

**SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY
AT DUMFRIES**

[2018] SC DUM 66

DUM-A41-18

NOTE BY SHERIFF GEORGE JAMIESON

in the cause

BARRY JAMES PARKER and AGNES DONIS PARKER

Pursuers

against

INKERSALL INVESTMENTS LTD

Defenders

Dumfries, 18 December 2018

The sheriff, having resumed consideration of the cause, finds the pursuers jointly and severally liable to the defenders in the expenses of the cause to the date of the Options Hearing on 12 July 2018 as assisted persons, subject to a 33% reduction of the fees element, reserving to each pursuer the right to apply to the court by motion for a modification of expenses in terms of section 18(2) of the Legal Aid (Scotland) Act 1986, and to the defenders to apply to the court by motion for a remit to the auditor of court for taxation of these expenses.

Introduction

[1] This was an action by tenants for payment of damages by their landlord for alleged breaches by the landlord of the terms of an assured tenancy.

[2] That action been dismissed because it was brought in the wrong *forum*; which is to say the sheriff court rather than the First-tier Tribunal for Scotland (Housing and Property Chamber) (hereafter, the “FTT”). This Note is in relation to the defenders’ motion that the expenses of the action should be awarded against the pursuers.

[3] References in this Note to the “2014 Act” are to the Housing (Scotland) Act 2014, to the “2016 Act” are to the Private Housing (Tenancies) (Scotland) Act 2016, and to the “Tribunal Rules” are to The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 set out in schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

Background

[4] On 1 December 2017, the “functions and jurisdiction of the sheriff” in relation to actions “arising from” assured tenancies under the Housing (Scotland) Act 1988 were transferred to the First-tier Tribunal for Scotland Housing and Property Chamber by section 16(1)(c) of the 2014 Act. Criminal jurisdiction was excluded from the transfer by section 16(2).

[5] As a result of this transfer of jurisdiction, actions “arising from” assured tenancies are no longer competent in the sheriff court, save those commenced before 1 December 2017: Housing (Scotland) Act 2014 (Commencement No. 7, Amendment and Saving Provision) Order 2017, article 4(a).

[6] The FTT also has jurisdiction in respect of civil proceedings arising from private residential tenancies (the successor to assured tenancies).

[7] Section 51 of the 2016 Act confers jurisdiction on the FTT to make an “eviction order” in respect of these tenancies, while section 71(1)(a) provides that the FTT has “whatever

competence and jurisdiction a sheriff would have” in relation to civil proceedings arising from a private residential tenancy. Section 71(1)(b) provides that “a sheriff does not have competence or jurisdiction” in relation to these proceedings.

[8] Neither the 2014 or 2016 Acts define what proceedings are within the sheriff’s civil jurisdiction transferred to the FTT. A landlord’s application for possession of an assured tenancy or an eviction order in respect of a private residential tenancy is made in Form E to the FTT. Applications for civil proceedings arising from assured and private residential tenancies are made in Form F to the FTT. There is no provision for counterclaims. These should be made as separate applications to the FTT. Rule 12 of the Tribunal Rules permits the hearing of related applications at the same time.

Procedural history

[9] On 23 March 2018 the initial writ was lodged with the court and on 6 April 2018 it was served on the defenders. On 25 April 2018 a notice of intention to defend was lodged by the defenders and an Options Hearing was fixed for 12 July 2018. On 8 May 2018 the defenders lodged defences incorporating a counterclaim. At the Options Hearing, the pursuers were represented by their solicitor while an employee of the company sought to appear on behalf of the defenders. The pursuers’ solicitors moved for continuation of the Options Hearing for negotiation. While that motion was granted, the defenders were also given an opportunity of applying to the court under section 97 of the Courts Reform (Scotland) Act 2014 and the Act of Sederunt (Lay Representation for Non-Natural Persons) 2016 for lay representation.

[10] In the event, a negotiated settlement did not prove possible and the defenders chose to instruct solicitors to continue with their defence and counterclaim rather than apply for lay representation.

[11] On 9 August 2018 at the continued Options Hearing the defenders' solicitor moved for the case to proceed under the additional procedure. The pursuers' solicitor did not oppose this motion and it was granted by the sheriff.

