Upper Tribunal for Scotland

2023UT38
UTS/AP/23/0018

DECISION OF

SHERIFF SG COLLINS KC

ON APPEAL FROM A DECISION OF THE FIRST TIER TRIBUNAL, HOUSING AND PROPERTY CHAMBER

IN THE CASE OF

Miss Caroline Manson, Mr David Downie, 9 Hillview Place, Dollar, Clackmannanshire, FK14 7JG
per Shelter Housing Law Service,
4th Floor, Scotiabank House, 6 South Charlotte Street, Edinburgh, EH2 4AW

Appellants

- and -

Mrs Virginie Turner, Mr Iain Turner, Apartment 9b, Sriratana Mansion 1, Sukhumvit Road, Bangkok, 10110, Thailand; 7 Rosemarkie Place, Inverkip, Greenock, PA16 0HR
per Bannatyne Kirkwood France & Co,
16 Royal Exchange Square, Glasgow, G1 3AG

Respondents

FTS Case reference: FTS/HPC/EV/22/2915

25 October 2023

Decision

1. The Upper Tribunal allows the appeal, quashes the decision of the First-tier Tribunal for Scotland dated 14 March 2023, and remits to a freshly constituted panel to consider the application of new.

Introduction

2. The parties entered into a private residential tenancy in respect of the property at 9 Hillview Place, Dollar, Clackmannanshire, FK14 9JG ("the property"). The tenancy commenced on 19 March 2020 and the rent was £895 per month. A notice to leave was served on the appellants on 24 January 2022. They did not leave, and an application was made to the First-tier Tribunal for Scotland ("FTS") on 16 August 2022. On 14 March 2023 the FTS granted an order for the eviction of the appellants from the property, with enforcement of the order postponed until 14 July 2023. In their Notice of Appeal to the Upper Tribunal the appellants submitted that the FTS erred in law in deciding that it was reasonable to grant the order in that it (i) failed to provide proper reasons, (ii) failed to make sufficient and adequate findings in fact; (iii) took into account irrelevant considerations, (iv) failed to have regard to relevant considerations, and (v) failed to properly assess and balance the interests of the appellants and the respondents bearing on whether it was reasonable to issue the eviction order.

3. The FTS refused permission to appeal by decision of 4 May 2023. The Upper Tribunal granted permission to appeal on all grounds by decision of 12 June 2023. A Response to the Notice of Appeal was lodged on 13 July 2023. Note of Arguments were lodged on 13 and 15 August 2023. An oral hearing was held on 16 August 2023. Mr Anderson, advocate, appeared for the appellants. Mr Tosh, advocate, appeared for the respondents. I am grateful to them both for their written and oral submissions.

Preliminary issues

Construction of the legislation – "on account of those facts"

4. In terms of section 51(1) of the Private Housing (Tenancies) Scotland Act 2016 ("the 2016 Act") the FTS is to issue an eviction order against the tenant of a private residential tenancy if, on application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies. Ground 1 of schedule 3 is relied on in the present case. This provides that:

> "(1) It is an eviction ground that the landlord intends to sell the let property.
>
> (2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if the landlord—

(a) is entitled to sell the let property,

(b) intends to sell it for market value, or at least put it up for sale, within 3 months of the tenant ceasing to occupy it, and

(c) the Tribunal is satisfied that it is reasonable to issue an eviction order on account of those facts."

"May" in sub paragraph 2 of ground 1 is not used in a permissive sense. It means 'may only'. That is apparent from section 51(2), which provides that:

> "The provisions of schedule 3 stating the circumstances in which the Tribunal may find that an eviction ground applies are exhaustive of the circumstances in which the Tribunal is entitled to find that the ground in question applies."

Thus the FTS is only empowered to issue an eviction order pursuant to ground 1 if satisfied that the facts in sub paragraphs 2(a) and (b) are established and that it is reasonable to do so on account of those facts per sub paragraph 2(c).

5. Sub paragraph 2(c) of ground 1 was inserted by paragraph 1(3)(a) of schedule 1 to the Coronavirus (Scotland) Act 2000 ("the 2000 Act"), which also substituted "may" for "must" in both section 51(2) and sub paragraph (2) of ground 1. These amendments were given effect in relation to notices to leave issued after 7 April 2020. Although they may initially have been intended to be temporary in the face of the pandemic, these amendments have now been maintained by section 43(3)(a)(i) of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 ("the 2022 Act"). As originally enacted, therefore, ground 1 was mandatory. If the landlord established that they were entitled to sell the let property, and intended to sell it, the FTS was required to issue an eviction order. But in relation to the notice to leave issued in the present case, the amendments in the 2020 and 2022 Acts have the effect of introducing an element of discretion into ground 1. A preliminary issue arose as to the proper meaning and scope of that discretion.

