Upper Tribunal for Scotland

2024UT44
Ref: UTS/AP/24/0010

DECISION OF

Sheriff Iain Fleming

ON AN APPEAL
IN THE CASE OF

Mr Peter Large, Ms Maria Lander,
per Raeside Chisholm Solicitors,

Appellant

- and -

Mrs Jean Thomson,

Respondent

FTS Case reference: FTS/HPC/EV/23/0767

Glasgow, 17th July 2024

Decision

The Upper Tribunal refuses the appeal and upholds the decision of the First Tier Tribunal for Scotland, Housing and Property Chamber dated 20 November 2023.

[1] Peter Large and Maria Lander, who are the appellants, own a property at Flat ½, 456 Victoria Road, Glasgow, G42 8YU. Although there is no formal lease which can be discovered the FTS held that the property is let to Ms Jean Thomson (the respondent).

[2] The appellants sought recovery of possession of the property. The basis of the action of eviction was that the appellants (the landlord) were suffering financial hardship and intended to alleviate that hardship by occupying the let house as their only or principal home for at least 3

months. The ground for eviction relied upon by the appellants was Case 8A which was amended into Schedule 2 of the Rent (Scotland) Act 1984 ("the 1984 Act") by the Cost of Living (Tenant Protection) (Scotland) Act 2022 ("the 2022 Act"). Case 8A provides as follows:

> "*The landlord who is seeking possession of the let house (a) is suffering financial hardship, and (b) intends to alleviate that hardship by occupying the let house as the landlord's only or principal home for at least 3 months".*

[3] The tenancy of the property, notwithstanding the absence of a written lease, is regulated by the 1984 Act. In terms of section 11 of the 1984 Act the FTS shall not make an order for possession of a dwellinghouse which is for the time being let on a protected tenancy or subject to a statutory tenancy unless the FTS considers it reasonable to make such an order.

[4] A hearing took place before the First-tier Tribunal for Scotland (Housing and Property) Chamber ("the FTS") on 13 November 2023.

[5] The FTS considered all of the evidence placed before it. It made findings in fact. It concluded that the appellants were suffering financial hardship. Further, it concluded that the appellants "seek" to alleviate that hardship by occupying the property. However, having considered all of the circumstances the FTS determined that it was not reasonable to issue an eviction order.

[6] In terms of the reasons for its decision these are addressed within paragraphs 27 – 31 of the FTS decision. Paragraph 31 of the FTS decision is in the following terms:

> "Having considered all of the circumstances, the Tribunal determined that it is not reasonable to issue an eviction order. In reaching its decision the Tribunal attached particular weight to the uncertainty of the applicant's (the appellants') financial position, the length of time the respondent has occupied the property, the age of the respondent and her husband, the proximity of the property to the place of work of the respondent, her husband and her daughter and the nature of the tenancy which provided the respondent with a degree of security of tenure in that the ground for eviction relied upon was not available to the appellants until the amendment of the 1984 Act by the 2022 Act."

[7] The appellants appealed the decision. A Webex hearing took place on 15 May 2024. The appellants were represented by Mr Nimmo, solicitor. Ms Thomson represented her own interests. I am grateful to both of them for both their written and oral submissions.

[8] The FTS decided the ground for eviction (Case 8A) was established but the FTS did not consider it was reasonable to grant the order for possession. In terms of section 11 of the 1984 Act the FTS shall not make an order for possession of a dwellinghouse which is for the time being let

on a protected tenancy or subject to a statutory tenant unless the FTS considers it reasonable to make such an order. The FTS found in fact and law that it was not reasonable to grant an order to the appellants for possession of the property.

[9] The principal issue in this case was whether there was an error in law by the FTS in holding that it was not reasonable to grant the order for recovery of the property to the appellants. In broad terms the appellants rely on three separate heads of appeal

[10] The appellants' first ground of appeal relates to Article 6(1) of the European Convention of Human Rights. In terms thereof:

> "In the determination of his/her civil rights and obligations or of any criminal charge against him/her everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law."

[11] The appellants contended that they did not receive a fair hearing before the FTS. It is submitted that the conduct of the FTS showed bias. The absence of the tenancy agreement was referred to. The submission of the appellants was that the FTS was being asked to consider a tenancy under a lease which was not possible to be evidenced (it being presumed lost) and could not be directly considered. It was submitted that the FTS should proceed with caution in such circumstances. Further, "there is a significant question" as to the weight than can be attributed to the alleged content of a missing document when it has not been produced.

