Upper Tribunal for Scotland

2024UT36
UTS Ref: UTS/AP/24/0020

DECISION OF

Sheriff O'Carroll

ON AN APPEAL
IN THE CASE OF

Mr Mark Horne and Mr Robert Horne
per Community Help & Advice Initiative

Appellants

- and -

Slash Property Ltd
per Neil Reid Property

Respondent

FTS Case Reference: FTS/HPC/CV/23/3285

21 June 2024

Decision

The appeal by the appellants against the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) dated 25 January 2024 is refused.

Reasons

Introduction

1. This is an appeal against the decision of the First-tier Tribunal for Scotland (Housing and Property chamber) ("the FTS) dated 25 January 2024 ("the decision") that the tenants (the current appellants, referred to hereinafter as the tenants) make payment of £483 of rent arrears to their landlord (the current respondent, referred to hereinafter as the landlord).
2. The tenants made written application for review of the decision on various bases. That application was refused on 12 February 2024. The tenants then sought leave from the FTS to appeal the decision on the following grounds. First, the FTS erred in considering the purpose of a case management discussion. Second, the FTS misconstrued section 24 of the Housing (Scotland) Act 1988. Third, the FTS failed to comply with the duty imposed on it by section 71 of the Consumer Rights Act 2015 to consider the fairness of the rent review clause in the tenancy agreement. The FTS granted leave to appeal to the Upper Tribunal on grounds two and three only. While both parties then submitted a variety of emails, extraneous documents and commentary on the other side's position, leave not was sought or granted to amend the grounds of appeal. Those two grounds are therefore the only ones before this Upper Tribunal.
3. The parties asked that the appeal be dealt with on the papers without a hearing. I allowed that. Both parties lodged written submissions which I have fully taken into account. Before dealing with the grounds of appeal, it is necessary to set out the salient background.

Factual and legal background.

4. The tenants took entry to the property under a short assured tenancy, the initial term of which commenced on 27 January 2016 and ended on 29 July 2016. Clause 3 provided that the tenancy would continue thereafter "on a monthly basis" until ended by two months' notice by either side. At the time of the events with which this appeal is concerned, the tenancy had not been ended by either party. Thus, as a matter of law, the tenants continued

to occupy the subjects on a *contractual* short assured tenancy of two months' duration subject to automatic renewal every two months.

5. It is helpful in passing to observe that where a contractual assured tenancy (whether short or not) has been terminated by either party (usually but not always by means of a notice to quit) and the tenant retains possession, the tenant will be entitled to continue to occupy the property under a *statutory assured tenancy;* the terms of which are governed by legislation: see section 16 of the 1988 Act. Notably, the terms of a statutory assured tenancy are the same as the terms of the contractual assured tenancy that was in existence immediately before it was terminated *except for:* (i) terms relating to termination of the tenancy and (ii) (put broadly) any contractual term relating to increase of rent which *does not* provide for a rent increase mechanism incorporating factors which are not wholly within the control of the landlord and which can be readily understood by the tenant. The first exception is obviously because a statutory assured tenancy can only come into effect when the contractual tenancy has been ended, so a term providing for termination could perform no function in a statutory assured tenancy. To illustrate with two simple examples how the second exception works, a rent increase term which allows for an annual rent increase of RPI + 2% would survive conversion into a statutory assured tenancy whereas a clause permitting an unrestricted increase at the sole discretion of the landlord would not. Understanding this distinction helps explain how section 24 of the 1988 Act, the subject of the first ground of appeal, is intended to operate. First however I should complete the factual background.

6. The rent at the start of the tenancy was £600 per month. Clause 5.2 provides that the "Landlord may propose to increase the rent after the end date specified in clause 4 above. Under such circumstances the tenant will be given a minimum of 1 months' notice in writing of any proposed change before the beginning of the rental period when the change is to start". (The clause numbering is awry and should read clause 4.2 and 3 respectively but nothing turns on that). Thus, the rent increase clause is contractual and that term governs the relationship between the parties subject to any restriction which may be

imposed by statute or some other rule of law. As a matter of ordinary contractual interpretation, the term "end date" here means 29 July 2016 or the end of any two month continuation period. The contract term does not restrict the rent increase. Although the verb "propose" is used, that word, in context means "decide". There is no mechanism for discussion or agreement in the event that the landlord decides to increase the rent (although of course there is nothing to prevent the parties from negotiating if they wish or the landlord changing its mind). Any rent increase under this tenancy agreement does not require the consent of the tenant. The rent was increased to £650 in January 2021. No issue is taken with that increase.

7. The next significant event was an email dated 23 June 2023 from the landlord to the tenant stating that the landlord had carried out a rent review and the rent would increase by £100 per month. The FTS found that was effective from 27 July 2023. There is no appeal against the finding as regards the effective date.

