Upper Tribunal for Scotland

[2021] UT 20
UTS/AP/20/0029

DECISION AND ORDER OF SHERIFF IAIN FLEMING
ON AN APPLICATION TO APPEAL

in the case of

JAMES SMITH, 40 Mough Lane, Chadderton, Oldham. 0L9 9PJ

per Anderson Strathern Solicitors, 1 Rutland Court, Edinburgh EH3 8EY

Appellant

and

MISS LYNNE MacDONALD AND MR STEVEN MUNRO, 23 Moravia Avenue, Bothwell, G71 8QA

Respondent

FTT Case Reference FTS/HPC/EV/20/0180

6 April 2021

The Tribunal ORDERS that:

The appeal is allowed, the decision of the First-tier Tribunal is set aside and the case is remitted to the First- tier Tribunal to consider further procedure.

[1] James Smith, (hereafter the "the appellant") is the heritable proprietor of the subjects known as and forming 23 Moravia Avenue, Bothwell G71 8QA (hereafter referred to as "the property"). Lynne MacDonald and Steven Munro (hereafter referred to as "the respondents") are the tenants of the property let by the appellant to them in terms of a private residential tenancy. In terms of that tenancy a rental payment of £420 is due on the

28th day of each month. By November 2019 the respondents are alleged to have accrued rental arrears over a period of three consecutive months. On 28 November 2019 sheriffs' officers instructed by the appellant delivered written Notices to Leave (hereafter referred to as "the Notices") at the property which were addressed to the respondents. A "Certificate of Intimation" provided by the sheriffs' officers confirms that the Notices were deposited at the property "by means of a letterbox." In addition, the Notices were sent to the respondents by ordinary post.

[2] On 17 January 2020 the appellant submitted an application to the FtT seeking a Private Residential Tenancy Eviction Order (hereafter referred to as "the Order"). The application was made in accordance with section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016 (hereafter referred to as "the 2016 Act") and Rule 109 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulation 2017 (hereafter referred to as "the Regulations").

[3] Following a Case Management Discussion on 14 August 2020 at which both the appellant, who was represented by his solicitor, and the first named respondent were present a hearing was fixed for 12 October 2020. That hearing took place by teleconference. The appellant was represented by his solicitor and the respondents did not attend the hearing. The FtT refused the application on the basis that the purported Notices to Leave served by the appellant on the respondents "did not meet the definition of a "Notice to Leave" in terms of the section 52(2) of the 2016 Act. As such the FtT could not "entertain" the application and it therefore required to be refused.

The Appeal

[4] The appellant has appealed against the decision of the FtT and permission to appeal was granted on 2 December 2020 by the FtT. The appeal was conducted on the basis of written submissions only. The appellants presented written submissions. The respondents elected to make no submissions.

[5] The purpose of the Upper Tribunal is to hear and decide appeals from decisions of the FtT. An appeal may only be on a point of law (section 46 of the Tribunals (Scotland) Act 2014. The Inner House of the Court of Session in the case of *Advocate General for Scotland* v *Murray Group Holdings Ltd* (2015) CSIH 77 identified four different categories of case covered by the concept of an appeal upon a point of law. These are (i) an error of general law, the contents of its rules; (ii) an error in the application of the law to the facts; (iii) making findings in fact without a basis in the evidence; and (iv) taking a wrong approach to the case by, for example, asking the wrong questions or taking account of manifestly irrelevant considerations, or by arriving at a decision no reasonable tribunal could properly reach. The statutory function of the upper tribunal is a limited one to correct errors of law.

[6] Application for permission to appeal has been granted in relation to the following two grounds:

(i) the FtT erred in law by failing to properly to interpret section 62 and related provisions of the 2016 Act when considering the date on which the Notice to Leave was served/delivered and whether the said Notice to Leave was valid and

(ii) the FtT erred in law by failing to properly interpret and apply section 73 of the 2016 Act by failing to assess the materiality of the purported error.

The relevant law

[7] In order for the Tribunal to consider an application for an eviction order a landlord must provide a tenant with a Notice to Leave. This requirement is imposed by section 52 of the 2016 Act.

> "**Section 52 applications for eviction orders and consideration of them**
>
> (2) The Tribunal is not to entertain an application for an eviction order if it is made in breach of –
> [1] subsection (3) or
> [2] Any of sections 54 to 56 (but see subsection (4)).
>
> (3) An application for an eviction order against a tenant must be accompanied by a copy of a notice to leave which has been given to the tenant".

