FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 23
XA69/17

Lord President
Lord Brodie
Lord Glennie

OPINION OF THE COURT

delivered by LORD GLENNIE

in the Appeal by

MICHELLE ANNE CAVEN

Appellant

against

IRVINE HOUSING ASSOCIATION

Respondent

against a decision of the Lands Tribunal for Scotland dated 22 June 2016

Appellant: party (R Membury, lay representative)
Respondent: McKinlay; Harper Macleod LLP

29 March 2018

[1] The appellant is the tenant of a dwelling house at 28 Goldie Crescent, Dumfries. The respondent is the landlord. On or about 10 November 2015 the appellant applied to the respondent to purchase her house, purporting to exercise her right to buy in terms of section 61(1) of the Housing (Scotland) Act 1987 ("the 1987 Act"). By letter dated

16 November 2015 the respondent refused that application on the ground that, although the tenancy was a "Scottish secure tenancy" and the appellant, as tenant, had the right to buy the house under the provisions of the "modernised" right to buy introduced by the Housing (Scotland) Act 2001 ("the 2001 Act"), that modernised right to buy could not be exercised until 30 September 2022 at the earliest, and accordingly the appellant's application to purchase the house could not be processed "at this time".

[2] The appellant applied to the Lands Tribunal ("the Tribunal") pursuant to section 68(4) of the 1987 Act for a finding that she had a right to purchase the house under section 61. On 22 June 2016 the Tribunal dismissed that application as incompetent. The Tribunal held that the right to buy was suspended until 30 September 2012 pursuant to section 61A(3)(a) of the 1987 Act and for a further period of 10 years (until 30 September 2022) granted by Scottish Ministers on the application of the respondent under section 61A(4). Accordingly, at that time the appellant had no right to apply to purchase the house; and the application was therefore incompetent. By a separate order made on 22 September 2016 the Tribunal awarded the respondent the expenses of the application.

[3] The appellant appeals to this court against those orders. In substance the appeal is against the order made on 22 June 2016 holding the application to be incompetent; we heard no separate submissions relating to the order for expenses made on 22 September 2016.

Subsequent abolition of the right to buy

[4] Subsequent legislation, *viz.* the Housing (Scotland) Act 2014, has abolished the right to buy by repealing the relevant provisions of the 1987 Act. We mention this for completeness since it explains why the appellant could not simply wait for a few more years before renewing her application to purchase.

The issue in outline

[5] The issue in this appeal is explained below under reference to the particular facts of the case. Suffice it to say for present purposes that it turns largely on: the introduction in the 2001 Act of the "Scottish secure tenancy" accompanied by a "modernised" right to buy; the effect of this on those who had previously been tenants under a secure tenancy with an original or "preserved" right to buy; the transitional provisions brought into effect by the Housing (Scotland) Act 2001 (Scottish Secure Tenancy etc.) Order 2002, SSI 2002/318 ("the 2002 Order"); and, in light of all this, the effect on her right to buy of the appellant's decision, after the date fixed by the 2002 Order, to exchange one tenancy for another with the same landlords. The appellant contends, in short, that none of this affected the right to buy attaching to her by reason of her original secure tenancy. The respondents contend otherwise.

Relevant facts and the changing statutory landscape

[6] The outline facts are not difficult to summarise. However, in order to understand the issue raised in this appeal, and to make legal sense of what has occurred, it is necessary to look at those facts in some detail in the light of the changing statutory landscape.

Secure tenancy from the council (with a right to buy the property)

[7] From about 1991 the appellant was a tenant of a property at 69 Stakeford Street, Dumfries. The property was owned by Dumfries & Galloway Council ("the council"). Her tenancy was a secure tenancy under section 44 of the 1987 Act. She had the right to

purchase that property from the council under section 61 of the 1987 Act. That is not in dispute. For convenience we shall refer to this right as an "original right to buy".