[12] On 12 September 2018, the case came to my attention in chambers when I was asked to consider an uncontentious motion for amendment by the defenders of the sum sued for in their counterclaim. On reading the record, I suspected that this action might relate to a private rented house. On that date, I pronounced an interlocutor asking parties to answer whether the dispute was in respect of an assured tenancy, and whether the court had jurisdiction to adjudicate the issues in the action and counterclaim.

[13] On 27 September 2018 at a hearing, I referred parties to the relevant legislation and invited them to address me on these issues at a hearing. It was not possible to resolve these issues on that date as parties' solicitors needed more time to consider the question of jurisdiction. I ordered the pursuers' solicitor to lodge a copy of the lease in process so I could satisfy myself as to whether this was an assured tenancy. I continued the hearing to 25 October 2018 in order that these enquiries could be made.

[14] On 9 October 2018, having perused the lease and some decisions of the FTT and a decision of the Upper Tribunal for Scotland (UT), I prepared a brief Note setting out some issues the court required to address in considering the competency of the action and counterclaim. On 25 October 2018 at the continued procedural hearing, parties' agents, having considered that Note and the tribunal cases referred to therein, conceded the court did not have jurisdiction in respect of the action or counterclaim.

[15] On that date, I dismissed both the action and counterclaim and made *avizandum* on the question of expenses.

Parties' pleadings

[16] Unfortunately, I found the pursuers' pleadings somewhat diffuse and difficult to follow, while those prepared by the defenders were easier to follow. The pursuers' pleadings still followed the structure originally framed in the initial writ. I could find no averment that the action related to an assured tenancy. As I observed in my Note dated 9 October 2018:

"This action and the counterclaim were made after 1 December 2017 albeit in respect of an assured tenancy prior to 1 December 2017. Clause 29 of the lease at 5/3 of process refers to the tenancy as a "short assured tenancy".

It would therefore appear only [to be] necessary to ask whether the action and counterclaim "arise from" an assured tenancy....[considering] the most recent record, number 11 of process.

The counterclaim is relatively easy to follow. It is an action for rent arrears and damages for breach of contract (provisions of the lease) minus the deposit and on the face of it arises from the assured tenancy and is therefore within the jurisdiction of the FTT.

[However], the action as [pleaded] on 11 August 2018 is not easy to follow. It appears to be for breach of provisions of the Housing (Scotland) Acts (see plea in law 1 of record number 11 of process, which refers only to the (unspecified) Acts, not any specific provision or provisions thereof)....

The pursuers' pleadings make some reference to section 14 of the Housing (Scotland) Act 2006 (the current statutory provision as to the landlord's duty to maintain and repair), but it appears not in a way that enables the reader of the pleadings to know what that obligation was and how it was breached.

The pursuer also seeks damages for "breach of the lease" (plea in law 2), which, on the face of it, "arises from" an assured tenancy. However, [I was] unable to find any averment setting out the condition of the lease which the pursuers rely on, and to relate any of the losses to it.

At best, there is an averment relating to a common law implied obligation regarding the habitability of the property.

Despite these difficulties, the pursuers' case appears to be one for damages for breach of contract and statutory obligation relating to the unsatisfactory condition of the property (including an unsatisfactory fire alarm system). On the face of it, this is a claim which "arises from" an assured tenancy."

Defenders' motion and submissions on expenses

[17] The defenders' solicitor moved for the expenses of the action. Her submission was that the defenders had been put to the unnecessary expense of defending the action which the pursuers had raised in the wrong *forum*. The defenders had not chosen to raise the proceedings and been forced to respond after the pursuers embarked on litigation in the sheriff court.

Pursuers' submissions in reply

[18] The pursuers' solicitor opposed the motion for expenses, arguing that no expenses should be found due to or by either party. She pointed out that, at no time, had the defenders taken a plea to the competency of the action. The court had taken the point of its own motion. Further, the defenders had not taken any steps to mitigate expense as they had lodged defences and made a counterclaim.

[19] In addition, the pursuers' solicitors had made enquiries of the FTT before presenting the initial writ to the court. They had been told that the FTT had no jurisdiction to award damages "for reparation" and had accordingly submitted the initial writ to the court, which had granted warrant for citation of the defenders. Finally, both pursuers were legally assisted persons. The first pursuer had been granted legal aid on 14 July 2017, before the transfer of jurisdiction to the FTT, while the second pursuer had been granted legal aid on 12 January 2018, after the transfer of jurisdiction to the FTT.

