Upper Tribunal for Scotland

[2021] UT 36
[Case Ref]

DECISION NOTICE OF SHERIFF GEORGE JAMIESON

ON AN APPLICATION FOR PERMISSION TO APPEAL (DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)

in the case of

MR NWAORA RANDALL ENE, 357 George Street VACATED, First Floor Right, Aberdeen

Appellant

and

MR GRAEME TOCHER, c/o 2 Corse Grove, Bridge of Don, Aberdeen, AB23 8LR per Peterkins Solicitors,
100 Union Street, Aberdeen, AB10 1QR

Respondent

FTT Case Reference FTS/HPC/EV/20/2501

Greenock, 28 June 2021

Decisions

(1) The application for permission to appeal to the Upper Tribunal against the First-tier Tribunal's Decision dated 26 March 2021 granting an eviction order is refused in relation to the issue whether the notice to quit and section 33 notice were valid. While these notices could have been better drafted, they are not materially defective and are not be regarded as being invalid. There is no realistic prospect of an appeal succeeding on this ground.

(2) The application for permission to appeal to the Upper Tribunal against the First-tier Tribunal's Decision dated 26 March 2021 granting an eviction order is refused on all other grounds set out in the Application for Permission to Appeal. Those other grounds of appeal are not arguable.

(3) The application for permission to appeal against the First-tier Tribunal's Decision dated 13 May 2021 to refuse permission to appeal to the Upper Tribunal is refused. This decision may not be appealed to the Upper Tribunal in terms of section 55(2)(b) of the Tribunals (Scotland) Act 2014.

Introduction

[1] The appellant has unsuccessfully challenged immigration decisions made by the Secretary of State for the Home Department ("SSHD") that he be removed from the United Kingdom including by way of an unsuccessful petition for judicial review to the Court of Session. He is unable to work as a failed asylum seeker. He has been in rent arrears since at least March 2020 in respect of a short-assured tenancy in Aberdeen. At a case management discussion on 26 March 2021 at which the appellant was not present, the First-tier Tribunal made the following findings in fact and granted an order for the appellant's eviction. This order is referred to in this Decision as "the eviction order" by way of shorthand for an order granted in an "application [by the landlord] for [an] order for possession upon termination of a short-assured tenancy" under rule 66 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017.

Findings in fact made by the First-tier Tribunal

- The applicant is the owner of the property.

- The parties entered into a short-assured tenancy on 1 July 2015 for let of the property for the initial period of 1 July 2015 until 20 June 2016 [*sic*] and month to month thereafter.
- The applicant's agents served a valid notice to quit and [section 33] notice on the respondent on 6 May 2020.
- The short-assured tenancy has reached its ish.
- Tacit relocation is not operating.
- The agreed rent was £650 per month.
- This was reduced by agreement in March 2018 to £475 per month.
- No rent has been paid since March 2020.
- As at 12 November 2020, the arrears had increased to £3200.
- The current rent arrears are in the region of £4550.
- It is reasonable in all of the circumstances that the order be granted.

[2] The reference to 20 June 2016 in the second of these findings in fact should have read 30 June 2016.

The lease

[3] The lease was entered into on 30 June 2015, with a commencement date of 1 July 2015. The termination date was 30 June 2016. The lease was therefore for an initial period of one year.

[4] Condition 1 relating to duration provided that the landlord give the tenant "two months written notice of termination", failing which the lease would continue on a month-to-month basis until terminated "by written notice as aforesaid". The lease was created as a short-assured tenancy.

Notices

[5] The landlord's agent, acting on behalf of the landlord, sent a Notice to Quit and a section 33 notice to the tenant on 8 May 2020.

[6] The Notice to Quit stated:

"I hereby give you formal Notice to Quit [the premises] by the 30th November 2020."

The prescribed information was included in the Notice to Quit.

[7] The section 33 notice stated:

> "Inform you that we hereby give notice that your landlords [*sic*] require possession of the [property] leased to you in terms of a short-assured tenancy which commenced on 01/10/2018.
>
> Your landlord requires vacant possession as at 30/11/2020. The tenancy will reach its termination date as at that date and WE NOW GIVE YOU NOTICE THAT YOU ARE REQUIRED TO REMOVE FROM THE PROPERTY ON OR BEFORE 30/11/2020."

Grounds of appeal

[8] The appellant appeals against the decision of the First-tier tribunal to grant the eviction order on a number of grounds which may be summarised as follows:

1. Given that he states his personal circumstances were exacerbated by decisions of the SSHD, he argues that the decisions made by the First-tier tribunal were reserved matters under the Scotland Act 1998 as they engaged issues of immigration law. He suggests therefore that these proceedings be transferred to the Upper Tribunal (United Kingdom) or to the Court of Session.

