



DECISION OF

SHERIFF SG COLLINS KC

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

IN THE CASE OF

Mrs Miriam Reynolds,
per Aberdeen Considine

Appellant

- and -

Mr Gordon Henry & Mrs Patricia Jane Henry,
per David Henry

Respondents

FTS Case reference: FTS/HPC/PR/23/1170

15 July 2024

Decision

1. The Upper Tribunal allows the appeal, quashes the decision of the First-tier Tribunal for Scotland (“FTS”) dated 17 November 2023, and remits to a freshly constituted panel to consider the application of new.



Introduction

2. On 27 July 2018 the parties entered into a private residential tenancy agreement in respect of the property at 32 Spylaw Road, Edinburgh (“the property”). Relations between them later broke down following disputes over the management of the tenancy. On 20 August 2021 the respondents’ agents served a notice to leave in terms of section 62 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”) and paragraph 6 of the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 SI 2017/297 (“the 2017 Regulations”). This notice informed the appellant that if she did not leave the property by 23 February 2022 the respondent intended to apply to the FTS for an eviction order, on the ground that “your landlord intends to sell the let property”, this being the ground specified in paragraph 1 of schedule 3 to the 2016 Act.
3. The respondents marketed the property for sale, incurring expense in connection with this. The appellant moved out on 3 March 2022, thereby bringing the tenancy to an end: 2016 Act, section 50(1). Although the respondents held viewings and received offers to purchase the property, they did not accept them. Instead, they took the property off the market, moved into it while they carried out works to their principal home, and then re-let it to another tenant, at a higher rent, from 19 August 2022.
4. On around 12 April 2023 the appellant applied to the FTS for a wrongful termination order under section 58 of the 2016 Act. A hearing took place by conference call on 30 October 2023 at which both parties led oral evidence. By decision and reasons dated 17 November 2023 the FTS refused the application. The appellant sought permission to appeal to the Upper Tribunal and this was granted by the FTS on 17 January 2024. A hearing before the Upper Tribunal took place by Webex on 13 May 2024, at which time the appellant was represented by Ms Elder, solicitor, and the respondents were represented by their son, Mr David Henry.

The legislation

5. Section 58 of the 2016 Act provides as follows:

“Wrongful termination without eviction order



- (1) This section applies where a private residential tenancy has been brought to an end in accordance with section 50.
- (2) An application for a wrongful-termination order may be made to the First-tier Tribunal by a person who was immediately before the tenancy ended... the tenant... (“the former tenant”).
- (3) The Tribunal may make a wrongful-termination order if it finds that the former tenant was misled into ceasing to occupy the let property by the person who was the landlord under the tenancy immediately before it was brought to an end.
- (4) In a case where two or more persons jointly were the landlord under the tenancy immediately before it ended, the reference to the landlord in subsection (3) is to any one of those persons.”

6. Section 50 provides, in particular:

“Termination by notice to leave and tenant leaving

- (1) A tenancy which is a private residential tenancy comes to an end if—
 - (a) the tenant has received a notice to leave from the landlord, and
 - (b) the tenant has ceased to occupy the let property...”

7. Section 62 defines “notice to leave” as meaning a notice which is (a) in writing, (b) specifies the day on which the landlord expects to become entitled to make an application for an eviction order to the FTS, (c) states the proposed eviction grounds, and (d) fulfils any other prescribed requirements, that is, per the 2017 Regulations.

8. Section 51 makes provision in relation to the FTS’ power to issue an eviction order. It provides that:

- “(1) The First-tier Tribunal is to issue an eviction order against the tenant under a private residential tenancy if, on an application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies.
- (2) 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.”



9. Ground 1 of Schedule 3 to the 2016 Act provides as follows:

“Landlord intends to sell

- (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.
- (3) Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2)(b) includes (for example)—
 - (a) a letter of engagement from a solicitor or estate agent concerning the sale of the let property,
 - (b) a recently prepared document that anyone responsible for marketing the let property would be required to possess under section 98 of the Housing (Scotland) Act 2006 were the property already on the market.”

The decision of the FTS

10. The appellant’s position before the FTS was that although the respondents had marketed the property they only did this in order to get her to give up the tenancy, and not because they really intended to sell. The FTS’ decision to refuse the application turned on its interpretation of ground 1 of schedule 3 to the 2016 Act:

“43... [It] considered the wording of part 1(b) and which states “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.” The use of the word “or” is important. The wording of this section is such that the landlords must have the intention to sell for market value or the intention to at least put it up for sale. The tribunal considers that whether or not there is any disagreement as to the intention



or otherwise of the Respondent to sell the Property for market value, there was no disagreement that the Property was indeed put up for sale. The tribunal considered that on the basis of this wording, just having the intention of putting the Property up for sale was sufficient to establish the Ground. Whilst the tribunal does not find this position to be an entirely satisfactory one for a tenant, it considers this to be the correct interpretation of the wording of this part of the ground.