[8] Accordingly, the FtT may not consider an application unless there is lodged a Notice to Leave which has been provided to the tenant. "Notice to Leave "is defined in the 2016 Act at section 62 as followings:

> "62 **Meaning of Notice to leave and stated eviction ground**
>
> (1) References in this Part to a notice to leave are to a notice which –
> (a) is in writing
> (b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First Tier Tribunal,
> (c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and
> (d) fulfils any other requirements prescribed by the Scottish Ministers in Regulations.
>
> (4) The date to be specified in accordance with subsection 1(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.
>
> (5) For the purpose of subsection (4) it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent."

[9] In relation to the date to be entered in terms of section 62(1)(b), the notice period is defined at section 54 of the 2016 Act which reads:

> **"54 Restriction in applying during the notice period**
>
> (2) The relevant period in relation to a notice to leave –
> (a) begins on the day the tenant receives the notice to leave from the landlord, and
> (b) expires on the day falling –
> (i) 28 days after it begins if subsection (3) applies,
> (ii) 84 days after it begins if subsection (3) does not apply.
>
> (3) This subsection applies if –
> (a) on the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than six months, or
> (b) the only eviction ground, or grounds, stated in the notice to leave is or are one or more of the following –
> (iii) that the tenant has been in rent arrears for three or more consecutive months.
>
> (4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3)."

[10] Both before the FtT and in the submission presented in support of the appeal reference was made to The Interpretation and Legislative Reform (Scotland) Act 2010 (hereafter "the Interpretation Act") and it is clear that is of significance for the present appeal. It would appear that there are no provisions in the 2016 Act as regards the service of notices under that Act. This results in the application of section 26 of the Interpretation Act;

> "**Section 26 service of documents**
>
> (1) This section applies where an Act of the Scottish Parliament or a Scottish Instrument authorises or requires a document to be served on a person, (whether the expression 'serve', 'give', 'send' or any other expression is used).
>
> (2) The document may be served upon the person –
> (a) by being delivered personally to the person

(b) by being sent to the proper address of the person –

(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c.26)), or
(ii) by a postal service which provides for the delivery of the document to be recorded,

(4) For the purposes of subsection (2)(b) the proper address of a person is –

(c) the last known address of the person.

(5) Where a document is served is mentioned in subsection (2)(b) on an address in the United Kingdom it is to be taken to have been received 48 hours after it is sent unless the contrary shown."

[11] The first issue relates to the timing of the service of the Notices. In terms of paragraph 38 the FtT drew attention to the requirements of section 62(1) and section 62(5) of the 2016 Act, wherein it states it is "assumed" that the tenants will receive the Notices 48 hours after they were sent. The appellant submitted before the FtT that the fact that the Notices were served by sheriff officers allowed this assumption to be rebutted. The Notice was not sent, it was delivered. In effect section 62(5) does not apply as the Notices were not sent by registered post. This is of significance because if it is the case that the Notices were delivered on 28 November 2019 the notice period will run for 28 days following that date. The notice period would therefore expire on 26 December 2019 and the first day that the appellant could raise the action was 27 December 2019, being one day after the expiry of the notice period. That is the date specified in the Notices. It was maintained by the appellant before the FtT that the Notices to Leave satisfied all requirements of section 62(1) of the 2016 Act and therefore constituted a valid Notice to Leave.

[12] The FtT did not accept that submission. The reasoning is detailed within paragraphs 39 and 40 of its decision. The FtT held that the appellant's position was predicated on the contention that the "assumption" referred to in section 62(5) could be

rebutted on the basis that the Notices to Leave were delivered by sheriffs' officer and not posted. The FtT held that parliament used the word "assumed" rather than "presumed" in this provision for a reason. The FtT held that while a presumption is capable of rebuttal, an assumption is not. The Notices to Leave were deemed to have been received on 30 November 2019. The notice period consequently ended on 28 December 2019 and the date it should have been entered on the Notice in terms of section 62(1)(b) is 29 December 2019. As such the Notices do not meet the definition of the "Notice to Leave" in terms of the Act and as such the FtT could not "entertain" the application.

