Upper Tribunal for Scotland

[2021] UT 15
UTS/AP/19/0049

DECISION OF SHERIFF IAN MILLER

ON AN APPEAL

in the case of

MR MOHAMMED UDDIN, 2/6, 6 Walls Street, Merchant City ,Glasgow, G1 1PA
per Legal Services Agency, 3rd Floor, Fleming House,
134 Renfrew Street, Glasgow, G3 6ST, Glasgow

Appellant

and

MR DAVID HENDERSON, 97A Derryhale Road, Portadown, Co Armagh, BT62 3SR
per T C Young Solicitors, 7 West George Street, Glasgow, G2 1BA

Respondent

FTT Case Reference FTS/HPC/EV/19/2171

19 February 2021

Decision

The Upper Tribunal, having resumed consideration of the cause, the submissions of parties, both written and oral, the written submissions of the Society of Messengers-at-Arms and Sheriff Officers and the various legal authorities and the several documents relied upon by them, Refuses the appeal.

Introduction

[1] The issue in this appeal is the competency of service by sheriff officer of the Notice to Quit dated 4 April 2018 in respect of an assured tenancy of a residential property in Glasgow for which the appellant was the tenant and the respondent the landlord. The appellant says that the service was incompetent, the respondent that it was.

[2] This situation has come about in the following manner. The cause was raised before the First-tier Tribunal for Scotland (FtT) as an application for eviction and recovery of possession of the heritable subjects at Flat 2/6, 6 Walls Street, Merchant City, Glasgow G1 1PA (the subjects) which had been let by the respondent to the applicant under an assured tenancy by lease dated 14 and 15 March 2016. The date of entry was 2 March 2016. On 9 April 2018, a sheriff officer, acting on the instructions of the respondent served on the appellant qua tenant of the subjects a notice to quit the subjects (the Notice in question) and a related Form AT6. After sundry procedure which included an arrangement between the parties for payment of rent that did not subsist the respondent instructed the service of a second form AT6 which was validly served on 14 June 2019 and then during July 2019 instituted the present proceedings for eviction and recovery of possession of the subjects. The FtT granted the application on 9 September 2019. The respondent requested permission to appeal against that decision. The FtT refused that by decision dated 23 October 2019. The appellant then requested permission from the Upper Tribunal to appeal against the decision dated 9 September 2019. By Decision dated 24 December 2019 the Upper Tribunal granted him permission to appeal on the single issue of whether service on the appellant of the Notice was effected competently by sheriff officer.

The ground of appeal

[3] In Part 7 of his Form UTS-1 the applicant intimated that the ground of his appeal was that "there is an arguable point of law, namely whether service of a Notice to Quit by Sheriff Officer is competent".

[4] This ground of challenge to the competency of the Notice by reason of the manner of its service was not one that was put in issue before the FtT either at first instance or when the appellant sought permission, unsuccessfully, from the FtT to appeal the first instance decision.

[5] Coming in the way that it did and at the stage in proceedings that it did there is a strong and compelling argument that the request should be refused for those reasons alone. However, the ground sought to raise an issue of competency which is always a matter that is *pars judicis*. For that reason the Upper Tribunal concluded that the issue raised was a point of law involving a live question of competency which was stateable on the information presented and which if sustained would require reversal of the FtT decision, recall of the order for eviction and recovery of possession and dismissal of the application. The Upper Tribunal also took into account that if the appellant were correct in his analysis of the law, that conclusion had the potential to be of general importance, significance and application to notices to quit in respect of such assured tenancies as still exist.

The procedure in the appeal

[6] Following the grant of appeal the case proceeded to an oral hearing. In advance of it the respondent lodged in process written submissions styled "Response to Appeal" and the appellant a written Reply to that document. At the hearing the solicitors for the parties adopted their respective written submissions and commented on them orally.

[7] In the course of the hearing I raised with both parties an issue that was absent from the submissions, namely, the authority of the sheriff officer to serve the Notice in question. As I expressed it in my subsequent Note dated 31 August 2020: (i) what is the source of the right of a sheriff officer to serve such a notice to quit within the place in respect of which he holds a commission as an officer of court; and (ii) put another way, is an officer of court also an officer of tribunals simply by virtue of being an officer of court? For the reasons that I gave in my Note I invited representations on these issues from both parties and from the Society of Messengers-at-Arms and Sheriff Officers (the Society). All complied and lodged written submissions.

[8] Neither the appellant nor the respondent nor the Society requested the opportunity of a further oral hearing to present additional submissions on the issue. Accordingly I have reached my decision by having regard to the submissions of the parties, both written and oral, to the written submissions of the Society and to the various legal authorities and the several documents relied upon by them.