44. The tribunal must therefore find that the Respondents have complied with the provisions of ground 1 of schedule 3 to the said 2016 Act. It is against that background and on that interpretation of the wording of ground one, that the tribunal finds that the application must be refused.”

In other words the FTS concluded that because the respondents had taken steps to market and advertise the property, this was sufficient to establish ground 1 of schedule 3, and thus that the appellant had not been misled by the notice to leave into ceasing to occupy the property for the purposes of section 58.

11. However the FTS then went on to state that:

“45 ...it was not satisfied, on the basis of the evidence before it, that the Respondents had any intention of going through with a sale of the Property. The tribunal was satisfied that it appeared that the Respondents sought removal of the [appellant] in order that they could move into the Property and occupy it pending the renovations in their own house. Taking into account the disagreements between the parties during the lease, and the timings of the building contract arrangements, the tribunal was satisfied that the situation was contrived for the benefit of the Respondents...”

In other words, the FTS appears to have accepted that although the respondents had marketed the property, this was not because they intended to sell it, but in order to secure the removal of the appellant as tenant.

Analysis



12. As has been observed (Combe & Robson: *A review of the first wrongful termination orders*, 2021 Jur. Rev. 88) private residential tenancies under the 2016 Act can be tenacious entities, in particular because - and in marked distinction to the common law and the previous assured tenancy regime - they have no specified end date. Accordingly they can only be ended by the tenant leaving voluntarily, or by the grant of an eviction order by the FTS on one of the grounds in schedule 3 to the 2016 Act. This creates the possibility that unscrupulous landlords may be tempted to manufacture a situation which appears to give them grounds for recovery of possession but solely in order to remove an unwanted tenant. The wrongful termination provisions in sections 57 to 60 of the 2016 Act are intended to provide some measure of protection for tenants against such sharp practices, and a deterrent to those landlords minded to employ them. If a wrongful termination order is made, the FTS can require the landlord to pay to the former tenant a sum not exceeding 6 months' rent: 2016 Act, section 59(1).
13. Section 58(3) of the 2016 provides that a wrongful-termination order may be made if "the former tenant was misled into ceasing to occupy the let property by the person who was the landlord". This applies in the situation where the tenant has chosen to remove in the face of a notice to leave rather than to try and contest an application to the FTS for an eviction order. In effect, section 58(3) requires the FTS to decide whether the applicant has established four principal issues:
- (i) First, the landlord must have made some form of representation to the tenant (which might be by concealment of relevant and material facts). The landlord will necessarily have represented to the tenant that he has a ground for eviction in a notice to leave under the 2017 Regulations, since such a notice must have been served in order to terminate the tenancy under section 50 - a necessary precursor to an application under section 58. But conceivably other forms of written or oral representations may have been made to the tenant by the landlord, and if so might also be founded upon.
 - (ii) Second, the representation must have been objectively misleading. Where it consists of a notice to leave, a representation will - in particular - be misleading if it states that the landlord has a ground for eviction under schedule 3 of the 2016 Act when in fact he does not.
 - (iii) Third, the tenant must have actually been misled by the landlord's representation. If the tenant knew, for whatever reason, that the landlord's representation was false - for example because he knew that the landlord did not in fact have the ground for eviction



stated in a notice to leave - then he will not have been misled by it and the application cannot succeed.

- (iv) Fourth, the representation must actually have misled the tenant into ceasing to occupy the property, that is, it must have been at least a significant or material cause of him doing so. So if the tenant's decision to leave the property was for reasons other than the landlord's representation, then again, his application cannot succeed.

Importantly, these are all issues of fact, on which the FTS should make clear findings in reaching its decision.

14. In the present case it appears from the FTS' statement of reasons, firstly, that the representation made by the respondents consisted solely in their serving a notice to leave stating that they intended to apply to the FTS for an eviction order on the ground that they intended to sell the property. If other representations were made and/or were being relied on by the appellant, these are not the subject of specific findings. The second issue - and indeed the critical issue for the FTS - was therefore whether what was represented by the respondents in the notice to leave served by them on 20 August 2021 was objectively misleading. It would be misleading if the respondents did not have the ground for recovery of possession specified in it. Determining this required a proper understanding of ground 1 of schedule 3 to the 2016 Act.
15. As is apparent, section 51 of the 2016 Act requires the FTS to issue an eviction order if one of the "eviction grounds" in schedule 3 applies. Paragraph 1(1) of schedule 3 states that it is an "eviction ground" that the landlord "intends to sell the let property". Paragraph 1(2) then sets out the circumstances in which the FTS "may find that the ground named by sub-paragraph (1) applies". "May" is not used in a permissive sense, but means "may only": 2016 Act, section 51(2); *Manson v Downie* [2023] UTS 38, paragraph 4. Accordingly the only circumstances in which the FTS can grant an eviction order under paragraph 1 are if the landlord is (a) found to be 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. Paragraph 1(3) then gives, in effect, examples of the sort of evidence which may go to establish the matters in paragraph 1(2)(b); it does not direct that these matters must be held as established by the production of such evidence.
16. Critically therefore, whether a landlord has a ground for eviction under paragraph 1 of schedule 3 depends on his intention, per paragraph 1(2)(b), to either sell the property for



