Upper Tribunal for Scotland

2023UT25
Ref: UTS/AP/23/0016

DECISION OF

Sheriff Simon Collins KC

ON APPEAL FROM A DECISION OF THE FIRST TIER TRIBUNAL, HOUSING AND PROPERTY CHAMBER

IN THE CASE OF

Mr Phillip McCallum, Alleyford Bungalow, Kirkgunzeon, Dumfries, DG2 8LE

Appellant

- and -

Mr Roger Wright, The Coach House, Leigh Farm, Angersleigh, Taunton, TA3 7SY
per Anderson Strathern,
1 Rutland Court, Edinburgh, EH3 8EY

Respondent

FTS Case Reference: FTS/HPC/EV/22/3903

30 August 2023

Decision

1. The Upper Tribunal refuses the appeal. The decision of the First-tier Tribunal ("FTS") dated 17 April 2023 to grant an eviction order in respect of the tenancy of The Bungalow, Alleyford, Kirkgunzeon, DG2 8LE ("the property") under section 33 of the Housing (Scotland) Act 1988 ("the 1988 Act") is upheld.

Introduction

2. The FTS accepted that appellant became the tenant of the property in around 1993. There was no written lease, but the tenancy was an assured tenancy in terms of section 12 of the 1988 Act. On 8 September 2006 the then landlord (the respondent's late aunt, and to whose interest he has succeeded) served on the appellant through agents a Form AT5 (per the Assured Tenancies (Forms) (Scotland) Regulations 1988 SI 1988/2109), being the form prescribed for the purposes of section 32(2)(a) of the 1988 Act as a prerequisite to the creation of a short assured tenancy under this section. On 1 October 2006 the parties executed a written lease, which bore to be a short assured tenancy of the property commencing on this date.

3. On 24 October 2022 the respondent applied to the FTS for an order for eviction under section 33 of the 1988 Act, that is, on the basis that the tenancy of the property was a short assured tenancy. The appellant resisted the application on a number of grounds, including on the basis that the tenancy was an assured tenancy not a short assured tenancy. On 17 April 2023 the FTS found that the tenancy was a short assured tenancy and granted an eviction order in terms of section 33, with effect from 30 July 2023.

4. On 12 June 2023 the Upper Tribunal granted the appellant permission to appeal, limited to the question of whether, accepting the FTS's findings in fact, the tenancy was as a matter of law an assured tenancy and not a short assured tenancy. Suspension of the eviction order was also granted pending the final determination of the appellant's appeal to the Upper Tribunal. An oral hearing of the appeal was requested and took place on 28 August 2023. The appellant represented himself. The respondent was represented by Mr Dunlop, advocate. I am grateful to both of them for their written and oral submissions.

Analysis

5. The FTS found in fact that by signing the short assured tenancy agreement in October 2006 the appellant agreed to both renounce his contractual assured tenancy and to then immediately enter into a new short assured tenancy of the same property. The appellant's position was that he only signed the new lease to trick the then landlord, because he believed that it was ineffective in law to create a short assured tenancy. The FTS rejected his evidence about this. It is perhaps hard to understand why else he might have signed the new tenancy agreement and agreed the matters just noted, but for present purposes the unchallenged fact is that he did.

6. The appeal therefore raises a sharp point of law. Is it open to a landlord and tenant, who are parties to an assured tenancy under section 12 of the 1988 Act, to agree to terminate that tenancy and then immediately enter into a short assured tenancy of the same property? Or are they precluded by operation of sections 16, 30 and 32 of the Act from doing so? The appellant advanced the latter proposition, invoking the principal that unless expressly permitted it is not possible to contract out of statutory provisions designed to safeguard the interests of tenants: cf. *Milnbank Housing Association Ltd v Murdoch* 1995 SLT

(Sh Ct) 11 at 13F- L. The respondent advanced the former proposition, invoking in particular the principal of freedom of contract: cf. *Morrison v Rendall* 1986 SC 69 at 73. In my view, the respondent's position is to be preferred.