The legal authorities

[9] The legal authorities relied upon or at least referred to in submissions were:

i. Companies Clauses Consolidation (Scotland) Act 1845 [sec 103]

ii. Removal Terms (Scotland) Act 1886 [sec 6]

iii. Recorded Delivery Act 1962 [sec 1]

iv. Conveyancing & Feudal Reform (Scotland) Act 1970 [sec 24]

v. Rent (Scotland) Act 1984 [secs 112 and 114]

vi. Insolvency Act 1986 [sec A21]

vii. Debtors (Scotland) Act 1987

viii. Housing (Scotland) Act 1988 [secs 16, 18, 19, 33 and 54 and schedule 5]

ix. Proceeds of Crime Act 2002 [sec 127]

x. Bankruptcy & Diligence (Scotland) Act 2007 [sec 216(1)(a)]

xi. Housing (Scotland) Act 2014

xii. Corporate Insolvency and Governance Act 2020 [sec 1]

xiii. Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988

xiv. Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991

xv. Act of Sederunt (Summary Cause Rules) 2002 [rules 30.7]

xvi. The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 [rules 6 and 41]

xvii. *Royal Bank of Scotland* v *Boyle* 1999 Housing L. R. 63

xviii. *Bank of Scotland* v *Stevenson* 2012 S.L.T. (Sh. Ct.) 155

xix. *Lowther Homes Limited* v *Nwoko* FTS/HPC/18/2760

xx. *Black's Law Dictionary*, deluxe 9th edition [article on "Process", p 1325]

xxi. Rankine *A Treatise on the Law of Leases in Scotland*, 3rd edition, 1916 [pages 559 and 561]

xxii. Scottish Law Commission "Discussion Paper on Aspects of Leases: Termination, Discussion Paper No 145, May 2018 [chapter 3]

xxiii. Stalker, Evictions in Scotland, 2007 [pages 31 and 44]

The several documents

[10] The several documents are:

a. Lease between the parties of the subjects dated 14 and 15 March 2018

b. Notice to Quit dated 4 April 2018

c. Certificate by Sheriff Officer of execution of service on 9 April 2018 of the Notice in question and Form AT6

d. Certificate of execution of Notice of Proceedings served on the appellant by Sheriff Officer on 14 June 2019

e. FtT decision dated 9 September 2019

f. FtT decision dated 21 October 2019

g. Appellant's Form UTS-1 dated 18 November 2019

h. Decision of the Upper Tribunal dated 24 December 2019 granting permission to appeal

i. Respondent's written submissions, undated, styled "Response to Appeal"

j. Appellant's written Reply, undated.

k. Note by the Upper Tribunal dated 31 August 2020

l. Appellant's written submissions, undated, on the issue raised in the above Note

m. Respondent's written submissions, undated, on the issue raised in the above Note

n. Written submissions, undated, presented on behalf of the Society of Messengers-at-Arms and Sheriff Officers on the issue raised in the Upper Tribunal Note dated 31 August 2020.

The submissions

[11] The written submissions of the parties and of the Society are available in process and should be treated as annexed to this decision. In this decision I have precised their main propositions so far as they are said to bear upon the issue in dispute. They ranged widely,

particularly those on behalf of the appellant. I have added to them where appropriate what was submitted orally. Much of it was in essence a restatement of what was in the written submissions.

The submission on the merits of the appeal

The primary submission for the appellant

[12] The solicitor for the appellant supported the appellant's primary position by reference to the provisions of the Removal Terms (Scotland) Act 1886 (the 1886 Act) and submitted that "there is no provision in Scots law for the service of a notice to quit an Assured Tenancy other than by service under" that Act and that service under that Act "is left as the only means by which a notice to quit can be served". From that proposition she concluded that there was no legal basis for service by way of sheriff officer and accordingly the FTT "erred in failing to dismiss the cause as incompetent". The appellant founds upon section 6 of the 1886 Act which states:

> "Notice of removal from a house, other than a dwelling-house or building let along with land for agricultural purposes, may hereafter be given by registered letter, signed by the person entitled to give such notice, or by the law agent or factor of such person, posted at any post office within the United Kingdom, in time to admit of its being delivered at the address thereon, on or prior to the last date upon which by law such notice of removal must be given, addressed to the person entitled to receive such notice, and bearing the particular address of such person at the time, if the same be known, or, if the same be not known, then the last known address of such person."

The submissions in response for the respondent

[13] The respondent replied to that proposition by submitting two grounds, one rooted in the purpose of a notice to quit and the other rebutting the appellant's primary position.