Discussion on Expenses

[20] It is significant, in my view, that the defenders were effectively party litigants until the Options Hearing. The defenders are domiciled in England and Wales and their employee informed me at the Options Hearing he would have had locus to represent the company in that jurisdiction. While I had no reason to doubt that information, the position was different in Scotland. The defenders appear to have had little choice but to instruct a solicitor after I explained matters to their employee at the Options Hearing. Until then, it represented itself in ignorance of the Scottish rules as to lay representation of non-natural persons. It had also no choice but to lodge defences if it wanted to avoid a motion for decree by default.

[21] In my view, the primary responsibility lies with parties' solicitors to satisfy themselves that the court has jurisdiction in respect of any particular litigation. This precise issue was the subject of discussion at a court users' meeting in Dumfries on 8 February 2018, when the legislation in relation to the transfer of jurisdiction was discussed and made known to the local faculties. In my opinion, the pursuers' solicitors bore responsibility for selecting the correct *forum* in raising proceedings.

[22] Although they made some enquiries of the FTT, the information put to the FTT appeared to mis-characterise the nature of the claim. This is not surprising given the pursuers' pleadings do not sufficiently focus the nature of the claim – put at its simplest the claim was for damages for breach of contract and the statutory repairing obligation. This was not an action for “reparation”.

[23] The pursuers' agents should therefore have addressed their own minds, at that early stage, to whether the pursuers' claim fell within the civil jurisdiction of the sheriff, and was therefore transferred to the FTT, rather than at such an advanced stage of the litigation.

[24] Further, I do not think the court is to blame for the action being raised in the wrong *forum* when the sheriff clerk depute signed the warrant of citation. Significantly, the property is designed in the initial writ as "The Knowe Farmhouse" and there appears to be no averment it was an assured tenancy.

[25] This is significant as the court retains jurisdiction over a number of leases or rights of occupancy that are excluded from the definition of assured and private residential tenancies. A private rented property might not be an assured tenancy, for example, because it is a "tied cottage" (this may not be a lease in certain circumstances: *Stalker, Evictions in Scotland*, pages 190-191); or it might be excluded from the definition of an assured tenancy by virtue of being a lease of a house forming part of an agricultural tenancy or occupied by a person responsible for the control of farmland (see paragraphs 6(a) and (b) of schedule 4 to the Housing (Scotland) Act 1988). "The Knowe Farmhouse" could easily have fallen into any of these categories without further knowledge as to the type of lease. The court was not to know, or even suspect, this was an assured tenancy, absent a clear averment to that effect when the initial writ was presented to it for warranting. Accordingly it had no reason to think it lacked jurisdiction when the sheriff clerk depute signed the warrant of citation.

Decision on Expenses

[26] I do not think it fair that the pursuers are found liable for the defenders' expenses after the Options Hearing. By then, the defenders had instructed a solicitor who moved for

additional procedure at the continued Options Hearing and did not make a plea as to the competency of the action, or seek to abandon the counterclaim.

[27] Further, although the defenders had not sought authority to be represented by a lay representative, they were effectively acting as party litigants until they instructed a solicitor at some point between the Options and Continued Options Hearing.

[28] While, essentially, I think it is just that they be awarded their expenses until a solicitor took over the conduct of the litigation (who ought then to have taken the plea to competency and disavowed the counterclaim), they should be in no better position in relation to an award of expenses had they been able to appear in person.

[29] Since the fees element of judicial expenses recoverable by a party litigant would be subject to a one third deduction by virtue of rule 2(a) of the Act of Sederunt (Expenses of Party Litigants) 1976, I have accordingly modified the fees element of their expenses by that percentage in exercise of my power to do so under general regulation 5(a) of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993.

[30] The fact the pursuers are assisted persons is not, in my view, of relevance to an award of expenses against them at this stage in the litigation. The principle of the matter is that the defenders incurred unnecessary expense in defending an action brought in the wrong forum and should be able to recover reasonable expenses from the pursuers.

However, the pursuers have the right to apply for modification of those expenses under section 18(2) of the Legal Aid (Scotland) 1986, and I have accordingly reserved their right to do that as different considerations apply at that stage as to the pursuers' final liability for expenses.