7. Section 16 of the 1988 Act provides for security of tenure for assured tenants as follows:

> "(1) After the termination of a contractual tenancy which was an assured tenancy the person who, immediately before that termination, was the tenant, so long as he retains possession of the house without being entitled to do so under a contractual tenancy shall, subject to section 12 above and sections 18 and 32 to 35 below—
>
> (a) continue to have the assured tenancy of the house; and
> (b) observe and be entitled to the benefits of all the terms and conditions of the original contract of tenancy…
>
> and references in this Part of this Act to a "statutory assured tenancy" are references to an assured tenancy which a person is continuing to have by virtue of this subsection…
>
> (2) A statutory assured tenancy cannot be brought to an end by the landlord except by obtaining an order of the First-tier Tribunal in accordance with the following provisions of this Part of this Act…"

8. The appellant's argument, in effect, was that the contractual assured tenancy in this case was terminated (on the FTS's findings) by his impliedly renouncing it by signing the short assured tenancy agreement. But the legal consequence of the termination of the assured tenancy by renunciation was, because of section 16(1) of the 1988 Act, the automatic creation of a statutory assured tenancy with the same terms and conditions as before. He remained in possession of the property. Therefore his statutory assured tenancy could only be terminated by an order from the FTS under section 16(2). It could not be terminated by the creation of a new short assured tenancy of the same property, nor under section 33. To hold otherwise was to allow parties to contract out of the statutory protections for tenants in the 1988 Act.

9. There are three flaws in this argument. The first is that section 16(1) provides that a statutory assured tenancy only comes into being if the tenant remains in possession "without being entitled to do so under a contractual tenancy". But "a" contractual tenancy can in principle be a new tenancy. By contrast with the earlier reference to a contractual tenancy in the subsection, there is no requirement that it be an assured tenancy rather than, for example, a short assured tenancy. Accordingly if an assured tenancy is terminated and a new short assured tenancy immediately created, then the tenant retains possession of the house by virtue of that new tenancy, and not without contractual entitlement. Accordingly no statutory assured tenancy could come into existence.

10. The second flaw in the appellant's argument is that, even if a statutory assured tenancy did come into existence on the appellant renouncing his contractual assured tenancy,

section 16(2) merely precludes the bringing of the statutory assured tenancy to an end "by the landlord", other than by obtaining an order from the FTS. It therefore does not preclude parties from agreeing to bring such a tenancy to an end, nor agreeing to then enter into a new short assured tenancy. It merely protects the tenant from the landlord imposing such a tenancy on them if they do not agree to it.

11. The third flaw is that to permit parties to agree to terminate an assured tenancy and immediately thereafter enter into a short assured tenancy of the same property is not to permit them to contract out of the tenant's statutory protections provided by the 1988 Act. Certain protections do exist. To create a short assured tenancy a form AT5 must be served on the tenant before the start of it, alerting them to the consequences of entering into such a tenancy and encouraging them to seek professional advice. If the tenant does not wish to agree to enter into a new short assured tenancy then they need not do so, and termination of the old contractual assured tenancy by the landlord, followed by the tenant's continued occupation of the property, will create a statutory assured tenancy by operation of section 16(1). Any attempt by the landlord to then impose new contractual terms can be met by an application to the FTS under section 17 of the 1988 Act. Any attempt to force the tenant to enter a new lease, for example under threat of removal, is subject to the protections afforded against harassment and unlawful eviction in sections 36 to 38. None of these protections is removed by, or is inconsistent with, the tenant agreeing to end an assured tenancy and enter a short assured tenancy if they consider it to be in their interests to do so (for example, in return for payment from the landlord).