[14] In support of the first ground the respondent submitted that the purpose of a notice to quit is to bring to an end the contractual tenancy by preventing the operation of tacit relocation and it was a necessary pre-litigation notice required to satisfy the conditions for recovery of possession contained within sec 18(6) of the Housing (Scotland) Act 1988 (the 1988 Act). The respondent considered the historical position regarding the giving of notice to quit in urban subjects at common law and in doing so referred to the Scottish Law Commission "Discussion Paper on Aspects of Leases: Termination, Discussion Paper No 145, May 2018 and Rankine *A Treatise on the Law of Leases in Scotland*, 3rd edition, 1916 at pages 559 and 561 and submitted they showed that the rules regarding removal from urban subjects were wholly customary and notice periods varied throughout Scotland. The 1886 Act was introduced to regularise notice periods although it did not expressly provide that a notice had to be given in writing. It provided that notices "may" be given by registered letter signed by the landlord or landlord's agent and this "statutory mode of sending warning … got over the difficulty of proving actual and timeous receipt of the notice by the tenant" (Rankine, p 561). The common law rule regarding verbal notice to quit was superseded by sec 112 of the Rent (Scotland) Act 1984 (the 1984 Act) and its sec 114(1) provided for service in three different ways: (a) by delivering it to the tenant; (b) by leaving it at the tenant's proper address; or (c) by sending it to the tenant by recorded delivery post at that address. The 1984 Act required that a notice to quit of a dwelling house be in writing and given to the tenant. In respect of the Notice in question the sheriff officer effected service of it on the appellant as tenant of the subjects in accordance with sec 114(1)(b). Furthermore sec 54 of the 1988 Act contains identical provisions regarding service of notices under that Act. The solicitor for the respondent submitted that the Notice in question was also served under Part II of that Act and in particular referred to the provisions of secs 16(3),

18(3), 18(6) and 33 for the role played by a notice to quit. She also founded upon the Assured Tenancies (Notice to Quit Prescribed Information) (Scotland) Regulations 1988 (the 1988 Regulations) which prescribes the information that was required in "a Notice to Quit given by a landlord to terminate a tenancy which is an assured tenancy under the Housing (Scotland) Act 1988."

[15] The response to the appellant's primary position started with an acceptance by the solicitor for the respondent that service of a notice to quit was competent if done in compliance with sec 6 the 1886 Act but proceeded to dispute that that section prescribed an exhaustive list of modes of service or precluded service by other means. The adoption of the word "may" and not "must" in section 6 meant that it permitted its mode of service but did not direct that it had to be done only in that way. Service by recorded delivery service (the modern successor to registered post) was one competent method of service. Service by sheriff officer was the most secure method by reason of the authentication provided by the certificate of service. The authority to serve a notice was grounded in the Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991 (the 1991 Act of Sederunt) and in particular its rule 14(1)(c) which provided that a sheriff officer acting in his official capacity was empowered to "execute a citation or serve any document required under any legal process". This provision authorises a sheriff officer to do for Tribunal documents what he or she has done for Sheriff Court documents. The Notice in question was a "statutory pre-litigation notice" in the sense used by Sheriff Jamieson at paragraph [91] of his decision in the case of *Bank of Scotland* v *Stevenson* and a document required under a legal process and service of it on the appellant qua tenant was an official function of the sheriff officer who served it on him. It was analogous to serving a calling-up notice under Part II of the

Conveyancing and Feudal Reform (Scotland) Act 1970 which in the *Bank of Scotland* case was held to be an act within the official capacity of a sheriff officer.

[16] The solicitor for the respondent submitted that the appellant advanced three propositions all of which were wrong. The first was that a notice to quit was not a pre-litigation notice, the second that it was not a document that was required under any legal process and the third that Sheriff Jamieson in paragraphs [91] and [92] of his decision in the *Bank of Scotland* case excluded taking account of a notice to quit because he referred only to a statutory pre-litigation notice. In connection with the first proposition the appellant accepted that there were circumstances in which a notice to quit was required. In this case the respondent served on the appellant a second form AT6 on 14 June 2019, over a year later than the service of the first along with the Notice in question because after that service the parties entered into a repayment arrangement and as a result of relying on the operation of that the first form AT6 expired. The Notice in question and the form AT6 served on 9 April 2018 were necessary pre-litigation steps but the litigation was delayed by the arrangement which in the event the appellant failed to honour resulting in the commencement of proceedings. In response to the second proposition the solicitor for the respondent said that the appellant's interpretation of "legal process" was narrow and erroneous. That concept was not defined in the 1991 Act of Sederunt. *Esto* the service of a notice to quit was not a pre-litigation notice it was a document that was required under a legal process. The appellant's interpretation of the decision in *Bank of Scotland* was excessively narrow. The 1984 Act superseded the common law on notices to quit and transformed it universally from verbal to writing thereby changing the nature of a notice. In conclusion the appeal should be dismissed.

The submissions in reply for the appellant

[17] The appellant's reply accepted that at common law a tenant must receive notice or what he described as fair warning prior to removal from heritable property but disputed that sec 112 of the 1984 Act superseded the common law regarding verbal notices to quit, that the Notice in question was served in terms of the 1988 Act and that Scots Law provided for service of a notice to quit by a sheriff officer. She then turned to consider the purpose of a notice to quit and the need for certain prerequisites before an action for recovery of possession would be competent.

[18] A notice to quit is a creature of the common law and while statutes may have added to or refined what is required of a notice it remained a creature of the common law. With regard to sec 112 she submitted that while notice could historically have been given verbally it could also be given under the 1886 Act by registered letter. All that sec 112 did was to require that a notice to quit be in writing; it did not require such a notice to be served under any provision of the 1984 Act and therefore the methods of service set out in sec 114 did not apply.

