellant's Intention to Carry out Substantial Works

[84] Miss Dalgleish on behalf of the Appellant posed the following question for the UTS in her Reply to the Respondent's Response to the Appellant's Notice of Appeal to the UTS.

[85] That question was whether the Appellant's intention ultimately to transfer ownership of the house to his stepson was a relevant question at all for consideration by the UTS or FTS in determining whether the Appellant intended to carry out the works. The answer to this question falls to be resolved in accordance with the decision of the Supreme Court in *S Franses Ltd v Cavendish Hotel (London) Ltd* [2019] A.C. 249 on the meaning of the phrase "the landlord intends" to carry out proposed reconstruction work. The approach in that case to the statutory interpretation of the phrase "the landlord intends" has been applied to ground of possession 6 in schedule 5 to the 1988 Act by the Court of Session in *Charlton v Josephine Marshall Trust* 2020 S.C. 297.

[86] The test is whether the landlord has a "firm and settled intention to carry out the works", the landlord's purpose or motive in this respect being irrelevant, save as material for testing whether such a firm and settled intention exists (paragraph 16, per Lord Sumption). Thus a landlord who has either no intention to carry out the works on obtaining vacant possession, or has the intention immediately to transfer the property to a third party on obtaining vacant possession without himself carrying out the works cannot be said to meet the test of having a firm and settled intention to carry out the works.

[87] The FTS did not refer to this test as set out in *S Franses Ltd v Cavendish Hotel (London) Ltd* in its decision. It would, however, have been correct to conclude that the Appellant did not have a firm and settled intention to carry out the works if the Appellant either would not carry out the works or would transfer the property to his stepson on obtaining vacant possession. However, I have found for the foregoing reasons that the FTS erred in law in the manner in which it reached those conclusions. Its decision will therefore be quashed for those reasons.

Further Procedure

[88] Miss Dalgleish invited the UTS to remake the decision in accordance with the UTS's power to do so under section 47(2) (a) of the Tribunals (Scotland) 2014 Act.

[89] Mr Bryce submitted that the case should be remitted to the FTS for its reconsideration under section 47(2) (b) of the Tribunals (Scotland) Act 2014. However, if the UTS were to remake the decision, then fresh evidence would be required to be heard by the UTS to allow it to do so. He invited me, in that event, to hold a case management hearing in advance of any evidential hearing in terms of rule 7(3) (g) of the Upper Tribunal for Scotland Rules of Procedure 2016.

[90] In considering this matter, I observe that an appellate tribunal will normally remit a case to the first instance tribunal where crucial aspects of the case require to be determined *de novo* on the evidence. However, the UTS does have power to rehear an application on allowing an appeal. This follows from the fact that the UTS has the same powers as the FTS when re-making a decision (section of 47(3)(a) of the Tribunals (Scotland) Act 2014) and, that to this end, the UTS has power to hear fresh evidence (rule 18(1)(a) of the Upper Tribunal for Scotland Rules of Procedure 2016) and to make appropriate findings in fact (section 47(3)(b) of the Tribunals (Scotland) 2014 Act)).

[91] Nevertheless, the UTS may only adopt this course of action in restricted circumstances. In particular, rule 18(4) (b) of the Upper Tribunal for Scotland Rules of Procedure 2016 provides that the UTS may only consider fresh evidence *inter alia* where the "interests of justice justify the evidence being led". The Appellant will therefore require to persuade me that it is in the interests of justice for the UTS to hear fresh evidence in this case.

[92] I shall therefore reserve my decision in respect of further procedure in the appeal for additional written submissions from parties' solicitors on this point. I have issued an accompanying Order to give effect to this requirement.

Further Appeal

[93] A party aggrieved by this decision may seek permission from the UTS to appeal to the Court of Session on a point of law.

[94] An application for such permission must be made to the UTS within 30 days of the date on which this decision was sent to a party.

[95] Any such application 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) in terms of section 50(4) of the Tribunals (Scotland) Act 2014, state the important point of principle or practice that would be raised in the further appeal or any other compelling reason there is for allowing a further appeal to proceed.

Sheriff George Jamieson

Sheriff of North Strathclyde

Judge of the Upper Tribunal for Scotland