6. The respondents submitted that the final words of sub paragraph (3) of ground 1 ("on account of those facts") are unique to the 2016 Act. Preceding statutes relating to private lettings had over many years merely directed the decision maker to decide "whether it was reasonable to make the order". This formulation had been repeatedly held to require that all relevant circumstances be taken into account, which included the personal circumstances of the tenants: for example, *Boyle v Ford* 2023 Hous LR 21 at paragraphs 60 - 65. By contrast, a requirement to assess whether it is reasonable to issue an eviction order

on account of certain specified facts, it was submitted, called for a far narrower inquiry. The question in the present case was simply whether the landlords' intention to sell was reasonable. It was submitted that there was no tenable alternative construction. By using the words "on account of those facts" Parliament had deliberately innovated on a historic formulation, and these new words must be given content: *CAB Housing Ltd v Secretary of State for Levelling Up* [2022] EWHC 208 (Admin) at paragraph 67. A landlord's intention to sell might not be reasonable in some circumstances, for example, if they were found to be acting out of spite, or in a discriminatory manner, so the reasonableness requirement in ground 1 was not emptied of content by the construction advanced. But the tenants' personal circumstances, such as those put before the FTS by the appellants in the present case, were now irrelevant to assessment of reasonableness. It followed that the FTS had erred in law by having regard to the tenants' circumstances at all. However this error was immaterial. Properly directing itself to the terms of ground 1, on the respondents' construction, the FTS would have been bound to grant an eviction order. Any alleged errors in its fact finding or reasoning as regards the tenants' circumstances were therefore irrelevant. The appeal should be refused on this basis alone.

7. I reject this submission. As the appellants submitted, is implicit in assessing whether taking a particular decision is reasonable that all available facts relevant to that decision are considered and weighed in the balance, for and against. In principle that does not change simply because the question is formulated as being whether it is reasonable to take a decision on account of certain specified facts. If there are other relevant facts put before the decision maker, additional to the specified facts, they may place the specified facts in context, and so assist in deciding whether it is reasonable to take the decision on account of them. Therefore formulating the question in this way does not of itself preclude the decision maker from having regard to other relevant facts. The respondents' construction involves reading sub paragraph 2(c) as if words such as "and no others", or "only", had been added at the end. I am not prepared to imply such words in the absence of express provision. I consider that insofar as the words "on account of those facts" have content, they simply make clear, for the avoidance of doubt, that establishing the facts in sub paragraphs 2(a) and (b) is sufficient to make it *prima facie* reasonable to evict. It is then for the tenant to put circumstances before the FTS to show otherwise: cf. *City of Glasgow District Council v Erhaiganoma* 1993 SCLR 592 at 594. This may include, in particular, their personal circumstances, the reasons why the ground for eviction has come to exist, the length and conduct of the tenancy generally, and any hardship to the tenant if eviction were to be granted. But in any event, just because the landlord's wish for possession is reasonable, this does not mean that it will be reasonable to grant it: *Shrimpton v Rabbits* 1924 TLR 541.

Materiality and exceptionality

8. As a fall back argument, the respondents submitted that the words "on account of those facts" called for particular weight to be given to the facts in sub paragraphs 2(a) and (b) in assessing reasonableness. Associated with this was a further submission that even if the FTS did err in law in its fact finding or reasoning in the present case, any error was immaterial, because only in exceptional circumstances could the FTS properly refuse (rather than postpone) an eviction order sought under ground 1. This was merely to recognise that it will be rare to find circumstances where it would be reasonable to refuse an eviction order to landlords who intend to sell their property, rather than merely postponing or delaying such an order from having effect. That would stymie indefinitely their ability to exercise their rights as owners of the let property. Ultimately the submission came to be that no reasonable tribunal could have refused to order eviction in circumstances such as those apparent in the present case, and that the only real question was whether the order should have been postponed, and if so for how long.

9. Again, I reject the respondents' submission. As noted, the words "on account of those facts" make clear that the FTS is entitled to find that it is reasonable to issue an eviction order simply on the basis that it is established that the landlord is entitled and intending to sell the property. That might arise where the tenant does not seek to put any other evidence relevant to reasonableness before the FTS, or such evidence as is put forward is rejected. But it does not accord particular weight to the facts in sub paragraphs 2(a) and 2(b) beyond this. The question of whether it is reasonable or not to issue an eviction order is always a matter for the judgment of the FTS in the circumstances of the particular case, attaching such weight as it considers appropriate to the evidence before it. This may include evidence from the landlord bearing on reasonableness - that is, additional to evidence of the facts in sub paragraphs 2(a) and (b) – as well as from the tenant. But there is no presumption, as a matter of law, in favour of giving primacy to the property rights of the landlord over the occupancy rights of the tenant, or vice versa. Accordingly I do not accept that in the circumstances of a case such as the present no reasonable FTS could refuse to issue an eviction order. The introduction of the reasonableness requirement into ground 1 gives a measure of security of tenure for tenants. The grant of an application for an eviction order is no longer automatic, in fact or law. If owners of property do not want to let on this basis, then they do not need to do so.

10. Similarly, there is no presumption in favour of granting an eviction order in a ground 1 case but postponing its having effect, rather than refusing it and leaving it open to the landlord to make a renewed application in the future. The former course might arise by fixing a later day on which the order brings the tenancy to an end (2016 Act, section 51(4)),

or ordering a delay in executing it (First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 SSI 2017/328, reg. 16A(d)). The decision to do so, and the period of any postponement, are a matter of discretion for the FTS. The latter course would be subject to the statutory time periods as regards notices to leave (2016 Act, section 54(2)(b)), and the need to satisfy the FTS that there had been a significant change in any material considerations since the previous application was determined (2017 Regulations, reg. 8(1)(e)). But sub paragraph 2(c) of ground 1 is expressed in the present tense, and accordingly the FTS must consider the circumstances as they exist at the time when it makes its decision. Accordingly it will only be if it is satisfied at that time that it is reasonable to issue an eviction order that the FTS will go on to consider whether it should postpone the order. But that is not to say that the possibility of postponing the order could not itself be taken into account in assessing whether it is presently reasonable to grant it.