[19] The 1988 Act made no provision for service of a notice to quit and neither did any of the statutory provisions noted by the respondent. Therefore the Notice in question could not be a notice under the 1988 Act and its sec 54 did not apply.

[20] On the authority of a sheriff officer to serve the Notice in question, the appellant submitted that the Act of Sederunt did not apply to it because it was not a document required under any legal process. While conceding that there is little authority in Scots law on the definition of "legal process" she sought to distinguish the discussion on that in the *Bank of Scotland* case on the ground that notices to quit were not in the mind of the sheriff when making his decision and a notice to quit was not a statutory pre-litigation notice and

therefore not a document required under any legal process. She also submitted that the respondent placed too wide an interpretation on the phrase "legal process". A notice to quit was not a notice under the 1988 Act because it is a notice at common law and therefore section 54 does not apply. *Esto* section 54 did apply then either (1)(b) or (1)(c) would come into play and be competent modes of service. The 1984 Act makes no express provision for the creation or operation of a notice to quit which reinforced the submission that it was a creature of the common law. Sec 114 of the same Act did not apply to the present tenancy. For all these reasons the appeal should be sustained and the cause dismissed. That would mean that tacit relocation would continue to run and there would be no valid basis for eviction of the appellant.

[21] The appellant submitted that the purpose of a notice to quit was to terminate a contractual tenancy but there were many circumstances in which it was possible to secure recovery of possession without service of a notice. A notice to quit alone could not form the basis of an action for recovery of possession. While an AT6 form might be capable of being considered to be a document that is required under any legal process and as such service by sheriff officer may be competent for that form, the same could not be said for a notice to quit. Furthermore the Notice in question was, as the appellant states "delivered" to the appellant on 9 April 2018 "according to the papers provided to the FtT" the ATC "does not appear to have been served until 14 June 2019, over a year later". Because no legal process was commenced until about 16 months after the notice to quit "appears to have been delivered" the appellant submitted that it was difficult to see how the Notice in question could be considered to be a notice required under any legal process. The appellant further submitted that there were certain necessary pre-requisites for an action for the recovery of possession to be competent, such as the existence of a lease and parties to a lease, and the

service of a notice to quit might fall into this category, as shown in the particular circumstances of the case of *Royal Bank of Scotland* v *Boyle* 1999 Housing L. R. 63 but the fact that service of a notice to quit is needed before an action can be raised competently does not mean that the notice is a document required under any legal process as is a calling up notice or form AT6. Instead the effect of service of a notice to quit creates the conditions in which a pre-litigation notice, the form AT6, could be served in due course and therefore a notice to quit is not a document required under any legal process.

The submissions on the authority of a sheriff officer to serve the Notice

The submissions of the appellant

[22] The appellant submitted that there was no statutory authority of the type described save in respect of orders pursuant to decisions of the FtT Housing and Property Chamber and instanced rule 41 in the schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (the 2017 Regulations) which allowed service and enforcement of orders by sheriff officer. Otherwise, the appropriate modes of service of formal communications under the 2017 rules was by post or by e-mail as set out in rule 6. The extent of the express authority of a sheriff officer under the 1991 rules turns on the interpretation of the words "any legal process". From various statutory provisions of which the solicitor for the appellant instanced the Companies Clauses Consolidation (Scotland) Act 1845, section 103, the Insolvency Act 1986 section A21, the Proceeds of Crime Act 2002 section 127 and the Corporate Insolvency and Governance Act 2020 section 1 and from the entry for Process in *Black's Law Dictionary*, the deluxe ninth edition, at page 1325 she concluded that a document required for "any legal process" means documents forming part of the proceedings before the Court or tribunal. Working with that the appellant

submitted that the Notice fell outwith that definition and did not form part of the legal process required by the 1988 Act which did not give an express requirement for service of a notice to quit and neither did the 1984 Act either accord a statutory status to a notice to quit or render it part of any legal process. On the question of whether a sheriff officer was also an officer of tribunals by virtue of being an officer of court, the appellant submitted that the answer was in the negative because the common law did not apply automatically to tribunals and there was no statutory provision that stated it to be the case.

The submissions of the Society

[23] The Society submitted that the answer to the first issue was to be found in the terms of rule 14(1)(c) of the 1991 Act of Sederunt and, if that proposition were not accepted, it lay in the authority conferred on a sheriff officer by the instruction of a landlord to serve a notice to quit. The answer to the second issue was in the affirmative because of the whole statutory scheme regulating the powers and responsibilities of sheriff officers as contained in both the 1991 Act of Sederunt and the 2017 Regulations.