12. Parliament cannot have been unaware of the possibility that landlords might seek to evict their tenants by persuading them to enter into a new tenancy agreement with reduced security of tenure. This practice is sometimes called "winkling": see Stalker, *Evictions in Scotland* (2nd Edition, 2021), page 264. Section 42(1)(b) of the 1988 Act precluded this practice in relation to persons who had protected tenancies under the Rent (Scotland) Act 1984 (the legislation which had previously governed private residential lets in Scotland). As a result, entering into a new tenancy agreement with the same landlord after the 1988 Act came into force (for example, one that bore to be a short assured tenancy) did not deprive such a tenant of his status as a protected tenant under the 1984 Act. By contrast the legislation which succeeded the 1988 Act, the Private Housing (Tenancies) (Scotland) Act 2016, does not provide similar protection in relation to assured tenants. But it does provide under section 44 that a private residential tenancy may not be brought to an end by the landlord or the tenant, "nor by any agreement between them", except in accordance with part 5 of the Act – see in particular sections 48 and 49. Accordingly there is no scope under the 2016 Act for parties being taken to have agreed to end a residential tenancy (as in the present case) by the mere fact of entering into a new lease.

13. But it is apparent, for the reasons set out above, that Parliament did not provide similar protections in relation to assured tenants under the 1988 Act. In the circumstances, this must have been a deliberate choice, and appears consistent with the then general legislative aim of liberalising the residential letting market and making it more attractive to private investors. But in any event, it may be added, there is no suggestion that the appellant's then landlord sought to "winkle" him out of the property in 2006 by inviting

him to enter into a short assured tenancy. Clearly, he has remained in possession under that tenancy for many years since then.

14. I am therefore in agreement with Sheriff Principal Bowen in *Johnstone v Finneran* 2003 SCLR 157. In this case the appellant had become the assured tenant of the property in September 1997. A notice to quit was served in September 1999, but the tenant had remained in possession, and so the tenancy became a statutory assured tenancy. Parties then entered into a lease which purported to create a short assured tenancy with effect from January 2000. On appeal the tenant argued that as a matter of law the lease was still a statutory assured tenancy and not a short assured tenancy. Rejecting this argument, the Sheriff Principal held that:

> "In fact [the tenant] entered into a short assured tenancy which provided her with certain rights, albeit of a more restricted nature than those of an assured tenancy. On no view could that be described as bringing to an end of the statutory assured tenancy by the landlord, the step which is prohibited by section 16(2). It does not appear to me that by voluntarily entering into this fresh obligation parties were 'contracting out' of the provisions of the Act. A contractual situation simply arose by which the terms of the Act no longer applied."

This decision is applicable to the situation in the present case and supportive of the respondent's position. I do not accept that it can be distinguished as the appellant sought to do.

15. The appellant also sought to rely on section 30 of the Act. This provides in particular:

> "(1) It shall be the duty of the landlord under an assured tenancy (of whether duration)—
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> (a) to draw up a document stating (whether expressly or by reference) the terms of the tenancy;
> (b) to ensure that it is so drawn up and executed that it is probative or holograph of the parties; and
> (c) to give a copy of it to the tenant.
>
> (2) On application by a tenant under an assured tenancy, the First-tier Tribunal shall by order—
>
> (a) where it appears to the Tribunal that the landlord has failed to draw up a document which fairly reflects the existing terms of the tenancy, draw up such a document or, as the case may be, adjust accordingly the terms of such document as there is; and
> (b) in any case, declare that the document (as originally drawn up or, where the Tribunal has drawn it up or adjusted it, as so drawn up or adjusted) fairly reflects the terms of the assured tenancy;

> and, where the Tribunal has made such a declaration in relation to a document which the Tribunal has drawn up or adjusted, it shall be deemed to have been duly executed by the parties as so drawn up or adjusted…"

16. The appellant submitted that the purpose of this provision was to prevent the landlord changing the terms of an assured tenancy after its creation. In a case where, as here, there was initially no written lease, and the landlord subsequently persuaded the tenant to sign a lease, that document could not change the terms of the tenancy: Rennie, *Leases* (SULI, 2015), paragraph 22.62. But, it was submitted, that was what had happened in the present case, in particular because the AT5 was a crucial part of the short assured tenancy and was not part of the previous, unwritten agreement.

