



SHERIFF APPEAL COURT

[2017] SAC (Civ) 32

Sheriff Principal D L Murray

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

CD

in the cause

AB

Respondent and Pursuer

CD

Appellant and Defender

Respondent and Pursuer: Brownlie, Solicitor

Appellant and Defender: Margaret McCaw; Authorised Lay Representative

7 November 2017

Background

[1] This is an appeal by Stated Case against the decision of the Sheriff to find the appellant to be liable to pay the respondent £787.50. This is in respect of two months' rent which he found to be unpaid; less the deposit the appellant had paid.

[2] The relevant findings in fact are: The appellant was the tenant of the respondent's property in Balloch between 1 April 2016 and 31 October 2016. The rent payable was £450 a month. On entry, 1 April 2016 the appellant paid a deposit of £112.50 and a friend of the

appellant, who only stayed briefly in the property, also paid £112.50 as a deposit. A lease agreement was signed on 26 April 2016 and although this stated a deposit of £275 was payable, only the foregoing sums were actually paid as a deposit. These sums were not placed in a Tenancy Deposit Scheme Account. The respondent provided to the appellant a document which was headed "Tenant Information Pack." This document did not comply with the statutory requirement of section 30A of the Housing (Scotland) Act 1988 to provide "standard tenancy documents." When the appellant vacated the property on 31 October two months' rent was outstanding.

[3] The respondent was not a registered landlord with West Dunbartonshire Council at the relevant period and was in consequence in breach of part 8 of the Antisocial Behaviour etc. (Scotland) Act 2004 "the 2004 Act" relating to the registration of certain landlords. The breaches of the regulations identified in findings of fact 8, 9 and 10 leave the respondent potentially liable to various enforcement and statutory penalties.

[4] The questions posed in the stated case are: "1. Was the court correct to find that the legal relationship between the pursuer and defender is that of landlord and tenant? 2. Was the court correct to find the pursuer has title to sue the defender? and 3. Was the court correct to find that the action is competent?"

Submissions for the Appellant

[5] In the written argument presented on behalf of the appellant she challenged the competency of the action, however in the course of submissions she accepted that the court had jurisdiction and the third question in the stated case could be answered in the affirmative.

[6] The appellant's argument concentrated on the proposition that the respondent's breach of various regulations resulted in the lease being an illegal contract, which meant that no rent was due. The respondent was guilty of an offence under section 93 of the 2004 Act. Section 93 provides that a person who is not registered and who lets a house or takes active steps to do so while not registered commits a criminal offence which is punishable by a fine. The maximum level of fine had been increased from £5,000 to £50,000 by the Private Rented Housing (Scotland) Act 2011. This reflected the very serious view the Scottish Parliament took of such a breach. It was also submitted under reference to section 94 of the 2004 Act which is headed "Circumstances in which no rent to be payable" that as far as the "pretended" rent arrears were concerned no rent was payable as the respondent was unregistered and had not submitted an application for registration until 3 January 2017. It was further submitted that the respondent had deceived the local authority into registering him as a landlord.

[7] The respondent was also guilty of a criminal offence as a result of his failure to provide the appellant with a Tenant Information Pack in terms of section 30A of the Housing (Scotland) Act 1988. Subsection 5 provides that a person who does not comply with the requirements of the section is liable to a fine up to level 2 on the standard scale.

[8] Additionally, the respondent had failed to comply with the requirements of Regulations 3 and 42 of The Tenancy Deposit Scheme (Scotland) Regulations 2011 in having failed to place the deposit which he had received in an appropriate scheme and having failed to provide the appellant with the relevant information.

[9] The appellant referred to *Jamieson v Watt's Trustee* 1950 SC 265 and in particular what is said by the Lord Justice Clerk at page 271:

“If a pursuer cannot maintain his cause of action without establishing that he acted in breach of a statute, the Courts will not listen to him.”

Founding on *Jamieson v Watt's Trustee* the appellant submitted that given the breaches of the statutory obligations by the respondent the lease was an illegal contract and should not be given effect to by the court. Accordingly the sheriff should not have found there was a relationship of landlord and tenant between the respondent and the appellant and the respondent had no title to sue the appellant. Therefore the first two questions in the stated case should be answered in the negative.

Submissions for the Respondent

[10] The respondent submitted on the basis of the findings in fact made by the sheriff he is entitled to decree as granted by the sheriff unless the contract (of lease) is an illegal contract: a *pactum illicitum*. The respondent accepted he was in breach of statutory provisions. He was not a registered landlord in terms of section 93 of the 2004 Act at the relevant times. He failed to provide the relevant documents and receipts required in the Tenant Information Pack in terms of section 30A of the Housing (Scotland) Act 1988. He had contravened regulations 3 and 42 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 by failing to lodge the deposit in an appropriate scheme and failing to provide the appellant with the information specified in regulation 42(2).

