SHERIFF APPEAL COURT

[2025] SAC (Civ) 16
EDI-CA40-24

Sheriff Principal N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in appeal by

XAFINITY PENSION TRUSTEES LIMITED

Pursuer and Respondent

against

YANLI ZHAO

Defender and Appellant

18 June 2025

[1] The respondent seeks declarator of irritancy of a lease of heritable property, an order for ejection and payment of arrears of rent in the sum of £5,200.16. The respondent founds on the terms of the lease, which include the customary obligation to pay the whole rents and other obligations stipulated in the lease. It avers that the appellant fell into arrears of rent. On 3 September 2024 the respondent served on the appellant a demand for the arrears of rent, in the sum craved. No payment was made. The respondent thereafter served notice of irritancy, terminating the lease with immediate effect. The appellant failed to remove from the premises.

[2] The appellant accepts that the terms of the lease apply and that arrears of rent accrued. Her position is that she took reasonable steps to remedy the arrears. She identified

an assignee who, she asserts, was financially capable of taking on the lease. She also proposed various solutions which she regarded as reasonable. These included payment of arrears upon assignation, use of a £5,000 deposit to reduce arrears, pre-payment of rent and fees by the incoming assignee. She asserts these proposals were unreasonably rejected, and that in relation to the proposed assignation the respondent was required to act fairly and reasonably in terms of section 5 of the Law Reform (Miscellaneous Provisions) Act 1985. The appellant also counterclaims for damages of £30,000 caused by loss of opportunity to sell the goodwill of a business operating from the premises.

[3] The respondent enrolled for summary decree, on the basis that the defences did not disclose a defence to the action. The sheriff, having heard parties, granted summary decree in the terms craved.

The appellant's submissions

[4] The appellant's submissions were lengthy, of which the following is a very brief summary: She submitted that the sheriff had misapplied the test for summary decree, and had failed to consider principles of waiver and personal bar. He had overlooked negotiations for the assignation, and financial evidence. There was also procedural unfairness as the interpreter had made errors, and critical evidence had been excluded. She set out several legal principles. The sheriff had failed to consider evidence, including a verbal agreement to assignation, the appellant's bank statements which proved she could meet arrears, and a sworn affidavit that the respondent had agreed to an assignation. There was evidence of a viable assignee. The appellant relied on representations made. The respondent had previously permitted an assignation by an earlier tenant, so were being inconsistent. The sheriff may have disregarded the requirement for proportionality. The

sheriff may have disregarded the refusal to assign when considering reasonableness. Commercial context and fairness were central, and a structured balancing exercise was required. There were errors by the interpreter in understanding some legal concepts.

The respondent's submissions

[5] The respondent submitted that the action was straightforward and there was no defence. No error existed in the sheriff's judgment, and he had applied the correct test for summary decree. The appellant had supplied several non-existent citations for cases in support. A theoretical assignation could never purge the irritancy. In any event, there was no evidence lodged, or case pled, that there was a proposed assignee of suitable standing, or of any unreasonable refusal. The arguments went beyond the case pled.

Decision

[6] At the outset, it is necessary to deal with the appellant's attempts to lodge further documents following the hearing before the sheriff, and also further documents on appeal. The general rule is that the introduction of new evidence will not be allowed following a final hearing, for reasons of finality and fairness. No reason is given for not introducing this material earlier. The motion to amend is therefore refused. An appeal is not an opportunity to make an improved submission, but depends on identifying error on the basis of the materials available at first instance. It might be observed that the additional material largely repeats points already made, and therefore adds little of significance in any event.

[7] The starting point, and the focus of the action, is the terms of the lease. There is no dispute that the appellant has breached the lease by failing to pay rent, or that the respondent has triggered the terms of the lease correctly in serving notice of irritancy. The

remedy under the lease includes ejection and enforcing payment of arrears, which is what the respondent craves. The appellant therefore faces considerable difficulty in avoiding decree passing against her.

[8] She attempts to do so by relying on a number of principles. These are summarised above. None of these principles applies in these factual circumstances, and there is no defence to the action. The sheriff did not err in pronouncing summary decree in the terms craved.