[24] On the first issue the Society submitted that the 1991 Act of Sederunt was made under the power conferred upon the Court of Session by section 75 of the Debtors (Scotland) Act 1987 (the 1987 Act) and prescribed the official functions and their scope for *inter alia* a sheriff officer. The language employed in rule 14(1)(c) is expressed in the broadest possible and unqualified terms extending to the service of "any" document as part of "any" legal process provided that the document is required under that process. The generality of the language includes service of any document which requires to be served in proceedings before *inter alia* the First-tier and Upper Tribunals for Scotland. Had it been intended to restrict the official functions of a sheriff officer to service if documents required in the course

of pending legal proceedings it would have been a relatively simple matter to do that expressly. Instead the 1991 Act of Sederunt uses the much broader expression "any legal process". That should be construed in accordance with its normal and ordinary meaning which was apt to include the legal process of removal of a tenant which will frequently require to be initiated by service of a notice to quit in order, as in the present case, to prevent the operation of tacit relocation. Similarly, service of a notice to quit is required if a landlord seeks recovery of possession of subjects let under a short assured tenancy in terms of section 33 of the 1988 Act. In those circumstances the service of the notice to quit is part of the legal process of terminating a tenancy. Support for a notice to quit being a document which requires to be served under a particular legal process comes from section 112(1) of the 1984 Act that a notice requires to be in writing and from the 1988 Regulations for the information that it has to contain and from section 114 of the 1984 Act regarding the methods of service of a notice. In this context the requirement to serve means that a document is one which is needed if a particular end is to be achieved rather than one which a party is somehow legally obliged to serve, for no landlord is legally obliged to take steps to terminate a tenancy. Under the 1984 Act the documents which are required to be served include the written notice which is now the only valid means by which a notice to quit can be given and the methods of service identified in section 114(1)(a) and (b) are the methods by which a sheriff officer effects service.

[25] The Society submit that support for its construction of "any legal process" is found by analogy in the reasoning of Sheriff Jamieson in the *Bank of Scotland* case which was followed by the FtT in *Lowther Limited* v *Nwoko* and concludes that rule 14(1)(c) is the source of a sheriff officer's right to serve a notice to quit.

[26] In support of its secondary position the Society submit that a sheriff officer is entitled to serve a notice to quit on behalf of a landlord by virtue of the authority conferred upon him by his client's instructions. The purpose of section 6 of the 1886 Act was to add to the existing methods of giving valid notice of removal and as such had the same object as section 6 of the Citation Amendment (Scotland) Act 1882. At both common law and in terms of section 114(1) of the 1984 Act a notice to quit in relation to a dwelling-house may validly be served by delivering it to the tenant or by leaving it at the tenant's address. A notice to quit is never signed by a sheriff officer but by the party giving notice or by his agent. A sheriff officer can serve a notice to quit on a landlord if instructed to do that by his tenant.

[27] Turning to the second issue, the Society support their proposition that a sheriff officer is authorised to carry out his official functions in relation to matters over which the Tribunal service have jurisdiction and as such is an officer of tribunals as well as an officer of court because he is deemed to be subject to the supervision of the particular Tribunal before which the case in point is pending. In particular for the Housing and Property Chamber the rules that govern its procedure make specific provision for a sheriff officer to perform various acts in the enforcement of the Tribunals' orders, namely, paragraphs 41, 41B, 41D and 41E of Part 1 of Schedule 1 to the 2017 Regulations. These procedural rules confer on a sheriff officer certain exclusive rights or powers and impose certain duties on him. In exercising those rights and carrying out those duties a sheriff officer must be characterised as an officer of tribunals and subject to its supervision and if necessary the disciplinary provisions which would follow a complaint by the Tribunal to the sheriff principal of grave misconduct.

The submissions of the respondent

[28] The solicitor who submitted the respondent's response said that having read the submissions on behalf of the Society he was in entire agreement with them on both issues. On the second issue he submitted that while he agreed with the Society he did not think it necessary to answer it because it was sufficient for the answer on the first issue to be in favour of the position of both the respondent and the Society.

Discussion

[29] The issue on which the Upper Tribunal granted leave to appeal is whether the appellant is correct in law in saying that it is incompetent for a sheriff officer acting on behalf of and on the instructions of a landlord to serve a notice to quit on the tenant under an assured tenancy entered into between the landlord and tenant. This is because Scots law makes no provision for service of a notice to quit in respect of such a tenancy other than by the way prescribed in the 1886 Act and it makes no provision for service by sheriff officer. If that proposition is correct in law the FtT erred in law in failing to dismiss the application as incompetent.

[30] As already observed the appellant did not present this challenge to the competency of the application by reason of the manner of service of the notice in question to the FtT and the issue of dismissal on this ground was therefore not one put before the FtT which made a finding in fact, the fifth, that the Notice in question had been validly served and that it terminated the tenancy as at 1 July 2019.

[31] The contract of lease between the parties has not been challenged as creating a legal relationship between them commencing on 2 March 2016 as found in fact by the FtT. It is an assured tenancy under the 1988 Act, the legislation then in force, as the FtT found in law.