11. This distinction can be illustrated in the context of whether alternative accommodation is available for the tenant if evicted. In principle this is a matter which can be relevant to whether it is reasonable to issue an eviction order, but also to whether an eviction order which the FTS has decided to issue should be postponed. For example, the FTS might positively find, in a particular case, that the tenant will have alternative accommodation available to them in 6 months time. The FTS could therefore conclude that it was reasonable to grant an eviction order, but if and only if it was postponed for 6 months. Alternatively, the FTS might be unable to make a positive finding about alternative accommodation becoming available, but might nevertheless be satisfied, on the basis of its other findings, that it was reasonable to issue an eviction order. It would therefore grant the order, but could still, in the exercise of its discretion, postpone it so as to give the tenant an opportunity to find alternative accommodation.

12. Other situations can also be envisaged. If the FTS found that no alternative accommodation was available for the tenant, and considered that this was the decisive factor in relation to reasonableness in the case, it would refuse the application. But if the evidence indicated a possibility that alternative accommodation might become available for the tenant at some point in the future (that is, without sufficient probability to enable the FTS to make a positive finding about this), it would at least be open to the FTS to adjourn until a later date (per regulation 28(1), (4)) and reconsider the position then. But two critical points arise from all these examples and possibilities. First, the FTS must be clear whether postponement of an order is a matter going to the reasonableness of granting it, or a matter consequential to an order which it has already decided that it is reasonable to grant. Second, whether and if so for what reason the FTS decides to postpone an order will depend on the evidence in the particular case and what the FTS makes of it, so clear and careful fact finding is required.

Deference to specialist tribunals

13. The respondents submitted that appeals from a specialised tribunal like the FTS should be approached with an appropriate degree of caution save where it has clearly misdirected itself in law. This was because in understanding and applying the law in its specialised field the specialised tribunal will probably have got it right. Reference was made to *Devine v Bailo* [2022] UT 02, at paragraph 12, where the Upper Tribunal judge quoted with approval familiar dicta from Baroness Hale of Richmond in *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279 at paragraph 16, and *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678 at paragraph 30. These were said to be supportive of the proposition that the FTS is a specialised tribunal and its decision therefore requires to be respected and deferred to, save where it has clearly misdirected itself in law.

14. I reject these submissions. I do not consider that the dicta in *Cooke* and *AH* are applicable in appeals or applications for permission to appeal to the Upper Tribunal in cases such as the present. Fundamentally this is because Baroness Hale was addressing the question of enhanced deference in relation to applications for permission to make a second appeal from a specialist tribunal to the ordinary – non specialist - civil courts. She was not addressing the situation where the Upper Tribunal is considering whether to grant permission to appeal from a first tier tribunal, or determining that appeal, within the same specialist chamber. The principal reason for that is simply that the Upper Tribunal is as much a specialised tribunal in the relevant area as the FTS, so greater deference to its judgment is neither necessary nor appropriate in this context: see *AP (Trinidad & Tobago) v Secretary of State for the Home Department* [2011] EWCA Civ 551 at paragraphs 45 to 46, 50.

15. There is therefore no good basis for the Upper Tribunal in the present case to give enhanced deference to the judgment of the FTS, nor to exercise anything beyond the normal degree of caution which an appellate court should have in setting aside the decision of the court below. There is no good reason to approach this appeal on the basis that the FTS will 'probably have got it right.' I reject the respondents' submissions to the contrary and, with respect, I am unable to agree with the approach in *Devine v Bailo* insofar as it suggests otherwise.

Supplementary reasons

16. The FTS issued a written statement of reasons for its decision dated 14 March 2023 ("the written statement"). Permission to appeal was sought by the appellants on the basis that these reasons were inadequate in various respects. The FTS refused permission to appeal by decision of 4 May 2023. In doing so it supplemented and expanded on the reasons for its decision of 14 March 2023 ("the supplementary statement"). The respondents submitted that the reasons given must be considered as a whole. Accordingly, although the reasons given in the written statement were adequate in themselves, if that were not accepted, their adequacy was in any event clear in the light of the further reasons provided in the supplementary statement. Reference was made to the practice of the English civil courts as explained in *A (Children) (Judgment: Adequacy of Reasoning)* [2012] 1 WLR 595 at paragraphs 13 – 22. In reply, the appellants submitted that this approach was impermissible and that the FTS' reasoning had to be considered by reference to what was said in the written statement itself, and not what was said in the supplementary statement in response to the permission to appeal application. The FTS had admitted its errors but then reverse engineered answers to the challenge to its original decision. A losing party should not have to appeal to find out why they lost. To hold otherwise would be to condone inadequate decision making in this area.

17. I am not aware of any authority from the Scottish tribunals bearing on this issue, and none was cited to me. Nor was I referred to the approach of the UK Upper Tribunal under the Tribunals, Courts and Enforcement Act 2007. However the approach of that tribunal is helpfully set out by Judge Jacobs in *Tribunal Practice and Procedure* (5th Edition, 2019), at paragraph 4.518 on. From this it is apparent that in principle a first-tier tribunal's reasons may be supplemented in a decision given in response to an application for permission to appeal. Indeed this may avoid the need for the appeal. But the power to produce such supplementary reasons must be exercised appropriately. The first-tier tribunal may elucidate the reasons already given, or deal with matters that have been omitted, but it must not rewrite its decision. Supplementary reasons will be treated with scepticism if they change the reasons that have been given. Supplementary reasons must be the real reasons which gave rise to the decision, and not a later rationalisation, or an attempt to deal with issues which the tribunal did not in fact consider: cf. *Barke v SEETEC Business Technology Centre Ltd* [2005] EWCA Civ 578 at paragraph 19. In other words, even accepting that in principle a tribunal can supplement its reasons in response to an application for permission to appeal, there are recognised dangers in doing so.