[12] The further submission of the appellants was that the appellants' position was fully vouched and that of the respondent was unvouched and as such the respondent's evidence should be given less weight by the FTS. It was submitted that the production of documents by the appellants, as opposed to the respondent, provided "clear evidential disparity" and that the respective parties' evidence should not have been considered on an even footing. Further, certain aspects of the evidence given by parties were not referred to in the FTS decision and were therefore not considered by the FTS in making its decision.

[13] In response the respondent indicated that her position was not unvouched because firstly there was no dispute with regards to the tenancy agreement and secondly she was asked to produce the tenancy agreement by the FTS but after full enquiry and investigations there was no physical document able to be produced, notwithstanding that enquiries had been made with various government bodies. The respondent also refers to the disparity in the financial circumstances of parties as they affect the funding of the litigation.

[14] The second ground of appeal proposed by the appellants is headed "Misapplication of the Cost of Living (Tenant Protection) (Scotland) Act 2022 and the Rent (Scotland) Act 1984". It was submitted that the FTS misapplied the legislation. In short the appellant's position was that the FTS having established that financial hardship applied to the appellants in this case,

investigation into the extent of that hardship by the FTS was misapplied and was an error in law. It was argued that rather than being used as a positive to establish that the grounds were established, the FTS erred in law by considering the extent of the financial hardship. Thereafter the FTS have misapplied the extent of such hardship, using this as a basis for refusing the application. It was submitted on behalf of the appellants that the FTS had used the appellants' financial position as "a cosh with which to beat" the appellants in the context of its application of the reasonableness test. The appellant submits that by considering the nature and extent of the financial hardship the FTS erred in law.

[15] It is accepted by the appellants that the FTS is required to consider the reasonableness test, with regard to the application. What is submitted however is that nowhere in either section of either Act does it suggest there is a maximum or minimum threshold in terms of financial hardship. As such it is submitted that the only consideration the FTS required to undertake is whether or not the appellants are deemed to be suffering from financial hardship. In considering the extent of such financial hardship there is an error in law.

[16] Further, the FTS considered not only the financial position of the appellants but also the proposals made by the appellants to alleviate or resolve their financial difficulties.

[17] It is further argued that the FTS engaged in speculation for instance by saying

> "The financial position of the applicant is such that selling Mart Street and moving into the property may not resolve their financial difficulties. Were creditors to take action against them their ownership of the property may be at risk."

[18] Criticism is made of that approach because it is speculative. It is submitted that it is neither relevant nor appropriate for any speculation to be engaged in by the FTS in deciding the application. It is submitted that it was only appropriate for the FTS to comment on the factual matters before them with regard to the extent of the appellants' debts and current financial position. It is submitted that the approach of the FTS in considering financial hardship resulted in them essentially turning a ground of clear reasonableness for the application to be granted (prima facie financial hardship) into a ground of unreasonableness. The submission is further developed to reflect a submission that the FTS decision appears to be based on the premise that the bleak financial position of the appellants is such that the granting of the order would alleviate only part of the financial hardship suffered. It is submitted that this is an error in law. The legislation does not provide that because a proposed eviction would only alleviate part of the financial hardship being suffered by the appellants that an eviction application should be refused. Nothing in Case 8A suggests that there are upper or lower limits for financial hardship.

[19] It is submitted that there is nothing in the legislation to suggest that those in the position of the appellants can be in "too much debt" for the ground of eviction to be invalidated or for the application to be deemed unreasonable.

[20] It is suggested by the appellants that the FTS "added additional criteria to parliamentary legislation". The argument presented is that there is no requirement in the legislation or indeed a need for the FTS to "look at the appellants' future possibilities in respect of their finances" or the level of their debt beyond concerns that they are suffering financial hardship. It is submitted that the FTS have misapplied the law and they have created an error in their approach to the application in as much as they appear to have considered that it is unreasonable to grant the eviction sought on the basis that the appellants' move to their own property would only alleviate part of the debt due by them.

[21] In response the respondent indicated that the respondent's current living situation and the appellants' plans for the future cannot be considered as the same. The respondent fully amplifies her and her family's circumstances and distinguishes the current situation from anything that may manifest itself in the future if the "plans" materialise. Future plans are not set in stone and may never occur, since they are "merely plans" it is argued. It is submitted that the FTS fully investigated the appellants' financial situation and was entitled to conclude as it did.

