



DECISION OF

Sheriff Tony Kelly

**ON APPEAL
IN THE CASE OF**

Pepper UK Limited
per Alston Law,

Appellant

- and -

Ms Jade Alvey, Mr Marc Rendle
per GIC

Respondents

FTS Case Reference - FTS/HPC/RP/23/1039

Glasgow, 8 January 2024

Decision

The Upper Tribunal upholds the appeal and dismisses the application.

Introduction

[1] The respondents in this appeal sought an order from the First Tier Tribunal for Scotland (Housing and Property Chamber) (“FTS”) that their landlord had failed to comply with the repairing standard duties in terms of section 14(1) of the Housing (Scotland) Act 2006. In their



application the tenants named the landlords as “Pepper Uk”, see Answer 6 of Form A submitted to the FTS.

[2] Mr Fever (designed as “the named landlord” by the FTS) contracted with the tenants for rental of the property at Flat 1, 7 East Pilton Farm Crescent, The Strada, Edinburgh (“the subjects”), commencing on 15 September 2020. The Housing (Scotland) Act 2006 (“the 2006 Act”) governs the tenancy agreement between the parties. The duty to ensure compliance with the repairing standard falls upon the landlord – section 14(1)(b). The tenant may make application to the FTS for a determination as to whether the duty has been complied with – section 22(1). When such an application is made, the FTS must decide whether there has been compliance – section 24(1).

The Subjects

[3] The subjects were purchased by Mr Fever on 18 December 2006. He remains the registered heritable proprietor of those subjects in terms of the Land Certificate MID100985. Mr Fever granted a standard security over the subjects on 8 January 2007. The heritable creditor was GMAC-RFC Ltd. The standard security was assigned on 18 December 2008 and 24 June 2015, and, on 20 June 2016, to the appellant, Pepper UK Limited.

[4] On 9 December 2021, the sheriff at Edinburgh granted decree in favour of the appellant against Mr Fever finding it entitled to enter into possession of the subjects.

[5] On 3 March and 18 November, both 2022, notices to leave were served upon the tenants. Proceedings seeking the ejection of the tenants had been commenced, and, at the time of the FTS decision, were pending before that tribunal, though in a separate process.

[6] After sundry procedure the FTS directed that a hearing take place in order to determine



whether Pepper UK Limited were properly convened as landlords in this application. By decision dated 24 August 2023, the FTS decided that the heritable creditor, the appellant, is the landlord for the purposes of the 2006 Act in relation to the subjects and thus properly designed as the party to respond to this application concerning the repairing standard.

FTS Decision

[7] The FTS had regard to section 20(5) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (“the 1970 Act”). This provides for deemed assignment to a creditor in lawful possession of rights and obligations of the proprietor relating to leases. The FTS reasoned that the obligations of the proprietor which transferred to the heritable creditor must include those relating to the repairing standard under the 2006 Act – see para.11.

[8] The decree pronounced by the Sheriff at Edinburgh permitted repairs to be carried out in order to keep the subjects in good and sufficient repair. The FTS had regard to schedule 3, condition 10(6) of the 1970 Act which provides that:

“[the creditor upon default] may effect all such repairs and may make good such defects as are necessary to maintain the security subjects in good and sufficient repair”.

It decided that these included repairs to meet the repairing standard under the 2006 Act – see para.12.

[9] Condition 10(5) of Schedule 3 to the 1970 Act provides for the transfer to a heritable creditor who has entered into possession of “all rights of the debtor in relation to the granting of leases...over the security subjects and to themaintenance of those subjects.” For the FTS the transferring of all rights was indicative of the corresponding transfer of all obligations – see



para.12.

[10] Finding against the appellant's submission that it was not the owner of the property, the FTS referred to a number of statutory provisions which it said supported the view that the heritable creditor is "commonly...deemed to be treated as the owner", these included: section 123 of the Title Conditions (Scotland) Act 2003; section 55 of the Housing (Scotland) Act 1988 and section 45 of the Private Housing (Tenancies) (Scotland) Act 2016. The FTS reasoned that the heritable creditor had *de facto* ownership despite not having an interest registered in the Land Register – see para.16.

[11] Reliance was placed by the appellant upon Gretton & Reid *Conveyancing* (5th Ed) at 23-37. Though acknowledging that the heritable creditor was not "the infeft registered owner", the FTS concluded as being "obvious from the statutory authorities" that it analysed, that:

"...a heritable creditor in possession stands in the shoes of named landlords in residential tenancy arrangements in Scotland and are 'treated as' the landlord for all practical and legal purposes pertaining to lease arrangements".– see para.18.