[11] The Tenancy Deposit Scheme (Scotland) Regulations 2011 do not declare non-compliance to give rise to a criminal offence; rather Regulation 10 gives the tenant the right to apply to the sheriff for an order that the landlord shall pay not more than three times the amount of the tenancy deposit. Such an enforcement penalty could not impact on the validity of the lease or the respondent's title to sue.

[12] The admitted breaches of the 2004 Act and section 30A Housing (Scotland) Act 1988 were submitted not to render the contract illegal. Accordingly the lease remained valid, the respondent had title to sue and the rent payable remained due. It was submitted that the sheriff was correct under reference to *Dowling & Rutter v Abacus Frozen Foods Ltd* 2002 SLT 491 to hold that the court should not hold the contract to be illegal unless the statute clearly so intends, and illegality is in the implementation (as distinct from the formation) of the contract. Section 94(3) of the 2004 Act would be otiose if the intention of the act was to render leases entered into contrary to section 93 to be illegal. Section 94(8) expressly provides that the validity of a lease entered into in breach of section 93 shall not be affected except as provided for where the local authority has served a notice under section 94(3).

[13] It was further submitted that the sheriff was correct in what he stated at paragraph 22 of the Stated Case that it could not have been the intention of the Scottish Parliament that a lease entered into by an unregistered landlord was void as that would result in the public being exposed to a lack of protection from unscrupulous landlords. The same argument applied in the context of section 30A of the Housing (Scotland) Act 1988.

[14] The sheriff was correct having recorded the respondent's reasons for inferring an absence of statutory intention to consider the materiality of the admitted breaches of statute and regulations and to find they did not impact on the validity of the lease. The breaches are discrete matters which carry their own sanctions and penalties, whether civil or criminal. The sheriff was therefore correct to have concluded that despite the respondent's failings the lease was not expressly forbidden by statute. The respondent invited the court to adhere to the sheriff's interlocutor, answer the three questions in the Stated Case in the affirmative and refuse the appeal.

Discussion and Decision

[15] The appellant conceded that the court had jurisdiction, so the third question in the Stated Case may be answered in the affirmative.

[16] The penalties imposed for a failure to comply with the tenancy deposit scheme arrangements are in the nature of civil penalties and there is no question of the respondent's contravention of the Tenancy Deposit (Scheme) Regulations 2011 rendering the contract unenforceable as an illegal contract. Consideration of the appellant's argument is therefore in relation to the respondent's failure to register as a landlord in contravention of part 8 of the 2004 Act and to provide the appellant with the "standard tenancy documents" in terms of section 30A of the Housing (Scotland) Act 1988.

[17] The editors of *Gloag and Henderson The Law of Scotland* 14th edition point out at 9.10: A statute may limit freedom to contract:

"either by declaring a particular contract or method of contracting void or unenforceable, or by imposing a penalty on the persons who contract."

The argument of the appellant focuses on that group of illegal contracts which arise where a statutory penalty is imposed. *Gloag The Law of Contract* 2nd edition at p.551 deals with

Statutory Penalty thus:

"A statute may impose a penalty upon a particular contract or upon a contract entered into without the observance of statutory conditions or the payment of a statutory duty. If there is no additional provision that the contract shall be void, it is a question of construction whether liability to the penalty is the sole result of disregard of the statutory provisions, or whether in addition, the avoidance of illegality or illegality of the contract is implied. While the question is one turning on the terms of a particular statute, and on the nature of the act penalised, there is a general presumption that an Act which imposes a penalty impliedly provides that a contract which would render that penalty exigible is illegal. Apart from revenue cases, and statutes where the penalty provides for loss of an office or an official position, the presumption may probably be regarded as a rule. But in exceptional cases it may be held that the imposition of the penalty is the sole effect of the statute, either because the circumstances are such as to make the avoidance of

contracts a penalty greater than the Legislature can be supposed to have intended to inflict.”

[18] The editors of *Gloag and Henderson* likewise identify the presumption under reference to *Jamieson v Watt's Trustee (supra)*, but qualify the presumption and state at 9.10:

“If without declaring a contract to be void, a statute imposes a penalty on the persons who enter into it, it is always a question of the construction of the particular statute whether or not avoidance of the contract is implied.”

The authority referred to for that proposition being *Whiteman v Sadler* [1910] AC 514. That case involved a moneylender acting in breach of the registration provisions of section 2 of the Moneylenders Act 1900. The House of Lords reversed the Court of Appeal and expressed a more nuanced position. Namely that where the statute does not declare the contract to be void it is a matter of interpretation of the statute to ascertain what the effect of the provision is and where there has been performance of the contract the court may give effect to rights in the contract. Lord Mersey at 534 qualified the principle as expressed by Farwell LJ in the court below:

““If and so far as any money-lending is done in breach of these sub-sections, such money-lending is forbidden by the Act and made criminal and can therefore form no ground for a civil action by the money-lender.”