2. He alternatively suggests a transfer of the proceedings to the sheriff court as there are issues relating to rent arrears.

3. He argues that the Housing (Scotland) Act 1988 should be read with the Private Housing (Tenancies) (Scotland) Act 2016 and that as provisions of the 2016

Act were not complied with in respect of the notice to quit, then the notice to quit was invalid.

4. He argues that the Notice to Quit was invalid because there were no reasons or grounds for recovery of possession referred to in the Notice.

5. He argues the section 33 notice was invalid because the notice referred to the wrong date of the tenancy.

6. He makes the subsidiary point that the section 11 notice to the local authority and the section 33 notice to him ought to have referred to the same tenancy agreement and did not do so because the section 33 notice had the wrong date for the tenancy.

7. He argues under reference to *Moughal* v *Sharif* FTS/HPC/EV/19/2306 and *Dsa* v *Speirs* FTS/HPC/EV/20/2342 (in his response before the First-tier Tribunal) that the First-Tier Tribunal should have rejected the application for the eviction order in terms of rule 66 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 because no valid section 33 notice had been lodged with the application for the eviction order.

8. He argues no ish was specified in the tenancy agreement.

9. He argues the First-tier Tribunal proceeded unlawfully by proceeding with the case management discussion in his absence.

10. He argues the First-tier Tribunal misdirected itself in determining that it was reasonable to grant the eviction order.

Discussion

[9] So far as these grounds of appeal are concerned:

1. This ground of appeal is not arguable. The general law of landlord and tenant is not a reserved matter. The appellant's immigration difficulties, though important to him, were incidental to the jurisdiction of the First-tier tribunal to consider the application for the eviction order. A transfer to another court or tribunal by the Upper Tribunal for Scotland is competent only where the other court or tribunal has jurisdiction in respect of the subject matter of the application. Even if that were the case, I see no merit in such a transfer. The Upper Tribunal for Scotland is vested with responsibility for determining this application for permission to appeal.

2. This ground of appeal is not arguable. Jurisdiction in eviction proceedings in respect of assured (including short-assured tenancies) was transferred from the sheriff to the First-tier tribunal by section 16(1)(c) of the Housing (Scotland) Act 2014.

3. This ground of appeal is not arguable. The 1988 and 2016 Acts create two distinct types of residential tenancy and provisions about the notice to leave applicable to the 2016 Act may not be imported into the provisions for recovery of possession of dwelling-houses let on a short-assured tenancy under the 1988 Act.

4. This ground of appeal is not arguable. The appellant misunderstands the nature of the proceedings. The landlord may recover possession of a house let under a short-assured tenancy if the conditions of section 33 of the Housing (Scotland) Act 1998 are met. There is no requirement to specify any ground for recovery of possession in either the Notice to Quit or the section 33 notice.

5. There was an error in the section 33 notice regarding the date of the lease which I consider in the next section of this Decision.

6. The appellant's subsidiary point that the section 11 notice to the local authority and the section 33 notice to him ought to have referred to the same tenancy agreement is not arguable. The section 11 and section 33 notices served different purposes. The section 11 notice served to give notice to the local authority that the appellant might become homeless as result of any eviction order granted. The section 33 notice served the purpose of allowing proceedings for possession to be brought before the First-tier Tribunal.

7. This ground of appeal is not arguable. Rule 66(b)(iii) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 required the applicant to lodge a copy of the section 33 notice with his application for the eviction order. *Moughal* v *Sharif* is a brief Decision recording that a copy of the notice to leave was lodged in respect of an application for an eviction order from a house rented under a private rented tenancy. *Dsa* v *Speirs* refers to the rejection by the First-tier Tribunal of a late notice to leave under section 55 of the 2016 Act after the applicant had initially unsuccessfully attempted to lodge the application for an eviction order in respect of a private rented tenancy with the First-tier Tribunal without the supporting documents, including a copy of the notice to leave. Both cases illustrate the importance of lodging the supporting documents with the application, but in this case that was done. The First-tier Tribunal records at paragraph 4(5) of its Decision that a copy of the section 33 notice had been lodged with the application. The issue of the validity of that notice was for the First-tier Tribunal to consider at the case management discussion and was distinct from the requirement to lodge the notice.