[12] The absence of having access to keys, and collecting rent was dealt with by the FTS on the basis that the heritable creditor "*de facto* lets the property regardless of whether or not rents are collected". – see para.19. The FTS placed reliance upon the initiating of proceedings by Pepper UK Limited seeking to eject the tenants as equivalent to the heritable creditor assuming the status as landlord – see para.21. It was illogical for the heritable creditor to be entitled to act as landlord for some purposes yet reject that status to diminish or extinguish other obligations. Confusion may arise if there was more than one landlord for different purposes. This conflicted with section 20(5) of the 1970 Act which transferred all rights and obligations of the proprietor to the heritable



creditor – see para.22. The tenants were entitled to have the repairing standard complied with. That right could not be extinguished. The FTS referred to the omissions in respect of the repairing standard stated in the application – see para.23.

Appeal

[13] Application was made for permission to appeal by the Pepper UK Limited. On 6 September 2023 the FTS granted permission to appeal. The grounds of appeal which were permitted to proceed were in the following terms:

- i. A heritable creditor with an unenforced decree for possession is a heritable creditor “in possession”.
- ii. A heritable creditor who seeks to sell a property under the calling up process has assumed the status of a landlord.
- iii. A heritable creditor who holds an unenforced decree for possession for the Sheriff (and is therefore in the possession of Pepper (UK) Limited is a landlord for the purposes of the Housing (Scotland) Act 2006 and specifically the repairing obligation.

[14] Both parties indicated that they were content for the matter to be decided without the necessity of a hearing. Written representations were received from the appellant but not the respondents.

Appellant's Submissions

[15] i. Pepper UK was not a heritable creditor in possession notwithstanding that a decree had been obtained by it at Edinburgh Sheriff Court. It had not taken possession. Reliance was placed upon the Report of the Scottish Law Commission on *Real Burdens* (No. 181 2000) at para 13.7. A mere entitlement does not of itself constitute possession nor does calling up the loan and marketing the property – see paragraph 13.8.



[16] In *Ascot Inns Ltd (in receivership) v Braidwood Estates Ltd* 1995 SCLR 390 the sheriff held that there was a distinction between a creditor proceeding to sell and a creditor entering into possession. Section 20(5) of the 1970 Act had application to the creditor who was in lawful possession of the security subjects.

[17] *David Watson Property Management v Woolwich Equitable Building Society* 1990 SLT 764 held that the grant of decree was not the same as entering into possession.

[18] ii. The heritable creditor who seeks to sell a property assumes the status of a landlord. Reference was made to the reasoning of the FTS which relied upon *Pepper UK Limited's* application to the FTS seeking the ejection of the tenants. The remedy which the heritable creditor was invoking was to seek vacant possession *qua* heritable creditor.

[19] The potential for confusion of having two landlords simply did not arise. There was only one landlord, the heritable proprietor.

[20] iii – a heritable creditor with a decree for possession from the sheriff is a landlord for the purposes of the Housing (Scotland) Act 2006. It was not the case that there had to be a landlord who was capable of discharging obligations arising under the 2006 Act. Reference was made to *Scottish Land Law*, Gordon, Wortley et al, at 20-156.

[21] The heritable creditor has not entered into possession. The decree granted by the Sheriff at Edinburgh gives it a limited power of entry to carry out certain repairs in order to maintain the value of the property. A power to carry out limited repairs would not be required if the heritable creditor also acquired the landlord's repairing obligation. Not every property where the heritable creditor seeks possession has a sitting tenant.



Decision

[22] Is Pepper UK Limited, the heritable creditor, the properly convened landlord for the purpose of the application to the FTS for a decision as to whether a landlord in respect of the subjects let to the tenants has failed to comply with the repairing standard in terms of section 14(1) of the Housing (Scotland) Act 2006?

Statutory Provisions

(i) *Conveyancing and Feudal Reform (Scotland) Act 1970*

[23] Section 20(5) provides:

“20 Exercise of rights of creditor on default of debtor in complying with a calling-up notice.

(5) There shall be deemed to be assigned to a creditor who is in lawful possession of the security subjects all rights and obligations of the proprietor relating to—

(a) leases, or any permission or right of occupancy, granted in respect of those subjects or any part thereof, and

(b) the management and maintenance of the subjects and the effecting of any reconstruction, alteration or improvement reasonably required for the purpose of maintaining the market value of the subjects.”