The principle is quite accurately stated by the learned Lord Justice, but in my opinion it has no application to (a) or (b). There is no express prohibition in either of those clauses, whereas in clause (c) there is. The learned Lord Justice, however, probably means to say that where a statute by implication forbids a contract and makes it criminal it can give no cause of action. This also is an accurate statement of the law. But the question must always arise, does the statute by implication forbid the contract? And the answer depends exclusively on the terms of the statute.”

[19] In *Downing & Rutter v Abacus Frozen Foods Ltd* 2002 SLT 491 Lord Wheatley undertook a detailed analysis of the case law. In so far as is relevant to the instant case he echoes the approach of their Lordships in *Whiteman v Sadler (supra)* when he states at page 495:

“These propositions however would seem to be subject to this qualification, that the court should not hold that any contract or class of contract is prohibited unless the statute clearly so intends.”

[20] It may not be said therefore that in every case where a contract is subject to a penalty its illegality and consequent avoidance follow. The respondent here failed to register as a landlord and failed to give the tenant the required tenancy information. These failures both constitute statutory offences. It is also apparent from the increase in the level of the maximum fine that the Scottish Parliament considers that a failure to register as a landlord or to have communings about a lease without registration was a serious criminal offence. It is not specifically stated in the 2004 Act that failure to register will render a contract void. So it is necessary to consider the terms of the statute to discern whether the terms of the 2004 Act lead to the inference that the Scottish Parliament did not intend that the consequence of failure to register would be to render the lease invalid. Section 94(8) provides:

“(8) Except as provided in subsection (3), nothing in this Part affects the validity of any lease or occupancy arrangement under which an unconnected person has the use as a dwelling of a house during the relevant period.”

The appellant falls within the definition of an unconnected person.

As the sheriff observes section 94(3) also provides:

“(3) Where a notice is served under this section, during the relevant period—
 (a) no rent shall be payable under any lease or occupancy arrangement in respect of the house to which the notice relates;
 (b) no other consideration shall be payable or exigible under any such lease or occupancy arrangement.”

Those provisions would, as the respondent submitted and sheriff concluded, be otiose if to fail to register rendered the lease void.

[21] The statutory regime therefore establishes criminal penalties where a landlord fails to register, but operates only to restrict the liability for rent where there is a notice issued by

the local authority under section 94(1). It does not render the contract void and does not entitle the appellant to avoid paying rent for her period of occupation under the lease, absent such a notice having been issued by the local authority.

[22] Section 30A of the Housing (Scotland) Act 1988 is also formulated to provide that if the landlord without reasonable excuse fails to provide the “standard tenancy documents” he is liable to a fine and does not specifically render any lease entered into, absent the tenant being provided with the “standard tenancy documents”, void.

[23] The failure to be registered and the failure to provide the Tenancy Information Pack must be seen as breaches in the context of the formation of the contract. They are actions to be undertaken prior to or at the point of entering into a lease in the case of the information pack. But in neither case is the statutory illegality said to affect the contract itself: the illegality is failing to be registered and to provide the tenant information pack.

[24] The statutory regime which provides for fines and specific circumstances where rent will not be payable, without any expression that a contract shall not be valid, distinguishes the instant case from *Jamieson v Watt's Trustee (supra)*. There the court was examining the operation of regulation 56A of the Defence (General) Regulations 1939 which specifically declares any building or construction operation to be unlawful if it is undertaken other than in terms of a licence granted by the Commissioners of Works. The quotation from Lord Justice Clerk Thomson on which the appellant relies is therefore not applicable to the instant case. The failure to register as a landlord and to provide the standard tenancy document which are offences do not in the context of the statutes result in the appellant being entitled to avoid the contract where there has been performance. The statutory provisions here fall within an exception to the general proposition that where a contract is subject to a penalty its illegality and consequent avoidance is implied.

[25] The appeal is therefore refused and questions one and two in the Stated Case are also answered in the affirmative. Parties were agreed that the normal rule on expenses should apply and that these should follow success, accordingly I shall award expenses in favour of the respondent.

[26] In conclusion I note what is said in *MacPhail Sheriff Court Practice* 3rd edition at paragraph 2.79:

“When in the course of civil proceedings it appears to the sheriff that a criminal offence may have been committed, he may send the relevant papers to the procurator fiscal in order that the latter may make further inquiries.”

The findings of the sheriff here suggest that criminal offences may have been committed by the respondent and I have directed that the Clerk of the Sheriff Appeal Court should forward the relevant papers in the case here to the procurator fiscal in order she may make further enquiries. I also consider that the circumstances surrounding this case may be relevant to a local authority in considering the suitability of the respondent to be registered as a landlord in terms of part 8 of the 2004 Act. I have therefore also directed the Clerk of the Sheriff Appeal Court to also forward the relevant papers to West Dunbartonshire Council who have registered the respondent as a landlord and to another Council where it was submitted to me he is acting as a landlord but is unregistered in order these councils may make further enquiries.