17. I agree with Mr Dunlop that this argument is unsound. In the first place, the Form AT5 is not a part of the tenancy agreement. Rather it is a statutory prescribed form, service of which is a precondition for the creation of a short assured tenancy. But more generally section 30 is directed to the situation where the landlord seeks to unilaterally change the terms of an existing and ongoing assured tenancy. So for example, if a tenant has an assured tenancy, but no written lease, and they are later presented by the landlord with a tenancy document which purports to state that the existing lease is a short assured tenancy, they are entitled not agree to its terms, but to apply to the FTS under section 30 and ask it to find and declare the true terms of the assured tenancy. But section 30 is not concerned with the situation - which the FTS in the present case found to exist – where the parties have agreed by execution of a new lease to end an assured tenancy and to create a short assured tenancy on different terms. Again, this does not involve contracting out of the protections of section 30, which remain open to the tenant if they do not accept or agree the terms of the tenancy document presented to them. In the present case, therefore, the appellant could, when presented with the new tenancy document in October 2006, have refused to sign it, and then challenged it by making an application to the court under section 30. But he did not do so.

18. Finally, the appellant sought to rely on section 32 of the 1988 Act. This provides that:

> "(1) A short assured tenancy is an assured tenancy—
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> (a) which is for a term of not less than six months; and
> (b) in respect of which a notice is served as mentioned in subsection (2) below.
>
> (2) The notice referred to in subsection (1)(b) above is one which—
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> (a) is in such form as may be prescribed;
> (b) is served before the creation of the assured tenancy;
> (c) is served by the person who is to be the landlord under the assured tenancy (or, where there are to be joint landlords under the tenancy, is served by a person who is to be one of them) on the person who is to be the tenant under that tenancy; and

(d) states that the assured tenancy to which it relates is to be a short assured tenancy."

19. As noted above, the form prescribed in relation to subsection 32(2)(a) is a Form AT5. The appellant pointed out that subsection 32(2)(b) requires that it be served "before the creation of the assured tenancy". As the assured tenancy in the present case began in 1993, it was submitted, the AT5 served on him in September 2006 was not served in accordance with section 32(2)(b). Accordingly the tenancy agreement which he signed in October 2006 could not be a short assured tenancy.

20. The flaw in this argument is that a short assured tenancy *is* an assured tenancy. This is clear from subsection 32(1). It is simply a special form of assured tenancy which has certain prescribed features and in respect of which certain prescribed formalities must be observed, the principal consequence of which (as originally enacted) is an absence of security of tenure. So in the present case the assured tenancy which began in 1993 could never had been a short assured tenancy, because no AT5 was served prior to its creation. But as the FTS found, the appellant renounced that tenancy. An AT5 was served "before the creation of the assured tenancy" which began in October 2006, because it was served in September 2006. Because the AT5 was so served, and this new tenancy had the other prescribed features and formalities set out in section 32, it was therefore also a short assured tenancy.

Conclusion

21. For all these reasons the appeal is refused and the decision of the FTS of 17 April 2023 is upheld.

22. No motion for expenses was made by Mr Dunlop in relation to this appeal or the proceedings before the FTS, and I am satisfied that it would not be appropriate to make any such order.

23. Any party aggrieved by this decision may seek permission to appeal to the Court of Session. Such an appeal may only be on a point of law. A party wishing to appeal must apply for permission to do so from the Upper Tribunal. Permission to appeal must be applied for within 30 days of the date on which this decision was sent to a party. If no application for permission is received, the Upper Tribunal's order of 12 June 2023, suspending the FTS's eviction order, will lapse on the expiry of this 30 day period.

24. Any request for permission to appeal to the Court of Session must be in writing and must: (a) identify the decision of the Upper Tribunal to which it relates; (b) identify the alleged error or errors of law in the decision; and (c) in terms of section 50(4) of the Tribunals (Scotland) Act 2014, state the important point of principle or practice that would be raised in the further appeal or any other compelling reason there is for allowing a further appeal to proceed.

Sheriff Simon Collins KC
Member of The Upper Tribunal for Scotland