[24] Schedule 3 of the 1970 Act, contains the standard conditions which regulate every standard security (section 11(2)). Condition 10 applies where the debtor is in default and provides that the creditor may exercise the remedies referred to there – 10(1).

[25] Condition 10(5) and (6), Schedule 3 of the 1970 Act provide:

“Rights of creditor on default.



(5) Where he has entered into possession as aforesaid there shall be transferred to him all the rights of the debtor in relation to the granting of leases or rights of occupancy over the security subjects and to the management and maintenance of those subjects.

(6) He may effect all such repairs and may make good such defects as are necessary to maintain the security subjects in good and sufficient repair, and may effect such reconstruction, alteration and improvement on the subjects as would be expected of a prudent proprietor to maintain the market value of the subjects, and for the aforesaid purposes may enter on the subjects at all reasonable times.”

[26] The distinction between a heritable creditor who has possession and one who sells the subjects was recognised *Ascot Inns Limited* :

“In terms of condition 10(3) the creditor may enter into possession of the security subjects and may receive or recover various payments, including the rents of the subjects. The rights in condition 10(4) and (5) apply where the creditor has entered into possession of the security subjects. Thus, in my view, a creditor proceeding to sell is quite separate and distinct from a creditor entering into possession and that, if the heritable creditors ... began an unsuccessful negotiation with the defenders for the sale of the property, this in no way involves, even by implication, the heritable creditors entering into possession.”

[27] Condition 10(3) provides:

(3) He may enter into possession of the security subjects and may receive or recover feu-duties, ground annuals or, as the case may be, the rents of those subjects or any part thereof.

[28] The provisions of the 1970 Act relied upon by the FTS have application where the heritable creditor has entered into possession of the subjects over which a security has been granted by the creditor. The purpose of s. 20(5) is to assign to the creditor *who is in lawful possession of the security subjects* rights and obligations already vested in the proprietor. Standard condition 10(5) describes what the creditor who has entered into possession may do once he has entered into possession



using such rights as the debtor may already have which are transferred.

(ii) *Title Conditions (Scotland) Act 2003*

[29] The Title Conditions (Scotland) Act 2003 is described in the long title as:

“An Act of the Scottish Parliament to make further provision as respects real burdens, servitudes and certain other obligations affecting land; to amend the law relating to the ranking of standard securities; and for connected purposes.”

[30] Section 123 provides:

“The expression “owner”

(1) Subject to subsections (2) and (3) below, **in this Act “owner”**, in relation to any property, means a person who has right to the property whether or not that person has completed title; but if, in relation to the property (or, if the property is held pro indiviso, any pro indiviso share in the property) more than one person comes within that description of owner, then “owner” —

(a) for the purposes of sections 4(2)(b), 6(1)(a), 15, 16, 19, 33(1) and (2) and 35 of this Act, means any person having such right; and

(b) for any other purposes means such person as has most recently acquired such right.

(2) Where a heritable creditor is in lawful possession of security subjects which comprise the property, then “owner” —

(a) for the purposes of the sections mentioned in paragraph (a) of subsection (1) above includes, in addition to any such person as is there mentioned, that heritable creditor; and

(b) for any other purposes (other than of construing section 1 of this Act) means the heritable creditor.” (emphasis added)

[31] The definition of the expression “owner” provided for in section 123 is expressly circumscribed to the use of that term in the 2003 Act. The FTS appear to rely upon this provision as an aid to construction of the term “landlord” in the 2006 Act.



[32] Section 194 includes in the definition of owner those who have a right to the property – whether or not infeft (sub-section (1)) and those who are heritable creditors in possession (sub-section (2)). In sub-section (1), the reference to completion of title being irrelevant is prefaced by a reference to “a person who has right to the property”. The heritable creditor who obtains a decree for possession does not acquire a right to the property. Sub-section (2) applies to a heritable creditor in possession.

[33] Section 123 of the 2003 Act does not equate a heritable creditor with an owner. The 2003 Act is not of assistance as an aid to interpretation of the term “landlord” in connection with a lease governed by the 2006 Act.

(iii) Housing (Scotland) Act 1988

[34] The interpretation provision, section 55, it applies only to Part II of the Act. For that part of the Act:

““landlord” includes any person from time to time deriving title from the original landlord and also includes, in relation to a house, any person other than a tenant who is, or but for the existence of an assured tenancy would be, entitled to possession of the house;” (section 55(1))

[35] Part II relates, in the main, to assured residential tenancies under the 1988 Act. The tenancy before the FTS in this case is not an assured tenancy. The manner in which the definition of landlord for tenancies under the 1988 Act can be invoked as an aid to interpretation for the term “landlord” in the 2006 Act is not made clear by the FTS.