[22] The final point is submitted on behalf of the appellants is entitled "Misapplication of the Cost of Living (Tenant Protection) (Scotland) Act 2022". The specific point under issue relates to the reference within paragraph 31 of its written decision by the FTS. Included within the considerations of the FTS is the fact that the nature of the tenancy provided the respondent with a degree of security of tenure in that the ground for eviction relied on was not available to the appellants until the amendment of the 1984 Act by the 2022 Act. It is submitted that such a consideration is irrelevant to consideration of the application. What is of significance is the current legislation in force at the time of the application and that the said legislation should be applied. It is submitted that there is no discretion afforded to the FTS as to whether or not the relevant legislation in force could be applied. To suggest that the recent change in the law is a relevant factor implying it is unreasonable to grant the eviction is submitted to be both illogical and perverse. As a consequence it is argued that the FTS decision is based upon a misapplication of the relevant law. As such it is submitted this creates an inherent flaw in the FTS decision.

[23] It is the position of the appellants that both independently and severally on the basis of all three legs of the argument that the Upper Tribunal should overturn the FTS decision deeming it reasonable to grant eviction after consideration of the full circumstances of the case are considered. The respondent opposes the appeal and invites the Upper Tribunal to sustain the FTS decision.

Decision

[24] The appellants are suffering financial hardship. The FTS found that the appellants "seek" to alleviate that hardship by occupying the property as the appellants' only or principal home for at least 3 months. That said, in applying section 11 of the 1984 Act the FTS is charged with not making an order for possession of a dwellinghouse which is for the time being let unless the FTS considers it reasonable to make such an order. There is a specific finding of fact and law that it is not reasonable to grant an order for possession of the property. The appellants seek to challenge that finding in fact and law on the basis advanced in the appeal.

[25] In so far as the Article 6 point is concerned, it relies firstly upon the absence of the lease. There is no question other than that the respondent is present in a property owned by the appellants. The respondent and her family occupy the property and are there as tenants. The appellants are the landlord. The existence of the lease or indeed its terms are not in dispute and rent is clearly being paid. The point about the absence of a lease was not a live issue before the FTS. The FTS found that the respondent is a tenant of the property in terms of a tenancy regulated by the 1984 Act. The appellants accept that the 1984 Act applies. The appellants do not rely on a particular section or clause in the lease. There is no dispute in relation to any of the lease's terms. The absence of the lease is not critical in these circumstances. The appeal insofar as it relates to this issue requires to be refused.

[26] The suggestion that more weight should be given to evidence which is supported by documentary evidence, or perhaps better put less weight should be given to evidence which is not supported by documentary evidence, would be to invite the Upper Tribunal to trespass upon the function of the FTS which is to consider and analyse the evidence and attach such weight as it thinks fit. Lest the Upper Tribunal's position should be misunderstood, there is no substance whatsoever in the proposition that simply because evidence has to be vouched that it necessarily will attract greater weight than such evidence as is not vouched. Each case is separate, each witness is separate and the FTS is charged with considering all of the evidence. On occasions documents vouching a position can support oral evidence but that should not be conflated with a position that evidence which is vouched should be given an enhanced status. The decisions about evidence, its acceptance or rejection and the weight to be attached thereto are exclusively the preserve of the FTS. It is also important to note that the appellants did not challenge the veracity of the evidence of the respondent.

[27] Elements of evaluation and judgement are supremely for the fact finder at first instance, *see Proctor & Gamble UK v HMRC*, [2009] STC 1990; [2009] EWCA Civ 407. That said in *Thomas v Thomas* 1947 SC (HL) 45, 54; [1947] AC 484, 488 Lord Thankerton stated:

> "The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

This is not case where in going about its fact finding exercise the FTS has arrived at an evaluative judgement on the basis of competing accounts or contradictory evidence. The fact finding was relatively uncontroversial. It is clear that the FTS did embark upon an evaluative exercise of the evidence and the weight to be attached thereto.

[28] Regard should also be had in this context to the decision of Lady Poole in the decision of *DS v SSWP* (ESA) [2019] UKUT 347 (AAC) , a decision concerning the adequacy of reasons given by the FTS in a matter involving entitlement to Employment Support wherein it is stated;

> "The hearing of evidence and decisions about which facts to find are primarily for the tribunal, which has the benefit of being able to assess witnesses and access expertise ….. Accordingly, there are careful statutory limits on the Upper Tribunal's jurisdiction; jurisdiction is limited to errors in point of law."