The notice in question was instructed by and on behalf of the respondent as landlord in respect of that contract of lease. The appellant takes no issue with the notice being what it purports to be. It is dated 4 April 2018. On 9 April 2018 a sheriff officer attended at Flat 2/6, 6 Walls Street, Merchant City, Glasgow G1 1PA to serve both the Notice in question and the Form AT6. As he narrates in his certificate of execution of the notice to quit, he was unable to contact the appellant at the address and after diligent enquiry and six audible knocks on the door of the property to which he could not gain access, he served both documents by leaving them in an external mailbox and furthermore sent a copy of them to the appellant by ordinary first class post.

[32] The submissions both written and oral concentrated upon the particular Notice in question while on occasion, and perhaps inevitably, those of the appellant in particular referred to the service of "a" notice to quit rather than "the" Notice in question. I will confine my decision to the Notice in question but I recognise that what I say and conclude may have more general application than the present case.

[33] In light of the submissions, it seems to me that the issue in the appeal invites an answer to three questions which may be formulated as follows:

1. By what legal authority was the sheriff officer permitted to serve the Notice in question?
2. Did that authority permit him to act as an officer of tribunals?
3. On the basis that he did have the authority to serve the Notice in question, did he serve it in conformity with and in furtherance of the requirements that governed the exercise of that authority?

I will deal with each in turn.

The three questions

1. By what legal authority was the sheriff officer permitted to serve the Notice in question?

[34] The appellant disputes that the 1991 Act of Sederunt provides the authority for a sheriff officer to serve the Notice in question on the ground that there is no statutory authority which allows such service except for the provisions of rules 6 and 41 of the 2017 Regulations while the respondent, adopting the reasoning of the Society, asserts that the 1991 Act of Sederunt provides the necessary authority.

[35] I am of the opinion that the authority of a sheriff officer to carry out the functions of his office rests in the provisions of the 1991 Act of Sederunt. I therefore agree with Sheriff Jamieson when he said in the *Bank of Scotland* case at paragraph [10] of his decision that the profession is regulated by those rules which were made by and with the authority of the Court of Session, and with the submissions of the Society which were adopted by the respondent. In promulgating the 1991 Act of Sederunt the Court of Session exercised the powers conferred on the Court by Parliament in section 75 of the Debtors (Scotland) Act 1987. Rule 14 designates the official functions of an officer of court of which a sheriff officer is one by virtue of his appointment to that office. It provides that an officer of court may exercise the functions set out in any place in respect of which he holds a commission as an officer of court. The function which is relevant to the present issue and the one on which the parties made submissions is (1)(c), that a sheriff officer may execute a citation or serve any document required under any legal process. No issue is taken in the appeal with the fact that in respect of the Notice in question the sheriff officer held that office and that he held a commission for the place in which he understood he was exercising his office.

[36] The specific language adopted in rule 14(1)(c) is, as the Society point out and the respondent adopts, expressed in the broadest possible and unqualified terms. I consider

that it is important for the issue in this appeal that the generality of the language be respected by giving it its normal and ordinary meaning for that is how the Court of Session wished to express the scope of a sheriff officer's entitlement to act in conformity with and in furtherance of his office. It extends to the service of "any document required under any legal process". It is not in dispute that "any document" includes the Notice in question. The dispute lies in whether the sheriff officer purported to serve the Notice in question "under any legal process". I will come back to this in answering the third question. For the present I hold that the answer to the first question lies in rule 14(1)(c) and that it provides the authority on which the sheriff officer purported to serve the Notice in question.

[37] For the sake of completeness I will indicate on an obiter basis my view on the secondary submission of the Society that a sheriff officer is entitled to serve a notice to quit on behalf of a landlord by virtue of the authority conferred upon him by his client's instructions. As it was presented I would not have sustained it. As I have said above in respect of the Society's primary submission the Court of Session has regulated the official functions of a sheriff officer in the 1991 Act of Sederunt. It is comprehensive in its terms and circumscribes the official functions of a sheriff officer. I consider that I would need to be persuaded that there exists a power at common law to serve the Notice in question as suggested that has survived the implementation of the 1991 Act of Sederunt. In the absence of such information which could satisfy me, I would not uphold the secondary submission.

2. Did that authority permit him to act as an officer of tribunals?

[38] The appellant submitted that a sheriff officer is not an officer of tribunals by virtue of being a sheriff officer because there is no statutory authority save in respect of orders pursuant to decisions of the FtT Housing and Property Chamber and instanced rule 41 in the

schedule to the 2017 Regulations which permitted service and enforcement of orders by sheriff officer. Otherwise, he says, the appropriate modes of service of formal communications under the 2017 rules was by post or by e-mail as set out in rule 6. The Society (and the respondent) submitted that a sheriff officer is authorised to carry out his official functions in relation to matters over which the Tribunal service have jurisdiction and as such is an officer of tribunals as well as an officer of court because he is deemed to be subject to the supervision of the particular Tribunal before which the case in point is pending and found support for that in the specific provisions for a sheriff officer to perform various acts in the enforcement of the Tribunals' orders, namely, paragraphs 41, 41B, 41D and 41E of Part 1 of Schedule 1 to the 2017 Regulations.