18. I see no good reason why the same approach should not be taken by the Scottish tribunals. Accordingly if the Upper Tribunal considers that there is a real risk that supplementary reasons provided by the FTS in response to an application for permission to appeal are not the real reasons for the decision, but reasons constructed or reconstructed in the light of

the application, then it should disregard them. Otherwise they can be taken into account in assessing whether the reasons of the FTS, considered as a whole, are adequate and comprehensible.

The grounds of appeal

Ground of appeal 1 – failure to give adequate and comprehensible reasons

19. The appellants submitted that the FTS had failed to provide adequate and comprehensible reasons for its decision that it was reasonable to issue an eviction order. The FTS stated that it had weighed the competing factors, but did not say what these were. It did not explain why the respondents' interests were preferred over those of the appellants. In reply the respondents accepted that the FTS had a duty to provide reasons and that a failure to do so would be an error of law. However they submitted that in the circumstances, adequate reasons had been given. The FTS did not need to engage in an elaborate and detailed evaluation of every point arising, but rather had to identify the material considerations, clearly and concisely, and to set out the essence of its reasoning. Adequacy had to be assessed by reference to the nature and context of the decision, recognising that it was addressed to persons who were familiar with the background and issues. The reasons given should be considered as a whole, including what was written in the supplementary statement. In the present case the FTS weighed the competing factors and an informed reader would be left in no real or substantial doubt as to why it considered it reasonable to issue an eviction order.

20. There is no doubt, and was no dispute, that the FTS was under a duty to provide reasons for its decision. These reasons had to be adequate and comprehensible. They had to deal with the substantial issues in an intelligible way. They had to leave the informed reader, and the appeal tribunal, in no real and substantial doubt as to what the reasons for the decision were, and what material considerations were taken into account in reaching it: *Wordie Property Company Ltd. v Secretary of State for Scotland* 1984 SLT 345 at 348. In the present context this meant that the FTS needed to explain why it decided that it was reasonable to issue an eviction order. This decision required the exercise of judicial discretion in the light of an assessment of the combined effect of a number of competing factors. The FTS was therefore required not only to identify the factors which it had taken into account, but also to explain why it had given more weight to those factors supporting the conclusion which it reached, relative to those which pointed the other way. Such an explanation did not need to be lengthy or elaborate. But a failure to undertake this

exercise, or for it to be impossible to discern from what was written that it had been undertaken, would be to fail to provide adequate reasons: cf. *Cunliffe v Fielden* [2006] Ch 361 at paragraph 23. The parties are entitled to know why they won, or why they lost. Merely to list the competing factors, and to then state a conclusion, is unlikely to be adequate for this purpose.

21. The appellants' position, based on their evidence as narrated by the FTS, and taken at its height, was that if the eviction order was issued they would be made homeless. They were unemployed, and had neither savings nor income sufficient to buy another home. They had made extensive efforts to find alternative rented accommodation over a long period of time, both locally and further afield, but without success. They would be unable to find alternative rented accommodation in the foreseeable future. This was because demand was very high, and also because some landlords were reluctant to let to tenants, such as them, who were in receipt of social security benefits and/or owned dogs. The second appellant was involved in ongoing litigation, which he hoped would settle in his favour within a few months. If it did, which was uncertain, this would improve the appellants' financial situation, and their ability to purchase alternative accommodation. But the second appellant suffered from bi-polar mental disorder. His mental health had already deteriorated due to the stress of the application for eviction, with rapid mood changes, disrupted sleep pattern, and depression. Reports were produced from his GP and clinical psychologist in this regard. If the appellants were evicted the second appellant's mental disorder would be further exacerbated, perhaps to the point of hospitalisation. This would have a significant adverse impact on the appellants' daughter. She was settled at a local school. It was in her best interests to remain at that school. Were the order for eviction granted and the appellants made homeless she would be unable to do so.

22. The respondents' position, on the other hand, was that they had owned the property for many years, and that sale of it was integral to their long standing plans to relocate. They had been living in rented accommodation in Thailand. They now intended to move to live and work in Switzerland and continue to live in rented accommodation there. They wanted the eviction order so as to be able to sell the property and buy a house in France. The respondents did not intend to live in this house as their main residence for several years, but it would be used by them from time to time and would be a place which their adult children could call home and visit for holidays. The first respondent is French. She wanted to own a property close to her widowed father so as to have greater contact with him. The respondents already owned three rental properties in France, but these were part of the second respondent's pension plan and not of sufficient value to finance the proposed house purchase. Meantime, it was accepted that the appellants had paid and were continuing to pay the rent on the property in full. They were content for the respondents to carry out work on it in order to prepare it for a possible future sale. That

the respondents were not able to control the process of recovering possession of the property was causing them inconvenience and stress. But if the order for eviction were refused and they were unable to sell the property they might alternatively rent a larger house in Switzerland than that which they originally intended.