[9] Before any principles of law can be considered, it is necessary to identify the basis of fact on which they will rest. In a motion for summary decree, the facts are set out in the initial writ and defences, together with any relevant productions. The appellant's averments in the defences are very sparse. They admit the breach but state that there was a "suitable assignee". The identity of this assignee is not given. The reason for their being "suitable" is not given. While the appellant avers that she "actively sought resolution", there is no averment that she ever applied for consent to assignation. The terms of clause 4.28 of the Lease indicate that any such assignee must be of "sufficient financial standing and demonstrably capable of fulfilling the whole obligations of the Tenants under this lease." No attempt is made, by pleadings or other materials, to show that condition was met. It is the appellant's responsibility, if she wishes to show that the respondents refused consent unreasonably, to show that this clause was satisfied. She failed to make sufficient averments of fact, and lodged no documents, sufficient to demonstrate that this condition was fulfilled, or even that she applied for consent. The burden of proof was on her.

[10] In the absence of such a case, the terms of the lease continue to apply, and the respondent is entitled to seek eviction. It is not enough that the appellant made attempts, or that there were negotiations, or that she formed a favourable impression of the assignee.

She required to meet the standards imposed in the lease, which meant proposing an assignee, giving full financial and other personal details proving they have sufficient financial standing so that consent cannot reasonably refused by a reasonable landlord, and making a formal application for consent. On the basis of the available averments and evidence, she did none of these things. Furthermore, by the time she got around to negotiation and suggesting assignation, the lease had already been irritated.

[11] Linked to this is her submission that the sheriff failed to have regard to certain evidence. One piece of evidence was a statement (not an affidavit) by a Mr Jenkins. She regarded this as evidence of discussion of assignation. On inspection, the statement is evidence of no more than a negotiation, with the respondent indicating that they would allow the appellant to look for an assignee, provided the assignee was deemed acceptable. It falls well short of showing any agreement that assignation would be permitted, or (which is crucial) any decision to consent or refuse consent. It is of no evidential assistance to the appellant. Similarly, evidence about her bank account does not assist in a situation where, in fact, she could not afford the rent. Further evidence of agreement to the "concept" of assignation is similarly inadequate. The fact that she actively sought resolution, or had negotiations, or intended to obtain an assignee, does not amount to a defence. She required to succeed in these things, or else the lease would be terminated. Her efforts and good intentions were, unfortunately, of no legal relevance. She made no application for consent to assign, as the sheriff noted, and there was thus no refusal. It can therefore not be claimed that the respondent refused consent, unreasonably or otherwise. Further, by the time the appellant suggested assignation, the irritancy had already taken place. An application for consent to assign would not purge a failure to pay rent.

[12] Another submission was that the respondents are personally barred from refusing assignation, because they consented to an earlier, similar assignation. That argument does not succeed, not only because she never applied for consent, but because there is no rule that a landlord, having given consent once, is obliged to give consent to every application. Each application turns on its own facts. The appellant submitted that "the fundamental issue before the court is whether the pursuer's actions have been consistent, reasonable and legally sound." That is not correct. The role of the court is not to assess the respondent's conduct in general terms, but to allow parties to enforce their own contract. There is no dispute that the respondent has the legal right under the contract to seek the present remedies. Reasonableness as a test is not triggered in the present circumstances unless the terms of section 5 of the 1985 Act apply. For reasons given above, they do not, and are unsupported by either pleading or evidence. In any event, a reasonableness test does not apply to claims for arrears of rent, under section 4 of the 1985 Act. Similarly, contrary to her submission, proportionality is not a principle engaged in these circumstances. The appellant also relied on personal bar or waiver, but it is clear that these also do not assist – the appellant at most offered to prove that there was agreement to negotiate, not agreement to consent to assignation.

[13] It follows that the counterclaim had no relevant basis and also fell to be dismissed.

[14] A last submission related to certain unspecified inadequacies in interpretation at the hearing. The appellant did not, however, complain at the hearing itself. The later complaint appears to relate to issues of legal interpretation. Even if these matters were correct, they do not invalidate the sheriff's decision. It is clear that he had a thorough understanding of the appellant's case, and that the appellant's submissions were rejected for sound reasons. There is no suggestion that there was any relevant submission which was not made or

understood. On appeal, the appellant was able to make full, detailed and supported submission. The facts do not demonstrate, or even suggest, any unfairness to the appellant. This ground of appeal is not made out.

[15] For these reasons, none of the grounds of appeal succeeds. The sheriff made no error of law or of fact, and decree was properly pronounced.

Disposal

[16] The appeal is refused. The respondent has moved for expenses. There is no reason not to grant these, as the appeal has been unsuccessful, and there are no other mitigating factors. I will find the appellant liable to the respondent in the expenses of this appeal, as taxed.