Secure tenancy from the respondent (with a preserved right to buy the property)

[8] In about March 1999 the council sold a number of properties in the Stakeford estate (including the appellant's property at 69 Stakeford Street and another property at 28 Goldie Crescent) to the respondent, Irvine Housing Association. The respondent is a registered social landlord, having been registered as such in 1994. At the time of the "stock transfer" in 1999 (ie the sale by the council to the respondent of the properties on the Stakeford estate) the right to buy did not extend to tenants of registered social landlords such as the respondent. However, section 81A of the 1987 Act (introduced by amendment in 1988) and the Housing (Preservation of Right to Buy) (Scotland) Regulations 1992 and 1993 provided, in effect, that, where public sector property which was subject to a secure tenancy was sold to a private sector landlord, the tenant's right to buy was preserved. The relevant statutory provisions are complicated; it is unnecessary to go into any detail since it is not in dispute that, after the sale of 69 Stakeford Street to the respondent, the appellant continued to be a secure tenant of that property, albeit with a different landlord (the respondent), and continued to have a "preserved" right to buy that property from her landlord under section 61 of the 1987 Act.

Exchange of tenancies

[9] The present issue arises from a three-way mutual exchange of tenancies on the Stakeford estate in terms of which the appellant moved from 69 Stakeford Street to 28 Goldie Crescent, and two other individuals moved from their existing tenancies to properties vacated as part of this mutual exchange. This occurred in September 2003. The reasons for

the exchange are of no importance, but it suited the appellant to move to a larger house because of the growing needs of her family and no doubt it suited the other two individuals as well. It should be noted that the respondent was the landlord of each of the properties involved in this exchange.

[10] We shall in due course consider the legal consequences of this exchange, so far as concerns the appellant, but it is necessary first to note important changes in the legislation relating to properties in the rented sector.

The Housing (Scotland) Act 2001 – creation of the "Scottish secure tenancy"

[11] The 2001 Act made a number of changes to this area of the law. So far as is relevant to this appeal, it created the "Scottish secure tenancy": see section 11 which provides that a tenancy of a house is a "Scottish secure tenancy" if, amongst other things, (a) the house is let as a separate dwelling, (b) the landlord is a local authority landlord, a registered social landlord or certain other types of landlord, and (c) the tenant is an individual and the house is the tenant's only or principal home.

[12] There are two important features to note about this part of the legislation. The first, which is set out in section 11(1)(e) of the 2001 Act, relates to timing: a tenancy is a "Scottish secure tenancy" if (i) the tenancy was created on or after a date in the future to be specified in an Order or (ii) the tenancy was created before that date and was of a description specified in the Order. In the event, the specified date was 30 September 2002 and the specified description included secure tenancies from registered social landlords: see Article 3 and the Schedule to the Housing (Scotland) Act 2001 (Scottish Secure Tenancy etc.) Order 2002, SSI 2002/318 ("the 2002 Order"). Put short, subject to a commencement date and

any transitional provisions, the Act applied so as to make a tenancy of the type held by the appellant in respect of 28 Goldie Crescent a "Scottish secure tenancy".

[13] The second feature relates to the steps which it was envisaged would be taken to protect pre-existing rights. Section 11(2) of the 2001 Act provided that any Order made under section 11(1) might make provision for ensuring that the rights of the landlord and the tenant under an existing tenancy, which became a Scottish secure tenancy by virtue of the Act and the Order, were not adversely affected by the tenancy becoming a Scottish secure tenancy. Before looking at how the 2002 Order sought to achieve this, we should notice the changes to the right to buy scheme brought in alongside the creation of the Scottish secure tenancy.

Effect of these changes on the right to buy

[14] Section 61(1) of the 1987 Act, as originally enacted, provided that a secure tenant of a house owned by a public sector landlord had the right to purchase that house at a price to be fixed under section 62. When the 2001 Act created the "Scottish secure tenancy", it amended the provisions of the 1987 Act concerning the right to purchase. It did so in two respects. First, section 61 of the 1987 Act was amended so that it applied to houses let under a "Scottish secure tenancy" where the landlord was either a local authority or a registered social landlord or Scottish Water. To that extent it extended the tenant's right to purchase to a wider category of tenants. The section applied to a Scottish secure tenancy where the landlord was a registered social landlord and (a) the tenancy was created either after the date to be specified in an Order (in the event 30 September 2002, as specified in the 2002 Order) or (b) where the tenancy became a Scottish secure tenancy by virtue of such an Order (in the event, the 2002 Order). Once brought into force and subject to the effect of any

transitional provisions, section 61 in terms applied to a (Scottish) secure tenancy such as that held by the appellant from the respondent in respect of the property at 69 Stakeford Street.