Postscript on the FTT's "civil jurisdiction"

[31] This case illustrates the possibility of misunderstandings about the extent of the FTT's civil jurisdiction in relation to private rented housing cases. I therefore think a few words may be of assistance to potential FTT users in the event of difficulties in interpreting the extent of this jurisdiction.

[32] First, there is no doubt the FTT has jurisdiction in respect of actions for possession of assured tenancies commenced on or after 1 December 2017, and for eviction orders in respect of private residential tenancies (see rule 65 (assured tenancies), rule 66 (short assured tenancies) and rule 109 (private residential tenancies) of the Tribunal Rules).

[33] Secondly, in proceedings other than for possession/eviction, the FTT's civil jurisdiction can only be in respect of "actions" within the sheriff's civil jurisdiction *arising from* assured tenancies (section 16(1) (c), 2014 Act; rule 70, Tribunal Rules) or "civil proceedings" within the sheriff's civil jurisdiction *arising from* private residential tenancies (section 71(a), 2016 Act; rule 111, Tribunal Rules).

[34] In working out what this means, a useful decision from Sheriff Hamilton sitting in the UT suggests the transfer of any of the sheriff's civil jurisdiction to the FTT may be unrestricted if the legislation is silent on such restriction (*Friel v Lafferty* UTS/AP/17/0009, dated 30 May 2018, at page 2, section 1).

[35] Thus, as there is nothing to suggest that either section 16(1)(c) of the 2014 Act or section 71(a) of the 2016 Act *restricts* the transfer of the sheriff's civil jurisdiction to the FTT in respect of any matter *arising from* assured and private residential tenancies, its civil jurisdiction may well extend to any remedy within the sheriff's jurisdiction, provided the action or civil proceeding *arises from* an assured or private residential tenancy.

[36] On this view, the FTT now has jurisdiction to grant any remedy such as interdict, declarator, or damages for breach of contract or statutory obligations relating to the lease *arising from* the tenancy.

[37] A more cautious interpretation might be to limit the transferred jurisdiction to *contractual* disputes arising from the tenancy itself (including rent arrears and breach of the statutory repair obligation), as only these directly *arise from* the tenancy in question (as in this case).

[38] On that view, the FTT would not, for example, exercise jurisdiction to reduce a tenancy agreement, suspend a charge for payment of rent arrears, or to deal with delictual claims arising from the use of the property.

[39] Further, the references in the 2014 and 2016 Acts to actions or civil proceedings within the sheriff's jurisdiction probably only refers to actions or proceedings within the *ordinary* jurisdiction of the sheriff, rather than any special statutory jurisdictions or functions conferred on the sheriff.

[40] In this regard, it should be noted that an overly literal interpretation of what is meant by the sheriff's jurisdiction *arising from* assured and private residential tenancies might result in consequences not intended by the Parliament.

[41] For example, the sheriff still has jurisdiction to make anti-social behaviour orders under section 4 of the Antisocial Behaviour etc (Scotland) Act 2004 in relation to assured and private residential tenancies, and to make orders for transfer of these tenancies between spouses or cohabitants under section 13 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or between civil partners under section 112 of the Civil Partnership Act 2004.

[42] No amendment has been made to these Acts, transferring these statutory applications to the jurisdiction to the FTT. As the Parliament could easily have done this, the implication is that it intended these functions are to stay with the sheriff.

[43] On the other hand, the FTT has been vested with jurisdiction over a large number of statutory applications in respect of assured tenancies and private residential tenancies. Some of these applications were formerly vested in the sheriff, but have been transferred to the jurisdiction of the FTT by virtue of specific statutory provisions, such as the various transfers of jurisdiction made by schedule 1 to the 2014 Act.

[44] Of particular note, the sheriff's jurisdiction in respect of sanctions in relation to the deposit scheme under the Tenancy Deposit Schemes (Scotland) Regulations 2011 was transferred to the FTT by virtue of article 2 of the Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017. (See rules 103 and 104 of the Tribunal Rules for the exercise of this jurisdiction by the FTT).

[45] Finally, the FTT's "eviction and civil proceedings decisions" database (accessible via the Scottish Courts and Tribunals Service website) allows for a search for FTT decisions under particular Tribunal Rules. One can therefore search for decided FTT cases under rule 70 of the Tribunal Rules (civil proceedings in relation to an assured tenancy), or rule 109 (civil jurisdiction in relation to a private residential tenancies), for examples of cases treated by the FTT as falling within its civil jurisdiction.