market value, or at least put it up for sale. But on either limb of this sub-paragraph, the intention to sell must be genuine. If a landlord puts a property on the market, but has no genuine intention of accepting any offers that may be made for it, he is neither intending to sell the property for market value, nor is he putting it up “for sale”. Rather, if he is purporting or pretending to market the property for sale simply in order to remove an unwanted tenant, then in reality he is putting it up for a purpose *other than* “for sale”. The marketing of the property and the inviting of offers to purchase in such circumstances is a sham, because there is no real intention to accept any offers which may be made, nor to conclude a contract of sale. It therefore does not constitute ‘putting the property up for sale’ for the purpose of ground 1 of schedule 3.

17. Accordingly the FTS erred in law in its approach on this matter. In paragraphs 43 and 44 of its statement of reasons it concluded, in effect, that it is sufficient to establish ground 1 of schedule 3 that a landlord purports or pretends to put a property up for sale even if in fact he has no intention of selling it. That cannot be correct. The “eviction ground” is established by demonstrating a genuine intention to sell the let property, and the expression “put it up for sale” must be read and understood in that context. Were it otherwise then the protections for tenants provided in ground 1 – and indeed section 58 – would be seriously undermined. The risks of doing so are well illustrated by the FTS’ acceptance (at paragraph 45) that the respondents did not genuinely intend to sell the property but had contrived the situation – including presumably the purported putting up of the property for sale – in order to secure the removal of the appellant. That is precisely the sort of mischief at which section 58 is directed.
18. There may of course be situations where the landlord does genuinely intend to sell the let property at market value, or puts it up for sale with this intention, but later changes his mind. In effect this was the respondents’ position before the FTS. As the *Explanatory Notes* for the 2016 Act state (at paragraph 90) a wrongful-termination order should not be granted where “the landlord genuinely intended to use the property in the way that the eviction ground required (even if, for some reason, that intention has not come to fruition).” An example is then given of a landlord who evicts their tenant because they want to sell the let property. However, after a year on the open market, the property has not sold and the landlord can no longer afford to maintain the mortgage repayments on it, so is forced to withdraw the property from the market and re-let it to a different tenant. As Combe & Robson put it, *op.cit.*, this neatly captures the point that a genuine plan might not be fulfilled, and in that situation it would be harsh – indeed wrong - to penalise the landlord by an order under section 58. In any event, the need to distinguish such a situation from a sham sale may not be easy, and highlights the need for careful fact finding by the FTS in relation to the landlord’s intention in this context.



19. This leaves the third and fourth issues mentioned above, that is, whether the appellant was in fact misled by the terms of the respondents' notice to leave, and if so whether it was a material or significant cause of her leaving the property and so giving up the tenancy. On these matters the FTS made no express findings. That is perhaps unsurprising, given that it found against the appellant in relation to the second issue. But there sufficient indications in the FTS' statement of reasons to at least suggest that there may be questions to consider here. For example, in relation to the issue of whether the appellant was in fact misled by the notice to leave, it is suggested that she is a solicitor (at paragraph 11), and that two acquaintances of hers had viewed the property (at her instigation?) and – in summary – doubted the genuineness of the sale (paragraphs 21 and 22). The precise chronology is unclear, but there may be an issue of whether the appellant really believed that the respondents were intending to sell the property, notwithstanding the terms of the notice to leave. As for the question of whether the appellant left the property, at least in significant or material part, because of the misleading representation identified, it appears that she ceased to occupy in the context of a long running and acrimonious dispute with the respondents in relation to a number of tenancy issues. It is therefore at least appropriate to explore and make findings on whether it was this, or other factors, which caused her to give up the tenancy, rather than her being misled by the notice to leave.

Disposal

20. The FTS having erred in law as described, its decision cannot stand and must be set aside. As to disposal, the FTS did not make clear findings in fact on all the issues necessary in order to properly determine the application. It did make a clear finding that the appellant had not been misled into ceasing to occupy the property (finding (vi)), but that finding was based on an erroneous approach to the relevant law as described. These matters indicate that further fact finding is required, and that it is neither appropriate for me to remake the decision, nor to remit the case to the same FTS to make additional findings in fact. Rather, the case should be remitted for a full re-hearing before a freshly constituted tribunal, who should apply the law as set out above and make its own findings and conclusions accordingly.

Further appeal rights

21. 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.

Sheriff SG Collins KC
Member of the Upper Tribunal for Scotland
15 July 2024