[39] I prefer the conclusion of the Society and the respondent. I reach it by interpreting rule 14(1)(c) of the 1991 Act of Sederunt and in particular the phrase "under any legal process". The generality of this phrase means that it does not restrict the official functions of a sheriff officer to any particular court or hierarchy of courts. The fact that it is a sheriff principal who, by virtue of rule 8(5) of the 1991 Act of Sederunt, grants an applicant a commission as a sheriff officer in his sheriffdom or a district within that sheriffdom does not mean that the sheriff officer is limited to carrying out as an official function within the place for which he holds a commission the service of documents that are under any legal process falling within the jurisdiction of the sheriff court. The phrase "under any legal process" is sufficiently general and unqualified to include a legal process that is required to proceed, is proceeding or has proceeded, in and through the Tribunal system and hierarchy. That approach is consistent with the conferment of a power to act in Tribunal cases by the 2017 Regulations founded upon by the Society. Moreover, and in any event, the Court of Session has the responsibility of regulating the scope of the official functions of, inter alia,

sheriff officers, as conferred by sec 75(1)(d) of the 1987 Act and if the Court felt it right to exercise that power the medium for doing that is by way of Act of Sederunt as prescribed by sec 75(1). Parliament has not altered that way of exercising the powers of the Court granted under that section and therefore if the Court had considered that when the Tribunal jurisdiction came into force there was a need for some formal recognition of that new jurisdiction in respect of the official functions of a sheriff officer the way to make any such provision was available by way of Act of Sederunt. From the fact that the Court has not seen fit to revisit the scope of the official functions of a sheriff officer as set out in rule 14 on the arrival of the Tribunal jurisdiction I think it right to infer that the Court does not see the need to do that and it follows from that that a sheriff officer must be held to have the right to exercise his office as an officer of tribunals.

[40] For each and all of these reasons I answer the second question in the affirmative.

3. On the basis that he did have the authority to serve the Notice in question, did he serve it in conformity with and in furtherance of the requirements that governed the exercise of that authority?

[41] Having answered the first two issues in the way that I have, the answer to the third becomes one of interpreting the terms of rule 14(1)(c) of the 1991 Act of Sederunt and in particular the concept there expressed of a legal process and then deciding whether the Notice in question was served in accordance with that interpretation of the subsection.

[42] In respect of the phrase "legal process" the appellant submitted that the Notice in question was not a document required under any legal process. While conceding that there is little authority in Scots law on the definition of "legal process" his solicitor referred to the definition of the word "Process" in Black's Law Dictionary at page 1325 which gives it as

"Process validly issued" and goes on to say that it is also termed lawful process. She also sought to distinguish the discussion on that concept in the *Bank of Scotland* case on the ground that notices to quit were not in the mind of the sheriff when making his decision and a notice to quit was not a statutory pre-litigation notice and therefore not a document required under any legal process. She also submitted that the respondent placed too wide an interpretation on the phrase "legal process".

[43] On the same issue she submitted that the authority whereby a sheriff officer could serve a notice to quit was grounded in the 1991 Act of Sederunt and in particular rule 14(1)(c) which provided that a sheriff officer acting in his official capacity was empowered to "execute a citation or serve any document required under any legal process". The Notice in question was a "statutory pre-litigation notice" in the sense used by Sheriff Jamieson at paragraph [91] of his decision in the *Bank of Scotland* case and a document required under a legal process and service of it on the appellant qua tenant was an official function of the sheriff officer who served it on him. It was analogous to serving a calling-up notice under Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970 which in the case of *Bank of Scotland* v *Stevenson* was held to be an act within the official capacity of a sheriff officer.

[44] The solicitor for the respondent submitted that the appellant advanced three propositions all of which were wrong. The first was that a notice to quit was not a pre-litigation notice, the second that it was not a document that was required under any legal process and the third that Sheriff Jamieson in paragraphs [91] and [92] of his decision in the *Bank of Scotland* case excluded taking account of a notice to quit because he referred only to a statutory pre-litigation notice. In connection with the first proposition the appellant accepted that there were circumstances in which a notice to quit was required. In

this case the respondent served on the appellant a second form AT6 on 14 June 2019, over a year later than the service of the first along with the Notice in question because after that service the parties entered into a repayment arrangement and as a result of relying on the operation of that the first form AT6 expired. The Notice in question and the form AT6 served on 9 April 2018 were necessary pre-litigation steps but the litigation was delayed by the arrangement which in the event the appellant failed to honour resulting in the commencement of proceedings. In response to the second proposition the solicitor for the respondent said that the appellant's interpretation of "legal process" was narrow and erroneous. That concept was not defined in the 1991 Act of Sederunt. *Esto* the service of a notice to quit was not a pre-litigation notice it was a document that was required under a legal process. The appellant's interpretation of the decision in *Bank of Scotland* was excessively narrow.

[45] In light of the submissions I have concluded that the phrase "under any legal process" is broad enough in its scope to include the Notice in question which is a pre-litigation notice and a document required under a legal process. Accordingly it was competent for the sheriff officer to serve it on the appellant qua tenant.