23. Given this evidence there was at least a real question as to why it was reasonable to issue an eviction order, and in particular why it was reasonable to issue such an order at the present time - that is, at the time when the FTS made its decision. It was suggested by the respondents that some form of concession in this regard was made by the appellants' lay representative at the hearing, but nothing to this effect is either recorded or accepted by the FTS in noting the appellants' submissions in paragraph 37 of the written statement. The first appellant's evidence was that eviction would be, in all the circumstances, "catastrophic" for them. The respondents' evidence was that a refusal to grant the order would give rise to inconvenience and frustration on their part, rather than insurmountable difficulty or financial hardship. Accordingly there were clearly competing factors, and it was not obvious why, even assuming that the respondents had acted reasonably in seeking possession of the property, it was also objectively reasonable in all the circumstances to issue an eviction order.

24. Against that background, in paragraphs 52 to 56 of the written statement, the FTS mentions a number of factors bearing on reasonableness. Some of these pointed towards it being reasonable to issue an eviction order (the first respondent's desire to live closer to her father in France, the respondents' wish to provide a place for their children to call the family home and to visit for holidays). Other factors pointed the other way (the apparent lack of urgency in granting the order, the second appellant's mental illness, the difficulty in finding alternative accommodation, the desirability that the appellants' daughter not have to move schools). But there is no evaluation of the relative weight which the FTS attached to these competing factors. It merely states (paragraph 57) that "having carefully weighed up all the competing factors [it] is satisfied that it is reasonable to grant the order sought." But this begs the question. *Why* did the FTS decide that greater weight should to be given to the respondents' interests than those of the appellants? This would not have required a long or elaborate explanation. But the matter is not obvious, given the conflicting evidence, and the question remains unanswered. For example, did the FTS consider the appellants' concerns in relation to the consequence of eviction as ill-founded or overstated? Did it regard the inconvenience and stress to the respondents from a refusal to grant the order as more acute than appears on the page? Did it simply give greater weight in the circumstances to the rights of ownership over the rights of tenancy? I do not know. But in the absence of any explanation the FTS' reasons in the written statement were inadequate, and amounted to an error of law.

25. In its supplementary statement the FTS conceded that it had erred in law in relation to this ground of appeal, but sought to supplement its reasons. It states that it had "concluded on balance that the disadvantage to the applicants/respondents of not granting the order was greater than that to the appellants in granting the order subject to a substantial delay in its implementation to give them more time to find alternative accommodation." This does not cure the FTS' failure to give adequate reasons in the written statement. It again merely begs the question as to why, given the various competing factors, the balance of disadvantage favoured the respondents. Merely rephrasing the question and restating the conclusion does not make the reasons for it any clearer. Given the nature and extent of the competing factors in issue more explanation was required. Additionally, the reference to the grant of the order being "subject to" postponement implies that this was a factor taken into account in deciding that it was reasonable to issue an eviction order. In principle, as noted above, this would not have been illegitimate. But this was not a reason which was given by the FTS in its written statement. There, it was only having made the decision that it was reasonable to evict that the FTS then went on to decide to postpone the date on which the order would have effect. It did not state, for example, that it had decided that it was presently reasonable to grant the order but if and only if it was postponed. Accordingly I am concerned that the FTS may in this respect have constructed or reconstructed its reasons in the light of the application for permission to appeal. For the reasons explained above I will therefore disregard the FTS' further explanation in the supplementary statement in relation to the appellant's first ground of appeal.

Ground of appeal 2 – failure to make proper findings in fact

26. The appellants submitted that the FTS failed to make adequate findings in fact. Although it provided a lengthy narration of the evidence there were only thirteen findings in fact. Only one of these makes any reference to the appellant's personal circumstances. In support of their contention that it was not reasonable to issue an eviction order the appellants gave evidence about a number of matters relative to their personal circumstances and the likely consequence of eviction for them. However the FTS made no findings in fact in relation to any of this evidence. If it rejected it, it neither said so nor explained why. In reply the respondents submitted that whether the FTS had made a finding in fact was to be assessed by reference to the whole of what had been written, and not just by looking only at the section headed "Findings in Fact". For example, it was apparent from parts of the section headed "Reasons" that the FTS had found in fact that the second appellant had "significant mental health issues". In any event detailed findings in fact were unnecessary, as there was little factual dispute, and there was nothing in the reasons to suggest that the FTS had rejected any of the evidence that was led before it. The

issue for it was to balance the competing factors disclosed by the evidence, and the FTS therefore did not require to make detailed findings in fact in addition to its detailed narration of the evidence.

27. There is no doubt and no dispute that the FTS was required to state clearly what facts it had found. This was part of its duty to give adequate and comprehensible reasons for its decision. Narration of the evidence, lengthy or otherwise, is not a substitute for findings in fact. A finding in fact is an expression of a conclusion, formed on the basis of evidence, not a narration of it: *Midlothian Council v PD* 2019 UT 52 at paragraphs 24 – 26. The FTS was not bound to accept a party's evidence as credible and reliable merely because it was not contradicted by evidence from the other party, and in the absence of proper findings in fact it cannot be assumed that it has done so. Findings in fact must be made even if, as in the present case, the ultimate issue for the FTS involved the exercise of a judicial discretion on competing facts, rather than conflicting evidence on the same facts. The FTS was obliged to make clear the factual basis on which its judicial discretion was being exercised, and accordingly to make sufficiently clear what evidence it had accepted or rejected on the issues relevant and material to reasonableness. The FTS was not obliged to set out formal findings in fact in the written statement under a discrete heading, but if it chose to do so, then the adequacy of its fact finding falls to be assessed by what is contained therein.