[36] The heritable creditor of the subjects at the point in time when the FTS was dealing with the tenants’ application did not derive title from the original landlord. The 1988 Act provides for a landlord’s successors in title – not yet infeft but entitled to possession – to be the landlord for the



purposes of tenancies under that Act. It is perhaps not helpful to speculate about examples where that provision might have application, but, perhaps, this is an anti-avoidance provision to allow for the continuation of a landlord's obligations in certain circumstances.

(iv) Private Housing (Tenancies) (Scotland) Act 2016

[37] Section 45 provides:

"45 Landlord's interest transfers with ownership of property

When ownership of a property let under a private residential tenancy is transferred, the landlord's interest under the tenancy transfers with it."

[38] The heritable creditor has no ownership of subjects which have been transferred. It has an interest, separate and distinct from ownership. The landlord's interest as owner has not transferred to the appellant. The appellant has its interest registered in the Land Register as assignees of the standard security. The landlord's interest has not transferred to the appellant. Mr Fever remains the heritable proprietor. The appellant remains the heritable creditor. The manner in which the FTS derived assistance from the 2016 Act as an aid to interpret the term "landlord" in the 2006 Act is not made clear.

[39] The FTS concluded, at para.18, that the heritable creditor in possession "stands in the shoes of named landlords in residential tenancy arrangements in Scotland" and may be

"'treated as' the landlord for all practical and legal purposes pertaining to lease arrangements". (quotation marks in the original)

[40] For the FTS this resolves any tension or conflict between the finding on the one hand that the heritable creditor in possession is the landlord and on the other what it describes as "the strict conveyancing interpretation" ascribed to Gretton & Reid, *Conveyancing* (5th Ed).



Housing (Scotland) Act 2006

[41] Section 194(1) provides:

“In this Act, unless the context indicates otherwise—

...

“landlord” means any person who lets a house under a tenancy, and includes the landlord's successors in title” (emphasis added)

[42] This meaning is expressly constrained to its use in the 2006 Act. The inclusion within the definition of “landlord” of a landlord’s successor in title does not assist here. The heritable creditor’s interest as security holder is separate and distinct from the registered proprietor. The appellant here is not a successor in title to the landlord. When selling, even if in implement of the powers under the security following upon default, the heritable creditor is not a proprietor: see *Gretton & Reid Conveyancing* (5th Ed) at 23-37.

[43] The construction of the term “landlord” in the 2006 Act is able to be arrived at invoking the ordinary principles of statutory construction. Recourse to other statutes is not apposite in this situation. The reason for that search in other statutory provisions is not made clear. There is no patent absurdity or ambiguity on the face of the provision which justifies a search through extraneous statutory (or other) material. The conclusion that a heritable creditor is treated as the landlord for all practical and legal purposes pertaining to lease arrangements is not supported by the legislative provisions invoked by the FTS.

[44] The provisions set by the FTS do not make out the proposition that the heritable creditor (in possession or otherwise) ‘stands in the shoes of named landlords in residential tenancy arrangements in Scotland’. That broad description does not assist in the endeavour that was the



focus for the FTS in the application it had to consider.

[45] The FTS elides the distinction between heritable creditor and heritable creditor in possession. That issue matters for the answer to the question as to whether the appellant is properly designed as landlord in this application and has an obligation to fulfil the repairing standard in relation to the subjects. It has significance in each of the statutory provisions referenced by the FTS.

[46] The appellant has not let a house under a tenancy. It is not the successor in title to a person who has let a house under a tenancy. It is not the landlord for the purposes of this application.

[47] Pepper UK Limited is not the heritable creditor in possession. Pepper UK Limited is not in possession of the subjects. The decision of the FTS, that the appellant is the landlord for the purposes of this application, amounts to an error of law. The landlord who is obliged to comply with the repairing obligation in terms of the 2006 Act is Mr Fever, the heritable proprietor who contracted with the respondents.

Conclusion

[48] Pepper UK Limited is not the landlord of the subjects. It is not the landlord for the purposes of the application before the FTS. In the circumstances the application is not competently before the FTS. The appeal is upheld. The decision of the FTS is quashed. The application is dismissed.

*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*