8. This ground of appeal is not arguable. The ish is the date on which the lease terminates, subject to tacit relocation. There is no need to use the word "ish" in a

lease provided the lease has specified a termination date. In this case, the lease specified the tenancy terminated on 30 June 2016. The tenancy continued thereafter on a monthly basis, and required two months' notice for termination by the landlord. There is no issue in this case about the period of notice given by the landlord to the appellant for the termination of the tenancy or the date on which the landlord intended to terminate the tenancy being incorrect. The appropriate periods of notice were given for both notices and both notices correctly identified 30 November 2020 as the intended termination date.

9. This ground of appeal is not arguable. The First-tier Tribunal was aware of and took account of the appellant's religious beliefs in refusing to postpone the case management discussion, was satisfied he had notice of the case management discussion, and that it was fair to proceed in his absence. These were matters for the discretion of the First-tier Tribunal. No arguable point of law arises from the exercise of that discretion.

10. This ground of appeal is not arguable. The First-tier Tribunal had regard to all relevant considerations in concluding it was reasonable to grant the eviction order. Their reasoning was as follows:

> "There are substantial arrears of rent and there is no prospect of the respondent making any payment towards the arrears or indeed paying any further rent. The applicant understands that the respondent is seeking asylum and is not currently able to work. This does not appear to have been the case some 6 years ago when the tenancy agreement was entered into. The applicant made a reduction in the rental payment in 2018 and his agents have tried to signpost the respondent to an agency that can help. The respondent sought legal advice from the Civil Legal Assistance office in January 2021 and their letter of 18 January 2021 has been lodged. This letter also seeks to signpost the respondent to seek assistance of an immigration solicitor and help with temporary accommodation. In all of the circumstances the tribunal is satisfied that it is reasonable to grant the eviction."

These were matters for the discretion of the First-tier Tribunal and no arguable point of law arises from the exercise of that discretion.

Errors and potential errors in the Notice to Quit and section 33 notice

[10] The Notice to Quit informed the appellant he had to remove himself from the property "by" 30 November 2020. "By" is an ambiguous expression and might mean "on or before" or "before". The appellant was not required to remove at any time before 30 November 2020.

[11] The section 33 notice specified the wrong date for the lease. The First-tier Tribunal correctly identified that error as immaterial. The notice required to advise the appellant only that the landlord required possession of the house. That notice could legally be served before, at or after the termination of the tenancy, but in this case was served before the intended termination of the tenancy. The section 33 notice correctly identified that the intended termination date was 30 November 2020 and the landlord required possession of "the property" at that date. The reference to "the property" rather than "the house" (the expression used in section 33(1)(d)) was again immaterial. However, more significantly, the section 33 notice incorrectly required the appellant to remove "on or before" that date. These words "on or before" were in block capitals thereby highlighting these words were of particular importance to the landlord.

[12] Of course, it was always open to the appellant to remove voluntarily at any time before 30 November 2020, but he was not required to do so.

[13] The words of termination appear in the section 33 notice rather than the Notice to Quit, though words of termination in the Notice to Quit would not have been necessary if the landlord had been following the style for a notice of removal under section 37 of the

Sheriff Courts (Scotland) Act 1907 set out in Form H4 of the Ordinary Cause Rules 1993 assuming such a style to be applicable to proceedings transferred from the sheriff to the First-tier Tribunal.

[14] The landlord appeared to be confusing to some extent the purposes of the Notice to Quit, to terminate the lease at its ish, and the section 33 notice, to give notice of intention to make an application to the First-tier Tribunal for an order for possession, by including words of termination in the section 33 notice rather than the Notice to Quit, even if such words had not, strictly speaking, been necessary for an effective Notice to Quit.

[15] The First-tier Tribunal correctly noted that there is no prescribed form for a section 33 notice other than the statutory provision in section 33(1)(d) requiring possession of the house let under the short-assured tenancy, but considered only the issue of the incorrect date for the lease in that notice as raised in the appellant's written response to the application before the First-tier Tribunal.

[16] The First-tier Tribunal was not necessarily obliged to take note of other issues with the statutory notices sent to the appellant at its own initiative though it would have been open to the Tribunal to have done so.

[17] Having, however, taken note of and considered these additional issues, I am of the opinion this is not an arguable ground of appeal.

[18] The notices, taken together, gave sufficient notice to the appellant that the tenancy would be terminated on 30 November 2020 if he did not leave on that date. To the extent the notices may have contained contradictory or misleading information about the appellant being required to leave on or before that date, no prejudice accrued to the appellant who remained in the property until after 30 November 2020.

Conclusion

[19] Permission to appeal is refused.