[15] Secondly, however, perhaps in recognition of the pressure placed on registered social landlords by increased demand and a shortage of housing stock, the 2001 Act inserted a new section 61A into the 1987 Act, which placed a limitation on the right to purchase from registered social landlords. The key provisions of section 61A are contained in sub-sections (3) and (4) thereof: These subsections provide as follows:

> "**61A Limitation on right to purchase from registered social landlords**
>
> …
>
> (3) Where this section applies, section 61(1) does not apply in relation to a house let under the tenancy until the expiry of –
>
> (a) the period of 10 years beginning with the date referred to in subsection (1)(a), and
>
> (b) any further period determined under subsection (4).
>
> (4) The Scottish Ministers may if they think fit, on an application made by the landlord before the expiry of a period mentioned in subsection (3)(a) or (b), determine a further period, not exceeding 10 years, for the purposes of paragraph (b) of that subsection."

The date mentioned in sub-section (3)(a) was, in the event, the date specified in the 2002 Order, namely 30 September 2002.

[16] The import of this is clear. In the case of a Scottish secure tenancy where the landlord is a registered social landlord, the tenant's right to buy conferred by section 61(1) of the 1987 Act is, in effect, suspended initially for a period of 10 years (ie until 30 September 2012); and it may, on an application made by the landlord, be suspended for a further period of up to 10 years (ie until 30 September 2022). This is what the respondent says happened in this case; and this is what the Tribunal too found to be the case. The Tribunal held that, at the time she applied to buy it in November 2015, the appellant had no right to make an application to purchase the house of which she was the tenant.

Transitional provisions in the 2002 Order

[17] We have already noted that when in 1999 the council sold the property at 69 Stakeford Street to the respondent, a registered social landlord, the appellant's tenancy remained a secure tenancy, notwithstanding the change of landlord, and her right to buy the property was preserved.

[18] When the relevant provisions of the 2001 Act came into force on 30 September 2002, it abolished the former "secure tenancy" by repealing the statutory basis for it in section 44 of the 1987 Act. It created the new "Scottish secure tenancy" in its place. The appellant's tenancy of 69 Stakeford Street changed from a "secure tenancy" under section 44 of the 1987 Act into a "Scottish secure tenancy" under section 11 of the 2001 Act. But this did not mean that she thereupon lost her existing right to buy the house. This is because, as anticipated in section 11(2) of the 2001 Act, the 2002 Order contained transitional provisions and savings in respect of the right to buy which had previously been enjoyed by secure tenants under the 1987 Act.

[19] Article 4(1) of the 2002 Order provided that where, immediately before the "conversion date" (ie 30 September 2002 when the relevant part of the 2001 Act came into force and the appellant's tenancy converted from being a "secure tenancy" to a "Scottish secure tenancy"), a tenant had a right to purchase under section 61 of the 1987 Act, the provisions of the 1987 Act and the 2001 Act would apply in relation to that tenancy subject to certain modifications mentioned in Article 4(2). The important modification for present purposes was that section 61A would not apply in relation to that tenancy. In other words, in the case of such a tenant, and this included the appellant, the right to buy would not be suspended in terms of section 61A. There would be a continuing, subsisting and enforceable

right to buy. In the case of the appellant, that meant that although her tenancy of 69 Stakeford Street became a Scottish secure tenancy, her right to buy that property was preserved and was not subject to the terms of section 61A.

[20] However, Article 4 of the 2002 Order made it clear that this retention of the original or preserved right to buy under these transitional provisions, free of any suspension in terms of section 61A, only continued until the earliest of certain events, the relevant one here being the termination of the tenancy (paragraph 4(1)(a)) of 69 Stakeford Street. In terms of Article 4(3), a tenancy is to be considered as terminated for this purpose if it is brought to an end under any of the circumstances listed in section 12(1) of the 2001 Act other than in certain circumstances which do not apply here. Section 12(1) sets out a number of ways in which a Scottish secure tenancy may be brought to an end, one of which, and the only relevant one here, is "(e) by written agreement between the landlord and the tenant …".