28. In the present case the FTS narrates at length the evidence of the respondents in paragraphs 9 to 23 of its statement of reasons. It then narrates at similar length the evidence of the appellants, at paragraphs 24 to 35. The respective submissions of both parties on the evidence are then summarised at paragraphs 36 to 37. There is then a heading, "Findings in Fact". Under this heading the FTS sets out thirteen numbered paragraphs. Three of the findings (paragraphs 38, 41 and 42) relate to uncontroversial issues, that is, the basic facts of the tenancy and the service of notices. One paragraph (paragraph 40) finds that the parties had tried to negotiate a sale of the property but that this did not proceed as the second appellant would only have funds to do so if an ongoing reparation claim against the NHS was successful. The other nine paragraphs relate to the personal circumstances of the respondents and the evidence given by them bearing on reasonableness, and in particular, their reasons for wanting to sell the property.

29. The FTS' findings in fact at paragraphs 38 to 50 are plainly inadequate. As noted, the FTS did not need to make formal findings in fact, providing that its fact finding was sufficiently clear from the written statement, considered as a whole. But, as is good practice, the FTS did choose to make formal findings in fact, and so the adequacy of its fact finding has to be judged by reference to them. It can be noted in the first place that there are no formal findings of the specific facts in sub paragraph 2(a) or 2(b) of ground 1. These facts may

not be controversial, and are not the subject of this appeal, but they are foundational to a ground 1 application and should have been clearly stated. But secondly, and more importantly for present purposes, there are no findings in fact relative to *any* of the evidence given by the appellants bearing on reasonableness. That is not adequate, given the nature and extent of the issues put in evidence by them, and that no reasons were provided for rejecting any of it.

30. The appellants, on the narrative set out by the FTS, were in effect asking it to find the following facts as proved, on balance of probabilities: (i) that if the eviction order was granted they would be made homeless; (ii) that they were unemployed, and had neither savings nor income sufficient to buy another home; (iii) that they had made extensive efforts to find alternative rented accommodation over a significant period of time, both locally and further afield, but without success; (iv) that they would be unable to find alternative rented accommodation in the foreseeable future, as demand was very high, and some landlords were reluctant to let to tenants such as themselves who were on benefits and/or owned dogs; (v) that the second appellant suffered from bi-polar mental disorder, which had already deteriorated due to the stress of the application for eviction, with rapid mood changes, disrupted sleep pattern, and depression; (vi) that if the appellants were evicted the second appellant's mental disorder would be further exacerbated, perhaps to the point of hospitalisation; (vii) that the appellants' daughter was settled at a local school and it was in her best interests to remain at that school, but that she would be unable to do so if the order for eviction was granted; and (viii) that deterioration of the second appellant's mental disorder would have a significant adverse impact on her own emotional well-being. The FTS was of course not obliged to make any or all of these findings – it was for it to assess the evidence and decide what it accepted or rejected. But if it had made such findings, it would then have had to explain why it was reasonable to issue an eviction order in the face of them. And if it was not going to make them, it required to explain why not, standing what the appellants had said in support of them, and that they were matters which were at least potentially relevant to the question of reasonableness. The FTS did neither, and its failures amount in the circumstances to an error of law.

31. As the respondents submitted, however, the FTS do touch on the appellants' evidence in paragraphs 53 and 54 of its written statement, under the heading "Reasons for Decision". In particular it states that it "acknowledges that the [second appellant] has significant mental health issues that may well be exacerbated by stressful situations…" It "also accepts that it may be more difficult for the [appellants] to find landlords who are willing to accept them as tenants given that that they are in receipt of benefits and have a dog". And it "also acknowledges that the [appellants'] daughter is settled at her school and that it would be important to her to remain there if at all possible." These comments are not,

in the circumstances, clear or sufficient findings on the issues advanced by the appellants, as noted above. They do not address all of those issues, for example, the critical proposition that eviction would render them homeless. And they do not state clear conclusions on the particular factual positions being advanced by the appellants. For example, the appellants' evidence about the second appellant's mental health condition was not that it "may well" (that is, "might") be exacerbated by (unspecified) "stressful situations", but that it *would* on balance of probabilities be exacerbated – and seriously exacerbated – by eviction and homelessness. The appellants were not saying that it "may well" be more difficult for them to find another suitable tenancy, but that on balance of probabilities they would be *unable* to do so. And as regards their daughter's school, what the appellants were apparently saying was that it would not be possible for her to remain at this school if the order was granted. Proper fact finding required to the FTS to squarely confront and decide these matters, and not skirt around them, whether out of sensitivity to the appellants or otherwise. In these circumstances the FTS observations in paragraphs 53 and 54 are insufficient to cure the error of law resulting from its failure to make proper findings in fact in relation to the appellants' evidence.

32. Two further matters can be noted in relation to this ground of appeal. The first is that the FTS did not seek to make any further findings in fact in its supplementary statement. It therefore does not assist as regards the error of law which arises from the failure to make proper findings in fact in the written statement. The second matter is that at paragraph 57 of the written statement the FTS states that the postponement of the eviction order for four months "will… give the [appellants] sufficient time to find a property that will meet their needs." Insofar as that amounts to a finding in fact it is unclear the basis on which the FTS made it. If it arose from its own specialist knowledge of lettings in the relevant area, it failed to make that clear. And in any event it ran counter to the appellants' evidence about their repeated but unsuccessful efforts over the previous months to find alternative accommodation, but without assessing or rejecting that evidence. For example, if the FTS did not believe that the appellants had really made the efforts to find alternative accommodation which they claimed, or considered that they were being too restrictive in their search, then it could and should have said so. But in the absence of any such explanation the FTS made – at best - a finding on an issue without addressing let alone rejecting evidence which on its face ran counter to it. This too underlines the error of law in the FTS approach to fact finding.