8. In response, the tenants made a reference to the Rent Officer under section 24(3)(a) of the 1988 Act as amended by the 2022 Act. That right derives from the temporary provisions of the Cost of Living (Tenant Protection)(Scotland) Act 2022 which made various amendments to the 1988 Act. Those amendments included the introduction of "rent cap controls" in a new section 23A whereby, except in the case of an "exempt tenancy", the landlord under a short assured or assured tenancy was prohibited from increasing the rent payable by more than the "permitted rate" (3% at that time: section 23A(2)). An "exempt tenancy" is one defined in section 24(5) of the 1988 Act being (put short) either: (a) a statutory assured tenancy with provision for the rent to be increased by reference to a rent increase mechanism incorporating factors which are not wholly within the control of the landlord and which can be readily understood by the tenant or (b) a contractual tenancy which makes provision for an increase in rent including a provision whereby the rent for a particular period will or may be greater than for an earlier period: section 24(5)(b). The echoes of section 16 (see paragraph 5 above) are deliberate. So, put simply, the "rent cap" restricted rent increases in all assured tenancies (whether statutory, assured or short) to 3%

unless the tenancy was "exempt". If the tenancy was exempt, then the landlord was free to increase rent, unaffected by the rent cap, as provided for in the contractual tenancy agreement or statutory assured tenancy.

9. The Rent Officer accepted the referral and made a decision under the new section 24A of the 1988 Act. Oddly, there is no provision in section 24A which allows or obliges the Rent Officer to decide whether the tenancy is exempt or not. The practice appeared to be that the Rent Officer would "verify" a maximum rent in line with the section 23A rent cap, based on an *assumption* that the tenancy fell within the terms of the 2022 Act and was not exempt. The Rent Officer's decision letter did not explain the right of appeal against that decision to the FTS (section 24B of the 1988 Act as amended) and neither party took advantage of that right. It is unfortunate that that was not done since that might have provided a quicker remedy than the procedure adopted in this case. Neither party has made any reference in this appeal to the significance of the Rent Officer's determination having been unchallenged. Rather, both parties have, in effect, concentrated their argument (in the context of an application for payment of rent arrears rather than a direct challenge to the Rent Officer's decision) on whether the tenancy was exempt within the meaning of section 24(5)(b) of the 1988 Act.

First ground of appeal: tenancy was not exempt

10. The argument of the pursuer is that he was entitled to increase the rent by £100 per month as the tenancy was exempt from the rent cap controls because the tenancy agreement entitled the landlord to increase the rent by any amount at any time (subject to the provisions of clause 5 of the tenancy agreement). The argument of the tenants is the converse: the tenancy is not exempt, so the rent cap applies and therefore the maximum increase in rent is that provided for in section 23A and section 24 as "verified" by the Rent Officer: that is £19.50 per month. The tenants argue that the FTS has misconstrued section 24 of the 1988 Act.
11. The text of section 24 of the 1988 Act as it stood in June 2023 (with those parts not relevant to this decision excised) was as follows:

24.— Increases of rent under assured tenancies.

(A1) This section does not apply where the permitted rate is 0%.
(1) Subject to subsection (1A) for the purpose of securing a statutory increase in the rent under an assured tenancy, the landlord may serve on the tenant a notice in the prescribed form proposing a new rent to take effect—
(a) if the tenancy was at the time of service of the notice a contractual tenancy (whether or not renewed by operation of tacit relocation), immediately after its termination; or
(b) if the tenancy was [at the time of service of the notice] not such a contractual tenancy, at any time during the tenancy,
but not earlier than the expiry of the minimum period after the date of service of the notice.
(1A) The landlord may not serve a notice under subsection (1) proposing an increase in the rent under an assured tenancy of more than the permitted rate.
[….]
(3) Where a notice is served under subsection (1) above, a new rent specified in the notice shall take effect as mentioned in the notice unless, before the beginning of the period to which the new rent relates—
(a) the tenant refers the notice to the relevant rent officer in the prescribed form; or
(b) the landlord and the tenant agree that the rent should not be varied.
[….]
[….]
(5) Nothing in this section
(a) extends to statutory assured tenancy of which there is a term which makes provision for an increase in rent (including provision whereby the rent for a particular period will or may be greater than that for an earlier period) by an amount specified in there specified or fixed by reference to factors there specified of an or fixed by reference to factors specified in the tenancy contract or by a percentage amount of rent payable under the tenancy, or
(b) affects the operation of any term of a contractual tenancy which makes provision for an increase in rent (including provision whereby the rent for a particular period will or may be greater than that for an earlier period)
(6) The factors referred to in subsection (5) above must be—
(a) factors which, once specified, are not wholly within the control of the landlord; and
(b) such as will enable the tenant at all material times to ascertain without undue difficulty any amount or percentage falling to be fixed by reference to them.
(7) [….]
(8) This section and sections 24A to 24K apply in relation to a short assured tenancy as they apply in relation to an assured tenancy (and references in these sections to an assured tenancy are to be read as including references to a short assured tenancy).
(9) [….]