[46] The concept of a legal process has to be interpreted in context. The context is the provisions of the 1991 Act of Sederunt which was promulgated to regulate the profession of Messengers-at-Arms and sheriff officers in a comprehensive way including the content, scope and reach of their official functions. Legal process is not defined either in the 1991 Act of Sederunt or in any of the other statutes or statutory instruments instanced by the parties and therefore the words used should be given their normal meanings so far as that context permits.

[47] The specific and relevant context is the terms of rule 14(1)(c) which give a sheriff officer the authority to exercise the official function of executing a citation or serving any document required under any legal process in any place in respect of which he holds a commission as an officer of court. As I have already observed no issue is taken in the appeal with the fact that in respect of the Notice in question the sheriff officer held that office and that he held a commission for the place in which he understood he was exercising his office.

[48] The immediate context of the concept of a legal process is to my mind within the entire phrase "serve any document required under any legal process". It is too restrictive to try to interpret the two words "legal process" or even the single word "process" and then import that interpretation into the subsection. The double use of the adjective "any" indicates that the scope of the official function is extremely wide and generous. The use of the word process is of critical significance. It connotes a wider power and opportunity to serve a document than would be the case if the rule had prescribed the function was in respect of legal proceedings. Accordingly it is not restricted to legal proceedings whether at the point of service they are intended, have been commenced or have been finalised. For that reason I have not found the reference to Black's Law Dictionary of assistance. It restricts the scope to "process validly issued" which is narrower in scope than what I consider rule 14(1)(c) permits. The idea of proceedings falls within the more general concept of process. That concept directs attention to the document in question being served for a purpose which has the capacity to have legal consequences whether or not any such legal consequences are insisted in and this is supported by the use of the preposition "under" which conveys the idea of being a feature of the process. I therefore disagree with the submission of the appellant that it is restricted to documents forming part of the proceedings before a court or tribunal. The use of the word "required" introduces a

measure of restraint on the exercise of the authority to serve by directing that the link between the document and the reason for serving it must be founded in a legal tenet.

[49] The submissions of the parties directed much attention to the development of the law on notices to quit in general and for the purposes of an assured tenancy with the assistance in particular of the Scottish Law Commission Discussion Paper on Aspects of Leases: Termination, Rankine's *Treatise on the Law of Leases in Scotland*, the 1886 Act, the 1984 Act and the 1988 Act. From that they adopted competing positions on whether service of the Notice in question was required. In my opinion it was. The general legal standing of a notice to quit is that once served it prevents the operation of tacit relocation and may act as a foundation of an action of removing, or both: the Scottish Law Commission Discussion Paper, paragraph 3.2. The Notice in question related to an assured tenancy. It was instructed by the respondent and at the same time he directed that it be accompanied by a form AT6. The sheriff officer left both documents for the tenant on 9 April 2018 and no exception is taken to the fact that he did it in that way. That in the context of an assured tenancy gave the landlord the opportunity to proceed with the action that he eventually did although in the event that was on the back of a later form AT6 to which no exception is taken. The sheriff officer was instructed to serve the Notice in question and the form AT6 for the purpose of terminating the appellant's tenancy of the subjects and that is the legal tenet. The documents had the capacity to have legal consequences in the form of an action to recover possession of the subjects which is what eventually happened. As such it was a pre-litigation notice. The fact that the action was delayed and the legal consequences of the delivery of the documents to the tenant on 9 April 2018 is not disputed as being attributable to an agreement into which the parties entered regarding payment of rent due by the appellant qua tenant to the respondent qua landlord. I infer that it was the implication of

the legal consequences that could follow the receipt of the Notice in question and the form AT6 that spurred the tenant to respond by way of entering into that agreement, which was in itself a legal consequence. Only when that agreement broke down was the legal consequence of the Notice in question and the form AT6 insisted in by the raising of the action before the FtT. The Notice in question was required as a first legally authorised step in the legal process that had the capacity to proceed to an action of recovery of possession. It is a document required under the legal process that proceeded to the stage of the action not least because of the operation of tacit relocation. On that analysis I am of the opinion that I do not need to reach a decision on whether the Notice in question proceeded at common law or under some statutory provision or provisions discussed in the course of submission or on whether it was a "statutory pre-litigation notice" that could benefit from the analysis by Sheriff Jamieson in the *Bank of Scotland* case of the demands of serving a calling-up notice under section 19 of the Conveyancing and Feudal Reform (Scotland) Act 1970 and I reserve my position on all those matters.

[50] For the foregoing reasons I answer the third issue in the affirmative.

Conclusion

[51] For all the reasons I have given I have concluded that service of the Notice in question by sheriff officer was effected competently because the legal authority that permitted him to serve it is found in rule 14 of the 1991 Act of Sederunt and in particular rule 14(1)(c), that the rule authorised him to act as an officer of tribunals and that he served the Notice in question in conformity with and in furtherance of the requirements that governed the exercise of that authority. Accordingly I refuse the appeal.