[29] The appellant contends that certain important evidential matters were not referred to be the FTS. For example the access to a private motor vehicle by the respondent was not referred to. Further there was no evidence in writing from the respondent's employers that the respondent might lose her job if evicted. It is no part of the FTS function to list all of the evidence before it. The FTS decision has identified relevant evidence and explained its decision. It has identified the features upon which it relied in paragraph 31. No reference is made to modes of transport by the FTS in that section of its decision. Its absence is not critical. Indeed other aspects of the evidence were not referred to. The evidence of the appellant was that when he purchased the property at an auction his intention was that he could purchase the property and thereafter evict the tenant in due course. This adminicle of evidence, perhaps favourable to the respondent, was also not referred to within the statement of reasons by the FTS which cannot be expected to refer to each piece of evidence led. It only requires to refer to the critical evidence and explain its decision. The reasons for the FTS decision were stated in paragraph 31of its decision. Their consideration does not demonstrate illogicality, perversity or unfairness. The FTS decision was reasoned, logical and based on the evidence. Regard should also be had to what was said by Lady Poole in *DS v SSWP*

> "In my opinion, it is not in keeping with this approach for judges in the First-tier be held to an excessively high standard in statements of reasons. The Upper Tribunal has an important role to play in ensuring the system works justly, and that tribunals do not make legal errors. But the Upper Tribunal does not ordinarily of itself hear evidence."

[30] In so far as the question of the nature and extent of the consideration of the financial hardship of the appellants is concerned, the first issue raised was whether or not the question of

financial hardship could be considered on a graduated basis, say from mild financial hardship to extreme financial hardship.

[31] The FTS gave consideration to the extent of financial hardship from which the appellants are suffering. While it may not be entitled to do so in terms of the first leg of the test which needs to be applied, namely whether there is a determination that financial hardship is being suffered, in terms of considering whether or not the appellant "intends to alleviate" the hardship by occupation of the let house the FTS was fully entitled to consider not only the appellants' debts but also the proposal. It is only by considering the extent of that financial hardship that the FTS can determine whether or not the" intention" to alleviate the hardship is one upon which it can be satisfied. In considering the question and meaning of" intends" regard should be had to the decision of Lord Justice Asquith in *Cunliffe v Goodman*[1950] 2K.B.237 at page 253l:

> "The question to be answered is whether the defendant (on whom the onus lies) has proved that the plaintiff, on November 30, 1945 "intended" to pull down the premises on this site. This question is in my view one of fact. If the plaintiff did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was *no* evidence of a positive "intention," or that the word "intention" was incapable as a matter of construction of applying to anything so tentative, and so indefinite. An "intention" to my mind connotes a state of affairs which the party "intending" – I will call him X – does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.
> X cannot, with any due regard to the English language, be said to "intend" a result which is wholly beyond the control of his will. He cannot "intend" that it shall be a fine day tomorrow: at most he can hope or desire or pray that it will. Nor, short of this, can X be said to "intend" a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents and cross-currents of circumstance that, not merely is it quite likely not to be achieved at all, but, if it is achieved, X.'s volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which predominately determine its occurrence. If there is a sufficiently formidable succession of fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X "intended" that result."

[32] As is properly recognised by the appellants all that requires to be determined for this consideration to apply is that the landlord is suffering financial hardship. That was established.

What thereafter requires to be considered is whether the landlord "intends to alleviate" the hardship. In considering the stated intention the FTS is entitled to consider if the intention is genuine and firm and settled.(*Fisher v Taylor's Furnishing Stores Ltd*[1956] QB 78 at page 94. As such the FTS was fully entitled to consider the extent of the financial hardship in assessing the "intention" of the appellant. The FTS held that the appellants "seek" to alleviate the financial hardship by occupying the property. It is unclear if the FTS is using "seeks" and "intends" as synonyms but nothing turns on that as the matter must be considered through the prism of reasonableness. On one view "seeks" goes beyond "intends" which conclusion would be favourable to the appellants. It is clear from the decision of Lord Asquith that the FTS is fully entitled to determine if there truly does exist a state of affairs which can be properly determined as a finding in fact that the appellants "intend" to alleviate the financial hardship. As such and in that context the FTS is fully entitled to consider the nature and extent of the financial hardship. Having done so the FTS found to that extent in favour of the appellant.