Ground of Appeal 3 – having regard to irrelevant considerations

33. The appellants submitted that the FTS had had regard to an irrelevant consideration in reaching its decision on reasonableness. Having noted at paragraph 54 that the appellants might find it more difficult to find an alternative tenancy because they were on benefits and had a dog, the FTS states that "good references and payment of an increased deposit do sometimes persuade landlords to accept tenants such as [the appellants] in these situations." It was submitted that there was no basis in the evidence for this. There was nothing to suggest that the appellants had good references, nor that they were able to pay an increased deposit. Even if correct as a matter of generality, the matters referred to and taken account of by the FTS were therefore irrelevant, and this amounted to an error of law. In reply the respondents submitted that the factors referred to by the FTS were ones that it was not only entitled but bound to take into account. It was an expert tribunal and was entitled to make use of its knowledge of the letting market in considering whether, as the appellants were submitting, the fact of their being dog owning benefits claimants would prevent them from securing alternative accommodation. The appellants had after all been able to secure a tenancy of the property in 2020.

34. In considering whether it was reasonable to issue an eviction order the FTS had to exercise a judicial discretion. It had to have regard to all the relevant circumstances, but to leave out of account irrelevant considerations: *Cumming v Danson* [1942] 2 All ER 653 at 655F/G, 657D/E. A consideration may be relevant in principle, but if it is not rooted in the facts of the particular case it will be irrelevant in practice. In considering whether it is reasonable to issue an eviction order on the ground that the landlord intends to sell the property, in principle it is relevant to consider whether the tenant can obtain alternative accommodation. Indeed in many cases the FTS would in effect be bound to do so. In assessing this matter the FTS is entitled, as an expert tribunal, to use its knowledge and experience of the residential letting market at the time and place in question. But if the FTS is going to assess the tenant's ability to obtain new rented accommodation within that market by reference to particular specified factors, it must first find in fact, on the evidence before it, that those factors exist.

35. In the present case the FTS was of the view, presumably applying its knowledge of the state of the rented housing market within central Scotland, that would-be tenants who had good references and an increased deposit might sometimes be able to persuade landlords to lease property to them notwithstanding that they were in receipt of benefits and owned dogs. Even assuming that proposition is correct, however, it only has relevance to the appellants if findings were first made that they did in fact have good references (or could get them), and that they would be able to pay an increased deposit. No evidence is narrated in the written statement relative to the first of these matters. And the second matter, if anything, ran contrary to the appellants' evidence about their financial position, namely that they were unemployed, had no savings, and relied on social security benefits.

The mere fact that the appellants had been able to secure a tenancy of the property in 2020 says nothing about the existence of either matter at the time when the FTS came to consider the present application three years later. Accordingly the FTS erred in law, either because it failed to make findings in fact sufficient to support this part of its reasoning, or because it had regard to factors which were not supported by the evidence and so irrelevant to the case before it.

36. In its supplementary reasons the FTS accepts that there was no evidence regarding landlords accepting tenants on benefits with dogs in return for increased deposits or good references. It asserts that it was reasonable to take these matters into account, in short, given its role as an expert tribunal. Again, this misses the point. The FTS was only entitled to take these matters into account if they were relevant to the facts of the case before it. If there was no evidence, or findings, that the appellants did have good references and could pay an increased deposit, then these otherwise potentially relevant factors had no actual relevance to the assessment of their ability to find alternative accommodation in the particular circumstances of the case. Again therefore, even having regard to the supplementary statement, the FTS erred in law in this regard.

Ground of Appeal 4 – failure to take account of relevant considerations

37. The appellants submitted that the FTS failed to have regard to relevant considerations in assessment of reasonableness. In particular, notwithstanding the evidence narrated on these matters, the FTS made no findings in fact and no other reference to (i) the second respondent's acceptance that he owned three other properties in France, (ii) the appellants' evidence that they would be willing to remain as sitting tenants if the property were sold to another landlord, and (iii) the appellants' evidence of the likely adverse effect on their daughter should the second appellant decompensate into mental illness following an eviction. The evidence on these matters was relevant to reasonableness, and the FTS failed to take it into account or, if it rejected it, to make this clear. In reply, the respondents submitted that these matters were all taken into account by the FTS. This was said to be plain on a holistic reading of the written statement, but in any event from the supplementary statement, where all these three matters are addressed.

38. Although all of the three matters identified in this ground of appeal are referred to in its narrative of the parties' oral evidence, the FTS made no findings in fact in relation to them. Nor did it make reference to them in its reasons for its decision. On the face of its written decision, therefore, the FTS appeared to have failed to take account of these matters, which were at least arguably relevant to its assessment of reasonableness. If the FTS thought

otherwise, it failed in its written statement to make that clear. But in the supplementary statement the FTS states that it did consider and have regard to these matters. It concedes ("perhaps it should have made it clear") (i) that it accepted the second respondent's evidence that his three French properties were not of sufficient value to purchase the house which he wanted to buy, and (ii) that it did not consider it reasonable that the respondent should have to sell the property at a substantial discount in order that the appellants could remain as sitting tenants. As regards the third matter, the FTS said, in effect, that it was the first appellant's responsibility as a parent to ensure that her daughter did not witness her father decompensating into mental illness.