12. Subsections (A1) to (4) of section 24 set out the procedure to be followed where a landlord wishes to obtain a "statutory increase in rent" in an assured tenancy. The purpose of the legislation as I have explained was to restrict rent increases in some tenancies to no more than the rent cap. Those assured tenancies which were exempted are defined in section

24(5). As I observe at paragraph 8 above, that subsection clearly distinguishes between statutory assured tenancies and contractual tenancies. So far as statutory assured tenancies are concerned, it is only those which contain a rent increase mechanism, incorporating factors which are not wholly within the control of the landlord, which can be readily understood by the tenant, that are excluded. That echoes precisely section 16(5) of the 1988 Act. Otherwise, a statutory assured tenancy is caught by the rent cap. Contractual assured tenancies are treated differently. The Scottish Parliament decided that where the parties have agreed in a tenancy agreement that the landlord may increase the rent, with or without any restrictions on amount or times or formulae, the statute does not interfere with that agreement. That is the plain meaning of section 24(5)(b) which is in distinct contrast to section 24(5)(a). I note also that this distinction between rent increase provisions concerning contractual assured and statutory assured tenancies was a feature of section 24 of the 1988 Act long before the 2022 Act came into force. The 2022 Act maintains that distinction: it permits increases in assured tenancy rents beyond the rent cap to the extent provided in the tenancy agreement or equivalent contract.

13. It is argued by the respondent in this case that section 24(6) imports the requirement for a rent increase mechanism into section 24(5)(b) as well as section 24(5)(a). It plainly does not. The reference to "factors" in subsection (6) can only be a reference to the use of the same term in section 24(5)(a) which applies to statutory assured tenancies only. It does not bite on the language of section 24(5)(b). If Parliament had intended that reference to apply equally to both cases, it could have said so. Further, there would be no sense in the distinction made at subsection (5) between the two types of tenancies. Such an interpretation is inconsistent with the structure of the legislation as I have explained it above. Section 24(1) provides the statutory procedure for a *statutory increase in* rent and it exempts tenancies where there is already provision for a contractual increase in rent. The Scottish Parliament clearly intended that the pre-existing distinction between the treatment of contractual assured tenancies and statutory assured tenancies was to remain

undisturbed by the 2022 Act. Though that appears to have come as a surprise to some, that is the result.

14. Turning then to the provisions of the tenancy agreement (see above at paragraph 6), it is plain that the contractual term places little restriction on the landlord's right to increase rent by any sum it chooses with effect from the end of the relevant rental period. As I have stated above, nothing turns on the use of the word "propose". It means "decide" in the context of this tenancy agreement. Leaving aside the question of the relevance of the Consumer Rights Act 2016 which I deal with below, the rent cap challenge having failed, the landlord was contractually entitled to do as he did.
15. It follows that the Rent Officer's decision dated 18 July 2023 verifying a new maximum rent (which decision explicitly rested on the *untested assumption* that the tenancy agreement fell within the rent cap provisions) was incorrect. Although as I have noted above , there is a defined appeal route for challenge to a rent officer's determination which was not followed in this case, the procedure adopted by the parties and the FTS has effectively produced a similar conclusion.
16. Thus, the decision of the FTS dated 25 January 2024, that the tenancy was exempt from the rent cap is correct in law and its finding that an unpaid amount of £483 rent arrears was due was also correct. The tenants' first ground of appeal is therefore refused.

Consumer Rights Act 2015

17. The second ground of appeal is that the FTS failed to comply with the duty imposed on it by section 71 of the Consumer Rights Act 2015 to consider the fairness of the rent review clause in the tenancy agreement. It helps to understand the following before examining section 71.
18. Section 61 of the 2015 Act provides that contracts covered by Part 2 of the Act (which includes section 71) are those between a "trader" and "consumer": they are consumer contracts. Those terms are defined. Contracts between a landlord and tenant (such as tenancy agreements, leases, missives of let etc) are neither expressly excluded from nor included within the scope of the Act. Thus, any court attempting to apply the provisions

of the 2016 Act to any given contract must first determine at the outset whether the contract is in fact a consumer contract and must have before it sufficient evidence on which to make that decision. Only if the court is able to determine that the contract in question is a consumer contract can it then consider the applicability of the other provisions of Part 2 of the 2016 Act.

19. Section 71 of the Consumer Rights Act 2015 provides as follows:

> **71 Duty of court to consider fairness of term**
>
> (1) Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract.
> (2) The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.
> (3) But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term.