[33] The FTS was also fully entitled to consider the nature and extent of the financial hardship not only in its consideration of the question of "intends" but also in considering the question of reasonableness. Those representing the appellant did not place before me any authority in relation to the question of reasonableness. I am, however, assisted by the following;

As Lord Greene M.R. said in *Cumming v Danson* [1942] 2 All E.R. 653, 655:-

> "In considering reasonableness it is, in my opinion, perfectly clear that the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, commonsense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account."

Further, as was said in *Cresswell v. Hodgson* [1951] 2KB 92 at page 95 on the effect of similar restrictions on possession orders in the Rent Acts

> " ….the county court judge must look at the effect of the order on each party to it. I do not see how it is possible to consider whether it is reasonable to make an order unless you consider its effect on landlord and tenant, firstly if you make it and secondly if you do not. I do not think we should say anything which restricts the circumstances which the county court judge should take into consideration."

[34] In considering the question of reasonableness the FTS must consider all of the relevant circumstances as they exist at the date of the hearing. That includes the extent of the financial hardship of the appellants. The weight to be applied to the considerations is for the FTS in making its determination. The FTS requires to apply the test set out in Case 8A through the prism of reasonableness. It is clear from the authorities that reasonableness is a very broad issue and given that each case centres upon its facts and circumstances it would be wrong to try to restrict an FTS in terms of the matters it can take into account. In considering the question of reasonableness the FTS applied weight to the uncertainty of the appellant's financial position. It was entitled to do so. Further the FTS was entitled to consider the extent of the financial hardship in determining that the appellants' financial position was uncertain. The FTS is obliged to consider all relevant circumstances as they exist at the date of the hearing and the extent of the appellants' financial hardship is one such circumstance.

[35] The final point raised by the appellants relates to an alleged misapplication of the 2022 Act. The specific issue which is under scrutiny is whether or not the FTS was correct to take into account the nature of the tenancy which was provided to the respondent which gave a degree of security of tenure in that the ground for eviction relied on was not available to the appellants until the amendment of the 1984 Act by the 2022 Act.

[36] The FTS specifically indicated that it gave particular weight to the length of time the respondent has occupied the property, the age of the respondent and her husband (63 and 65), the proximity of the property to the place of work of the respondent, her husband and her daughter and the nature of the tenancy which provided the respondent with a degree of security of tenure "in that the ground for eviction relied upon was not available to the appellant until the amendment of the 1984 Act by the 2022 Act."

[37] It is clear that the question of the removal of the respondent's apparent security of tenure by dint of the introduction of the 2022 Act was only one consideration which was taken into account by the FTS. There were various other factors which the FTS was fully entitled to take into account. In particular, and in the context of its decision making, the FTS was entitled to consider as relevant factors the length of the tenancy, the nature of the tenancy and indeed the fact that there had been a degree of security of tenure.

[38] The respondent has resided in the property since 1985 and her earlier security of tenure was an important feature which the FTS was entitled to consider. In its decision the FTS states that it considered the nature of the tenancy which provided the respondent with a degree of security of tenure **in that** *(my emphasis***)** the ground for eviction relied upon was not available to the appellant until the amendment of the 1984 Act. The mention by the FTS of the change in the law is being considered and referred to in the context of the security of tenure previously enjoyed by the respondent. The FTS simply states that the security of tenure was affected by the fact that the ground for eviction is now available. It is a statement of fact and indeed had the law not changed the action could not have proceeded. The fact of the matter is that the ground for

eviction was not available to the appellants until the amendment of the 1984 Act by the 2022 Act. The FTS did not consider the fact that the law had changed in isolation. It considered that aspect in the context that the respondent had been a tenant for a considerable period of time, had enjoyed security of tenure and did not now necessarily do so due to the legislative change. In the context of reasonableness the FTS was entitled to consider the length and nature of the tenancy which had previously provided the respondent with security of tenure. The FTS was also entitled to consider that the security of tenure could not be challenged in terms of Case 8A until the statutory amendment. Put differently, the respondent had enjoyed security of tenure for a lengthy period until the law changed. All of these considerations are relevant in the consideration of whether it is reasonable to issue an eviction notice.

[39] In all of the circumstances there is no error in law and the appeal is refused. Parties should be aware that this section has now been repealed with effect from 31 March 2024.

Sheriff I Fleming
Member of the Upper Tribunal for Scotland

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within 30 days of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.