39. I would not endorse the FTS' approach on this last matter, which seems to me to be both unrealistic and rather harsh. But the appellants' position in relation to this ground of appeal was not to criticise the responses in the supplementary statement, but to argue that they should be disregarded in assessing whether the FTS had failed to have regard to relevant considerations. In my view this argument is unsound. For the reasons explained above the supplementary statement can in principle be taken into account in assessing the adequacy of the FTS' reasons, and in relation to this ground of appeal there is no good reason not to. The supplementary reasons given are not inconsistent with the written statement, but rather make clear that the FTS did have regard to the three matters referred to even though it had previously appeared to overlook them. Whether the FTS' reasoning in relation to these three matters is sound is therefore not a matter which is live in this appeal. No error of law arises in relation to this ground.

Ground of Appeal 5 – assessment of reasonableness

40. The appellants submitted that the FTS failed to properly address the question of reasonableness. It required to balance the interests of the respondents and the appellants. Instead it had based its decision entirely on the reasonableness of the respondents' plans and intentions for the property. The FTS had in effect asked not whether it was objectively reasonable to issue the order, but whether the respondents' actions and intentions were subjectively reasonable. In reply, the respondents' preliminary position, as noted above, was that the approach attributed to the FTS was as a matter of construction the correct one, which failing it merely recognised the reality that only in exceptional circumstances would the FTS refuse an application under ground 1 where sub paragraphs 2(a) and 2(b) were established. But in any event, the FTS in the present case did not take either approach. It did take an "all the circumstances" approach to reasonableness, yet concluded that on balance that it should exercise its discretion in the respondents' favour.

41. In paragraph 51 of the written statement the FTS clearly and properly directed itself on the correct approach to assessment of reasonableness. It noted that ground 1 is no longer mandatory and that therefore the FTS "must now consider whether it is reasonable in all the circumstances to grant the order sought." It expressly recognised that in doing so "the [FTS] must consider the whole of the circumstances in which the application is made". Appropriate reference is made to familiar authority (*Cumming v Danson*) in which the "all the circumstances" approach to assessment of reasonableness is endorsed and applied. The appellants' position in relation to this ground of appeal, therefore, is that although the FTS properly directed itself on the relevant law, it then ignored that direction. In reality, it was argued, the FTS applied the approach disapproved in *Shrimpton v Rabbits*, mentioned above. In other words it decided the case on the basis of the reasonableness of the respondents' subjective intentions, rather than by objectively balancing the rights and interests of both parties. This submission gains force from the FTS' findings in fact which, as noted, relate almost entirely to the respondent's intentions and interests.

42. I am unable to accept the appellants' submission. As noted above, the establishment of the facts specified in sub paragraphs 2(a) and (b) of ground 1 is *prima facie* sufficient to establish that it is reasonable to issue an eviction order under this ground. Where, as here, both the landlord and the tenant put evidence before the FTS in an attempt to establish other facts relevant to reasonableness, its first task is to assess that evidence and make clear findings of fact in relation to it. Having done so, it must then weigh and balance all the relevant facts found by it which bear on reasonableness. This will include the facts specified in sub paragraphs 2(a) and (b). The intentions of the landlord are therefore clearly relevant, and the FTS is entitled if not bound to consider whether they are reasonable. Furthermore the FTS would be entitled, at least in principle, to find that the landlord's intentions outweighed the matters put in evidence by the tenant. Put another way, the FTS would be entitled in principle to conclude *both* that the landlord's intentions were subjectively reasonable, *and* that they made it objectively reasonable to issue an eviction order. The FTS' emphasis in its written reasons on the respondents' intentions is therefore not of itself sufficient to establish that the FTS has departed from the "all the circumstances" approach to which it correctly directed itself. The FTS' errors in this case were in relation to fact finding and in failing to explain why the respondents' interests and intentions outweighed those of the appellants, not its general approach to assessment of reasonableness.

Disposal

43. The respondents submitted that if the Upper Tribunal were minded to allow the appeal it should either direct the FTS to provide supplementary reasons, or remake the decision on

the basis of the FTS narration of the evidence. Neither course is appropriate. The FTS have already provided supplementary reasons in response to the application for leave to appeal, but these have not cured all of the errors of law in the written statement. It would not now be appropriate to offer a further invitation to the FTS to make the findings in fact which are absent from the written and supplementary statements, nor to further explain the reasons for its decision, when it has twice failed adequately to do so. Nor would it be appropriate for the Upper Tribunal to remake the decision on the basis of the narration of evidence given by the FTS. The appellants did not concede for the purpose of the present appeal that this narration was accurate and complete. But in any event, unlike the FTS, the Upper Tribunal has not seen nor heard the parties give oral evidence. Matters of credibility and reliability, and in any event the relative weight to be attached to their evidence in considering reasonableness, cannot be properly assessed from the written page. The case will be remitted to the FTS for a full rehearing before a freshly constituted panel.

Conclusion

44. The appeal is allowed. Grounds of appeal 1, 2 and 3 are upheld. Grounds 4 and 5 are refused. The decision of the FTS of 14 March 2023 is quashed. The case is remitted to a freshly constituted panel to consider the application of new.

45. Any party aggrieved by this decision may seek permission to appeal to the Court of Session. Such an appeal may only be on a point of law. A party wishing to appeal must apply for permission to do so from the Upper Tribunal. Permission to appeal must be applied for within 30 days of the date on which this decision was sent to a party.

46. Any request for permission to appeal to the Court of Session 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 SG Collins KC
Member of the Upper Tribunal