Upper Tribunal for Scotland

Ref: UTS/AP/22/0027
2023UT41

DECISION ON REMAKING THE DECISION OF THE FIRST TIER TRIBUNAL FOR SCOTLAND AND ORDER NO. 4 IN CONNECTION THEREWITH

BY

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

Paisley 6 November 2023

Decision

The Upper Tribunal for Scotland ORDERS that:

1. 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 shall be re-made by the Upper Tribunal for Scotland ("UTS") in terms of section 47(2)(a) of the Tribunals (Scotland) Act 2014.
2. An evidential hearing in respect of remaking the Decision shall take place within Dumfries Sheriff Court on 25 and 26 January 2024 at 10.00am each day in terms of rule 7(3) (h) of the Upper Tribunal for Scotland Rules of Procedure 2016.
3. A case management hearing shall take place by way of webex on 13 November 2023 at 10.00am in terms of rules 7(3) (g) and (h) of the Upper Tribunal for Scotland Rules of Procedure 2016 to ascertain the number of witnesses required for the evidential hearing, to consider directions for the evidence in chief of those witnesses to be given by way of signed witness statement, and to make such other directions as may be required for the expeditious conduct of the evidential hearing on 25 and 26 January 2024 at 10.00am.

Representation in Connection with the Appeal

The appellant is represented by his solicitor Miss Dalgleish.

The respondents are represented by their solicitor Mr Bryce.

Introduction

[1] On 26 June 2023, I allowed the appeal, quashed the Decision of the First-tier Tribunal for Scotland ("FTS") and reserved consideration of whether the UTS should remake the Decision or remit the case for reconsideration by the First-tier Tribunal for Scotland.

[2] I duly received and considered the parties' written submissions on this question and on 11 August 2023 decided that the UTS should remake the Decision.

[3] Arrangements were made thereafter for a preliminary case management hearing to take place on 13 November 2023.

[4] Further time was then required to make arrangements for the UTS to hear further evidence in this appeal, including ascertaining dates suitable to all concerned, and a suitable venue to hear fresh evidence in connection with the appeal.

[5] I now issue this Order to confirm these arrangements and provide brief reasons for my decision that the UTS should re-make the Decision and, to that end, hear fresh evidence itself, rather than remit to the FTS for reconsideration.

[6] I understand this is the first time the UTS will sit in a venue outside the Glasgow Hearing Centre. The venue has been chosen with regard to the convenience of parties and witnesses and I am grateful to those concerned for being able to accommodate the UTS in this manner.

Summary of Issues

[7] The Appellant applied as landlord to the FTS for an order for possession of a house in Dumfriesshire let by him on an assured tenancy to the Respondents. He did so under section 18(1) of the Housing (Scotland) Act 1988 and 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".

[8] Ground 6 also required certain conditions to be fulfilled in relation to the landlord who is intending to carry out the demolition, reconstruction or substantial works.

[9] The Appellant's position before the FTS was that he *intended* to carry out very substantial works on the house at an anticipated cost of £146,850.97.

[10] Further, that it was reasonable in terms of section 18(4) of the 1988 Act for the Tribunal to make an order for possession of the property.

[11] I allowed the Appellant's appeal against the Decision of the FTS as I considered the FTS had erred in law in a number of significant respects, taking the view the FTS had:

1) erred in its approach to assessing the credibility of the Appellant's evidence as to his intention to carry out the works and as to the reasonableness of granting an order for possession (grounds of appeal 1, 2, 7.1 and 7.2);
2) erred in concluding that the Respondents would inevitably be rendered homeless by making an order for possession (ground of appeal 3);
3) erred by concluding, contrary to the evidence, that both Respondents were elderly in weighing the competing factors in its assessment of reasonableness (the First Respondent is 57 years of age and is not to be regarded as elderly whereas the Second Respondent is to be regarded as elderly because he is aged 80) (ground of appeal 4);
4) erred by placing an onus on the Appellant 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, contrary to condition 6(b) in schedule 5 to the 1988 Act (ground of appeal 5);

5) erred 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 as: (i) 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; and (ii) 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) (ground of appeal 6);

6) erred by not adequately establishing, considering and properly weighing 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 (ground of appeal 7.3); and

7) erred by failing to have regard to 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, as applied in Scotland by the Court of Session in *Charlton v Josephine Marshall Trust* 2020 S.C. 297), in determining whether or not the Appellant had such an intention (observation of the UTS in its appeal decision).

Reasons for Deciding to Remake the Decision

[12] The UTS will normally remit a case to the FTS where crucial aspects of the case require to be determined *de novo* on the evidence.

[13] However, the UTS does have power to rehear an application on allowing an appeal.

[14] 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)).

[15] 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 where the "interests of justice justify the evidence being led".

[16] Having considered parties' written submissions on this question, I am satisfied that such exceptional circumstances exist in this case (*cf W Martin Oliver Partnership v Deputy Transport Commissioner for the North East of England* [2016] UKUT 0070 (AAC) at paragraph 73), and that it is therefore in the interests of justice for the UTS to hear fresh evidence in this case.

[17] Firstly, I have taken into account that, by not remitting to the FTS, the parties will lose a further right of appeal to the UTS against whatever decision might have been reached by the FTS (*cf AEB v Secretary of State for the Home Department* [2023] 4 W.L.R 12).

[18] However, this consideration is offset by the numerous and significant errors of law made by the FTS on this occasion, the relatively uncommon nature of the ground of possession and the possibility for further delay and appeal from the FTS if this case were remitted to it.

[19] Not all findings in fact made by the FTS in this case need be set aside and therefore the fresh evidence may be limited in scope (*cf Begum v Secretary of State for the Home Department* [2023] UKUT 00046 (IAC)).

[20] This will therefore allow the UTS to concentrate on making findings on the two major issues in this case - the Appellant's intention to carry out the works, and, if that be established, the reasonableness of granting an order for possession – taking into account the guidance to be applied from the cases of *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, as applied in Scotland by the Court of Session in *Charlton v Josephine Marshall Trust* 2020 S.C. 297 and *Barclay v Hannah* 1947 S.C. 245 on how to assess reasonableness.

[21] In conclusion therefore:

- The FTS erred in its approach to this case in a number of significant respects.
- The case involves an uncommon ground of possession.
- It involves consideration of Supreme Court and Inner House authority.
- Whatever the decision of the FTS, if remitted, the chances of a further appeal to the UTS are significant.
- Further delay is to be avoided.
- Any further appeal would be to the Court of Session but only if after a final decision of the UTS there remained an important point of principle or practice.
- There is therefore a reasonable chance a decision of the UTS would bring finality to this dispute.

[22] Parties' solicitors were in agreement that, were the UTS to remake the Decision, then a case management hearing would be required in advance of the evidential hearing to discuss management of the evidential hearing. I have so provided in Order No. 4 which forms part of this Decision.

Further Appeal

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

[24] 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