[13] In considering the appeal it is perhaps important to recognise that this issue does not appear to have been a relevant consideration when the application was initially accepted for determination before the FtT by its legal member on 16 March 2020. When the Notice of Acceptance of the application by the First Tier Tribunal made under Rule 9 of the Regulations was issued on 16 March 2020 it was quite clearly stated that the legal member who was acting under delegated powers from the Chamber President did not consider that there were grounds for rejection of the application in terms of Rule 8 of the Regulations. One can perhaps conclude that the legal member did not consider that there was an issue with the Notices.

[14] The FtT may not consider an application unless that application is accompanied by a copy of the Notice to Leave which was given to the tenant. It does need to be recognised that section 52 does not address any issues referable to the validity of the Notice to Leave but nevertheless the legal member of the FtT who considered the application paperwork considered that "no further documents or information is required"

[15] It is argued by the appellant that a Notice to Leave requires to advise a tenant of the date that a landlord "expects" to be entitled to seek an eviction order. That is the date after

the end of the notice period. There is an "assumption" that the tenant will receive a Notice to Leave 48 hours after it is "sent", unless the contrary is shown. The Upper Tribunal is invited to conclude that the word "sent" requires to be distinguished from the words "received" or "served". Where a document is served or delivered by a sheriffs' officer there is a received date but there is no sent date. With reference to section 54(2) of the 2016 Act it was submitted that the 28 days is calculated by reference to the date the tenant "receives" the Notice to Leave, the parliamentary intention clearly being that a tenant could not be aware of such a Notice while it is in transit. The submission was that the FtT did not properly direct itself to the different references to "sent" and "received" within the 2016 Act.

[16] The grounds of appeal as further developed submit that there is an error of law because the FtT, "without reference to authority or adequate reasoning" held that "while a presumption is capable of rebuttal, an assumption is not". It was submitted that the FtT did not correctly interpret the meaning of "assumption" either in isolation as a word or in the context of the phrase used in the 2016 Act. Further, it was argued that the FtT did not adopt a purposive approach to interpretation of the statue such as was required. When the interpreting a statute the FtT required a certain amount of commonsense in consideration the object of the statutory provision (*Arms* v *Jarvis* 1953 1 WLR 649 at page 652)

"Appendix No 10".)

[17] The FtT drew a significant distinction between an "assumption" and a "presumption". The submission of the appellant is that no such significant distinction exists. Reference is made to the definition in Volume Two of the Shorter Oxford English Dictionary on Historical Principles, Fifth Edition. Assumption includes "the taking of something being true for the sake of argument or action" and "presumption"; presumption is defined as including "taking something for granted" and "an assumption". The

submission was further developed that an assumption is not a proven fact and may be rebutted or otherwise shown to be incorrect by a party. Use of assumption is permissive but allows an alternative finding to be made. If parliament had intended that no contrary position could be established by a party it would have used non-permissive words or phrases such as "conclusively or deemed". The use of "assumption" merely creates a "default position". Reference was made to the case of *Lees* v *Gilmour* 1990 SCCR (Sh Crt) 419 at page 422 where the court held that where a statute referred to an "assumption" this does not have "the hallowed status of an rebuttable presumption" and that as a matter of law a court or tribunal was entitled to have regard to evidence which may demonstrate that the assumption was incorrect or should be disregarded. It was submitted that the FtT erred in finding that a presumption can be rebutted but an assumption cannot be rebutted.

[18] Further, it was argued that the FtT failed in providing proper, adequate and intelligible reasons for distinguishing between assumption and a presumption. This was a determining factor and accordingly it was submitted the FtT failed in its duty to deliver proper and adequate reasoning for the conclusion (*Wordie Property Ltd* v *Secretary of State for Scotland* (1984) SLT 345 at page 348) it is argued that the decision leaves the informed reader in substantial doubt as to the FtT reasoning.

[19] Finally, it was argued that the FtT appeared only to be considering the sending of the Notices by unregistered mail. While a distinction was recognised between unregistered mail and perhaps email (paragraph 39 of the FtT decision) the FtT's approach failed to have regard to Notices to Leave when the date of service is known due to other means of service such as by sheriff officers.

[20] It was submitted that the purpose of the provisions in the 2016 Act were to ensure that a tenant had a minimum period of Notice. The Tribunal did not find that the Notice

was not received by the respondents on the date of service. The effect of the Tribunal's decision is to increase the Notice period under 2016 Act, which the FtT was disentitled to do.