20. So, although the proactive duty on a court (that term being undefined but which must in my view include a tribunal including the FTS, applying a purposive interpretation), when dealing with proceedings relating to a term of a consumer contract, is to consider whether the term is "fair" (as later defined, see below), even if that issue is not raised by the parties, that duty is only triggered if the court decides that it has sufficient legal and factual material to make that assessment. So, for example, where none of the parties has put in issue the question of whether a term of a contract is fair within the meaning of the 2016 Act, and the material placed before the court would not be sufficient to determine the question of fairness, no duty arises on the part of the court to consider and determine fairness. So what is meant by fairness and what factors does the court have to consider?

21. Section 62 provides that unfair terms in consumer contracts are not binding on the consumer. The meaning of an unfair term in a consumer contract is explained as follows:

> **62.**
> [….]
> (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
> (5) Whether a term is fair is to be determined—
> (a) taking into account the nature of the subject matter of the contract, and

(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.
[….]

22. It is evident that assessment of the fairness of a contractual term is not a straightforward matter. It will involve among other things evidence or agreement between the parties concerning all the circumstances pertaining when the contract was agreed, all considered in the context of the subject matter of the contract and the remaining terms of the contract. The court would also need to consider the other provisions of Part 2 of the 2016 Act. That includes section 63 (contract terms which may or must be regarded as unfair); schedule 2 to the Act which contains an indicative and non-exhaustive list of terms which may be regarded as unfair (sometimes referred to as the 'grey list'); section 64 (terms excluded from assessment of unfairness) and the remaining provisions of Part 2. Interpretation may require consideration of the provisions of European law on which this part of the 2015 Act is based and ECJ decisions anent such legislation. The court may also want to have regard to guidance and information issued by official bodies such as the Competition and Markets Authority and the Office of Fair Trading. Those considering the terms of this legislation and its history in a housing context may well find the discussion and references in *Stalker* 'Evictions in Scotland' (2nd ed.) at pg 73-74 helpful and illuminating.
23. Thus, it is evident that the assessment of the fairness of any term in a contract is far from straightforward. It is very likely that in the ordinary case, where the FTS is determining a contentious issue brought by one party (for example, whether rent arrears are owing; the correctness of a rent officer's decision or whether a landlord is entitled to recovery of possession and so on), where neither of the parties have also put in issue the fairness of a contractual term under the 2015 Act, the FTS will not have before it sufficient legal and factual material to determine of its own volition whether any term in the tenancy agreement is fair or unfair. Thus, in such a case, which will be the usual case, it may well be that no duty on the court or tribunal arises under section 71 of the 2015 Act.

24. Turning to the circumstances of the present case, it is evident from the terms of the FTS decision at first instance that no party raised the question of the fairness of the rent review clause under Part 2 of the 2015 Act before the FTS. The FTS did not decide that question. It is also clear that even on the tenants' request for a review, no question as to the fairness of the rent review clause under the 2015 Act was raised. It is equally clear that on the material put before the FTS, factual and legal, the FTS could not have determined the question of fairness of its own volition either at first instance or on review. Therefore the FTS did not breach the section 71 duty. That is because it did not arise in the circumstances. It was only after the FTS had made its decision at first instance and then on review, that the question of the section 71 duty is first raised by the tenants and that in the context of an application for leave to appeal to the Upper Tribunal. Even then, there is little focused effort made to explain how the section 71 duty arose considering the facts and circumstances before the FTS.
25. In my view therefore, the FTS did not err in law in failing to fulfil its duty under section 71 of the Consumer Rights Act 2015 to consider and determine the fairness of the rent review clause now impugned. This appeal therefore fails on this ground as well.
26. I should add the following. Where, in the context of an application to the FTS turning on a matter of contract, a party also wishes to contend that a contractual term is unfair within the meaning of the 2016 Act and that contention is relevant to determination of the application, that contention together with the relevant facts and circumstances and legal issues, should be placed before the FTS when the application is being made so that the respondent may respond with its views and the FTS is thereby enabled properly to decide the matter: unless that is done, the section 71 duty may well not bite. In any event, that is in the interests of justice and is a matter also of fairness to all concerned, not least the respondent to such an application.

Postscript

27. I add the following observations. First, as regards the first ground of appeal, the legislation has altered significantly since 1 April 2024. A different type of rent cap is now in force: see

sections 24 to section 25B of the 1988 Act. Referrals of proposed rent increases may now be made to the FTS rather than the Rent Officer. Second, that notwithstanding, section 24 continues to regulate the circumstances in which the landlord of an assured tenancy (including short assured and statutory assured tenancies) may increase the rent to achieve a "statutory increase in rent" (section 24(1)). Third, the terms of section 24(5), which excludes certain tenancies from the section 24 restrictions continues to distinguish between statutory assured tenancies on the one hand and contractual tenancies on the other, in the same way I have described above and so this decision may still be of contemporary relevance.

28. The appeal is refused.

*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.*

Member of the Upper Tribunal for Scotland