[21] In September 2003 the appellant exchanged her Scottish secure tenancy (as it had become) of 69 Stakeford Street for a Scottish secure tenancy of 28 Goldie Crescent. Section 33 of the 2001 Act gives a tenant under a Scottish secure tenancy the right to exchange the house which is subject to the tenancy for another house which is also subject to a Scottish secure tenancy, whether or not belonging to the same landlord, but only with the consent (not to be unreasonably withheld) of the landlord or landlords concerned. Section 33(6) provides that on an exchange in accordance with that section, "the existing tenancy is terminated and the tenant is taken to have been granted a Scottish secure tenancy of the other house by the landlord of that house". The new tenancy of 28 Goldie Crescent was the subject of a Scottish Secure Tenancy Agreement between the appellant and the respondent. It was signed by both parties in September 2003. Those signatures were preceded by a letter from the respondent to the appellant dated 3 September 2003 in which

the respondent states that it has no objection to the exchange taking place with effect from 15 September 2003 "on the condition that you return the enclosed End of Tenancy Forms, all duly signed and witnessed, by 12 September 2003". It goes on to say that if the End of Tenancy Forms are not returned by that date, the mutual exchange will be cancelled. It seems plain that End of Tenancy Forms in respect of the tenancy at 69 Stakeford Street must have been signed by the appellant and returned to the respondent; otherwise the exchange would not have taken place. But even if that did not happen, the effect of the new Scottish Secure Tenancy Agreement in respect of 28 Goldie Crescent, signed by both parties, following on from the letter of 3 September 2003, read in the light of section 33(6) of the 2001 Act, is clear; it amounts to a written agreement between the landlord and tenant, *viz.* the respondent and the appellant, bringing the tenancy of 69 Stakeford Street to an end and creating a new tenancy of 28 Goldie Crescent.

[22] In those circumstances there was a termination of the Stakeford Street tenancy within the meaning of Article 4(1)(a) of the 2002 Order, as a result of which the transitional provisions, so far as they assisted the appellant by preserving her right to buy free of the suspension in section 61A of the 1987 Act, came to an end; and thereafter the appellant, as a Scottish secure tenant of the house in Goldie Crescent, simply had the modernised right to buy conferred by section 61(1) of the 1987 Act but subject to it being suspended for a period of 10 years and possibly more in terms of section 61A of that Act. In the event, as noted above, the suspension of the right to buy continued beyond the original 10 year period for another 10 years thereafter, so that it could not be exercised until September 2022. At the time the appellant applied to purchase the property at Goldie Crescent in November 2015 she no longer benefitted from the transitional arrangements put in place by the 2002 Order – those transitional arrangements in her case having come to an end when she exchanged the

tenancy of Stakeford Street for that of Goldie Crescent – and her right to buy the house was suspended in terms of section 61A of the 1987 Act. It was subsequently abolished.

[23] In those circumstances, in terms of the statutory provisions applicable to the appellant's situation, the Tribunal was right to conclude that the appellant had no right to buy capable of being exercised at that time and that therefore the appellant's application to buy the property in Goldie Crescent was incompetent.

Additional argument by the appellant

[24] The appellant recognised that it was the transfer of the tenancy from Stakeford Street to Goldie Crescent which caused the problems. She sought to get around this by arguing that the respondent, as landlord, had failed to comply with certain preconditions for the coming into effect of a Scottish secure tenancy, as a result of which, as we understood the argument, the tenancy of Goldie Crescent had not fully come into being and the termination of the tenancy at Stakeford Street was similarly incomplete. On that basis she argued that, since the Stakeford Street tenancy had not been (fully) terminated, the transitional arrangements brought into effect by Article 4 of the 2002 Order continued to apply, the suspension of the right to buy under the provisions of section 61A did not apply to her tenancy of Goldie Crescent, and she was entitled to buy the property.

[25] In support of this argument, the appellant referred to section 23 of the 2001 Act which deals with the "Tenant's right to written tenancy agreement and information". Section 23(4) specifically provided that before the creation of a Scottish secure tenancy the landlord must provide the tenant with information about (a) the tenant's right under the 1987 Act to purchase the house which is the subject of the tenancy, and (b) the obligations which the tenant is likely to incur if the right to buy is exercised. It was submitted that no

proper information was given to the appellant at the time of effecting the exchange of tenancies and entering into the new tenancy agreement in respect of Goldie Crescent. The giving of that information was, in effect, a precondition to the validity of the tenancy; and if the Goldie Crescent tenancy was defective in this way, so too was the termination of the Stakeford Street tenancy, since the two were inseparably linked and were part of the mutual exchange of tenancies in 2003.