The Decision

[21] The Upper Tribunal upholds the appeal. The purpose of the provisions of the 2016 Act is to ensure that a tenant has a minimum period of notice. The FtT accepted that the Notices were received by the respondents on the date when the sheriff officers delivered them. Indeed a Certificate of Intimation from the sheriffs' officers is produced. They were delivered to the property by posting them through the letter box and addressed to the respondents.

[22] In my view section 62(5) does not apply in this case because the Notices were not sent. They were delivered. The notice period began when the tenants received the Notices (section 54(2)(a) of the 2016 Act.) In a case such as this where there is personal delivery the tenants received the Notices on the day they were delivered. Further the FtT does not appear to have considered the terms of paragraph 3 of the lease between the parties. The appellant and the respondents agree therein that all communications which are made under the 2016 Act will be "hard copy by personal delivery or recorded delivery." That which was done by the appellant is that which was agreed in the lease between the parties. Service was not only carried out in the agreed way it was carried out in terms of section 26(2)(a) of the Interpretation Act, namely personal delivery. Section 26(5) only applies where a document is "sent" and "unless the contrary is shown." The Notices were not sent. There is a difference between "sent" and "delivered" on the one hand and also between "sent" and "received" on the other.

[23] I also accept the argument as presented by the appellant that an assumption is not a proven fact and may be rebutted. There was no authority within the FtT decision for the statement that an assumption cannot be rebutted but a presumption could be. While the case of *Lees* v *Gilmour* is a case in an entirely separate context (criminal) nevertheless its reasoning can be applied in this case. An assumption does not have what is described is the "hallowed status of an irrebuttable presumption". Adopting a purposive approach to the statute the 28 day period should commence on the date when the Notice to Leave was received. On one view, the actual delivery of the Notices to Leave provides greater certainty that committing a document to the post. In addition, the FtT did not provide any legal reasoning or explanation for its conclusion that a presumption is capable of rebuttal but an assumption is not. I consider that the appellant is correct in his submission that the absence of such leaves the informed reader in substantial doubt as to the FtT reasoning. On that basis alone I would uphold the appeal.

[24] The purpose of the provisions of the 2016 Act are to ensure that a tenant has a minimum period of notice. The FtT did not find that the Notices were not received by the respondents. There was unchallenged evidence of delivery of the Notices to the respondents at the property. The FtT appears to have discounted or ignored that unchallenged position and concluded that the Notices were required to be treated as having been received on 30 November 2020. In so doing the FtT failed to take account of a relevant and material consideration. The FtT has effectively increased the period of notice under the 2016 Act which it was not entitled to do.

[25] In terms of section 26 of the Interpretation Act the assumed date of receipt depends on the type of service. Section 26 makes provision for service of documents by various means. The FtT indicated that when a date is entered on a Notice to Leave a landlord will

be unaware as to when the tenant will receive the notice. I accept the argument presented by the appellant that this is a recognition by the FtT that the date of receipt of the Notice to Leave by the tenant is critical. However, the FtT appeared to limit its consideration to those Notices to Leave served by unregistered mail and did not consider Notices such as in the instant case where the date of receipt is known. Where service is "taken to have been received 48 hours after it was sent" parliament has provided the assumption of 48 hours may be disregarded where the contrary is shown. Accordingly, it is clear that there was evidence in this case that the contrary was shown. There is no dispute regarding the "actual date of receipt of the Notices to Leave" and section 26 of the Interpretation Act does not provide for a deemed date of receipt 48 hours later where service has been made by personal delivery.

[26] The decision I have made is sufficient for disposal of the appeal. There is a further ground which is whether section 73 of the 2016 Act can be applied. Given my decision in relation to the first ground of appeal there is no requirement that I address the second ground. However, had it been the case that the notice period had been less than that to which the tenants were entitled I would have upheld the FtT, upon the basis that the Notices were invalid. One of the purposes of the Notices to Leave is to provide tenants with an opportunity to consider what should be done in the period before proceedings are raised. What is at issue is the loss of a home. Tenants are statutorily entitled to a period of time to try to resolve issued prior to proceedings being raised. Section 73 of the 2016 Act will only apply to errors which are sufficiently minor that they do not materially alter the effect of the document. Such a description could not apply to an error which reduces a period of notice to a tenant.

[27] The Coronavirus (Scotland) Act 2020 removes the mandatory aspect of ground 12 of the 2016 Act relevant to rent arrears. As such having granted the appeal I will direct that the case be returned to the FtT for consideration.