[26] There was some dispute about whether the respondent had sent a letter to the appellant containing information to the effect that the appellant would not be able to exercise her right to buy until 30 September 2012 at the earliest, which date could be extended. This issue is referred to by the Tribunal but it does not form any part of its reasons for holding the application to be incompetent. The Scottish Secure Tenancy Agreement in respect of 28 Goldie Crescent does not contain any such information, though it does (in section 8 "Information and Consultation") state that the landlord will, on request, provide the tenant with information on a wide range of topics, including the right to buy. On the other hand, it should be noted that the letter of 3 September 2003, by which the respondent indicated that it had no objection to the exchange taking place, pointed out that in effecting that exchange the appellant "will lose your preserved Right To Buy and move to the modernised Right To Buy once you have transferred to your new property."

[27] We do not need to resolve this factual dispute. It is not relevant to our decision. This is an appeal from a decision of the Lands Tribunal made upon an application by the appellant under section 68(4) of the 1987 Act. In reaching its decision the Tribunal was concerned with the proper application of the various statutes and statutory instruments to the facts as presented to it. The application by the appellant was based upon there being a tenancy of 28 Goldie Crescent; she contended that she had a right to buy that property on

the basis of her tenancy thereof. That was an essential part of her case, and the Tribunal could not proceed on the basis that the validity of that tenancy was in dispute, even if only as a stepping stone to casting doubt upon the termination of the tenancy over 69 Stakeford Street; indeed any dispute as to whether the Goldie Crescent tenancy was in some way defective would have undermined the very right (the right to buy that property) which the appellant was seeking to assert. Further, if and insofar as the matters complained of by the appellant might be said to cast any doubt upon the appellant's tenancy of 28 Goldie Crescent, and we express no view about the merits of any such argument, they would not render that tenancy null and void – at best for the appellant they would be relevant only as grounds for reduction of the Goldie Crescent tenancy, a matter over which the Tribunal has no jurisdiction. On appeal from the Tribunal, this court cannot go into matters over which the Tribunal had no jurisdiction. Accordingly this argument must fail. But we cannot leave the matter without pointing out the unreality of a challenge to the tenancy of 28 Goldie Crescent and the termination of the tenancy of 69 Stakeford Road when the appellant has been living at 28 Goldie Crescent without objection for some 15 years after the mutual exchange of tenancies of which these transactions formed part.

Section 43(3)(c) of the Housing (Scotland) Act 1988

[28] During the course of the hearing the court raised the question of whether the provisions of section 43 of the Housing (Scotland) Act 1988 ("the 1988 Act") had any bearing on the matter. That Act introduced the "assured" tenancy (which has now been abolished) and restricted the circumstances in which a tenancy entered into thereafter could be a secure tenancy. Section 43(3)(c) of that Act provided that a tenancy entered into on or after the commencement of that section could not be a secure tenancy unless, and this was one

situation amongst many, it was granted to a person who, immediately before it was entered into, was the secure tenant of the same landlord. It was, in effect, a transitional provision to ensure that those who moved from one tenancy to another with the same landlord did not lose their rights as a secure tenant, including the right to buy. That section has been the subject of judicial consideration in *Queens Cross Housing Association* v *McAllister* 2003 SC 514 (the precise point decided in that case does not matter for present purposes). The question was whether that provision, which is still in force, could assist the appellant, the argument potentially being that she too, as a secure tenant of 69 Stakeford Street had been granted a new tenancy of another property belonging to the same landlord, namely 28 Goldie Crescent, and was therefore entitled to continue in her status as a secure tenant of that new property. The appellant naturally enough sought to rely upon this argument. However it was pointed out by counsel for the respondent that, on the coming into force of the 2001 Act, section 44 of the 1987 Act, which was the statutory foundation for the existence of a "secure tenancy", was repealed. It was replaced by the "Scottish secure tenancy". So far as relevant to this case, therefore, section 43(3) of the 1988 Act had no content; there was no longer any such thing as a "secure tenancy". Further, given the terms of section 11(2) of the 2001 Act and the transitional provisions contained within the 2002 Order, there was no need for a secure tenant exchanging tenancies under the same landlord to be given any special status in terms of section 43(3) of the 1988 Act. The transitional provisions in the 2002 Order preserved existing rights to buy the property in respect of which there was an existing secure tenancy, and those preserved rights were only lost when the tenant decided to move. We are satisfied that this is a complete answer to this question.

Disposal

[29] For the above reasons, we shall refuse the appeal. We reserve all questions of expenses.