SHERIFF APPEAL COURT

[2026] SAC (Civ) 60
DUN-SD177-25

Sheriff Principal G A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL G A WADE KC

in the application for certification of suitability for appeal to the Court of Session

(Sheriff Courts (Scotland) Act 1971 section 38(b))

by

DAVID GOODFELLOW MELVILLE

Applicant

In the appeal in the cause

DAVID SCOTT CHALMERS

Pursuer and Respondent

against

DAVID GOODFELLOW MELVILLE

Defender and Appellant

24 August 2026

[1] On 18 May 2026 this court issued an opinion in an appeal by the applicant in relation to the recovery of possession of a room which he then occupied at the Marine Hotel, Crail.

The respondent's brother, the late Morgan Chalmers, was the heritable proprietor of the hotel and had leased a room to the applicant for the period of one year. The arrangement amounted to a common law lease. The late Mr Chalmers died on 4 August 2024 and on 23 December 2024 the respondent instructed sheriff officers to serve a notice to quit on the applicant with notice of the proceedings being provided to Fife Council on 2 July 2025 in terms of section 11(1) of the Homelessness etc (Scotland) Act 2003 and the Notice to Local Authorities (Scotland) Regulations 2008.

[2] The respondent was subsequently confirmed as the late Mr Chalmers' executor nominate on 2 May 2025. However at the time of the appeal before this court the applicant refused to remove out of the property. He argued both at first instance and on appeal that the notice to quit was invalid because at the time of its service the executor had been unconfirmed and as such was not entitled to serve such a notice. The notice, he argued, could not be retrospectively validated by the subsequent grant of confirmation. He maintained that only administrative acts could be retrospectively validated and where the rights of third parties were affected different considerations applied.

[3] Further arguments were advanced by the applicant anent the operation of tacit relocation and the uncertainty which would arise for tenants in such situations because the effectiveness of the notice to quit would be contingent on confirmation being subsequently granted.

[4] Having given due consideration to these matters an opinion was issued refusing the appeal. The detailed reasons for that decision are provided at paras [26] to [40] thereof. While there was no authority directly in point in relation to the effect of retrospective validation of a notice to quit, there was ample authority upon which the court was able to draw in relation to the effect of confirmation on antecedent acts of an unconfirmed executor.

[5] Subsequent to the unsuccessful appeal the applicant removed from the property on 1 July 2026 albeit he maintains he did so in accordance with a subsequent notice to quit served by the respondent.

[6] The applicant now seeks certification that the cause is suitable for appeal to the court of Session under section 38(b) of the Sheriff Courts (Scotland) Act 1971. That section provides:

> **38. Appeal in summary causes.**
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> In the case of **[—] 1**
>
> **[** (a) any summary cause an appeal shall lie to the sheriff principal on any point of law from the final judgment of the sheriff; and **] 1**
>
> (b) **[** any summary cause **[…]3** an appeal shall lie **] 2** to the Court of Session on any point of law from the final judgment of the sheriff principal, if the sheriff principal certifies the cause as suitable for such an appeal,
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> but save as aforesaid an interlocutor of the sheriff or the sheriff principal in any such cause shall not be subject to review.

[7] Although there is no clear definition of what is required to satisfy the test of suitability some guidance was given in *Macphail Sheriff Court Practice,* 3rd Edition paragraph 31.352 which suggests that the court would require to be satisfied that there was a substantial and important question of law raised by the proposed appeal. That section has been omitted from the *Macphail Sheriff Court Practice,* 4th edition.

[8] The test differs from what has come to be known as the "second appeals" test in section 113(2) of the Courts Reform (Scotland) Act 2014 in terms of which permission may only be granted if (a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Session to hear the appeal.

[9] That test has been considered authoritatively in *Politakis* v *Spencely* [2017] CSIH 74; 2018 SC 184 at paras [20] and [21]. The purpose of the test is to restrict the scope for a

second appeal. An appeal raises an important point of principle or practice when it refers to one which has not yet been established, and does not include a question of whether these have been correctly applied. The existence of some other compelling reason presupposes the first part of the test has not been met, and will only be met in exceptional circumstances. "Compelling" is a very strong word. A good starting point is consideration of the prospects of success. The test can be met if, for example, it is clear that the first appeal court reached a decision which is plainly wrong, or if there has been some procedural irregularity which demonstrates that the applicant did not have a fair hearing.

[10] Even where one of these tests is met, the court is not bound to grant permission to appeal (*Explore Learning Ltd* v *Social Care and Social Work Improvement Scotland* [2019] CSIH 53). It must consider the prospects of success of the appeal and the suitability of the particular case as a vehicle for that.

[11] The respondent submits that similar considerations should apply when considering whether this court should certify a cause as suitable for appeal to the Court of Session. I accept that proposition particularly in so far as it requires this court to consider the prospects of success, the importance of the point of principle at issue, or any other compelling reasons why the matter may benefit from consideration by the higher court. However these factors require to be viewed in light of the general principles regarding finality and certainty and the general reluctance of appellate courts to consider matters where the appeal is or has become academic and the decision will deliver no practical benefit to the parties.

The applicant's position

[12] The applicant submits that the appeal raises an important point of law concerning the scope and limits of the doctrine of retrospective validation following confirmation of an executor. He founds on the acknowledgment that no authority directly in point exists specifically concerning whether a notice to quit served by an unconfirmed executor could be retrospectively validated by later confirmation and the court determined the appeal by analogy from authorities concerning executry administration and transfers of estate interests. The note of appeal expressly states that the applicant does not seek to challenge the existence of the doctrine of retrospective validation following confirmation but rather to define the proper scope and limits of that doctrine.

[13] As submitted at first instance and before this court the applicant seeks to draw a distinction between cases concerning retrospective validation of executry acts where confirmation perfects title in relation to the administration or transmission of estate interests and those which affect the continuation or termination of a third party's lease. He seeks to distinguish *Garvie's Trs.* v *Garvie's Tutors*, 1975 S.L.T. 94 (transfer of lease) on this basis and draws a distinction between what he describes as administrative functions and those terminating third-party contractual and possessory rights arguing also that the issue is whether, at the date of service, there existed a valid notice to quit capable of preventing tacit relocation at the ish. The effect of the court's opinion, he submits, creates uncertainty and the validity of any notice to quit served on a tenant in similar circumstances may depend upon a future event, namely whether confirmation is subsequently obtained. It is the applicant's position that that this extends retrospective validation into a new category of juridical act affecting third-party rights without clear authority or a defined limiting

principle and that authoritative guidance from the Court of Session is desirable as the issue is of wider significance to executry practice, leases, tacit relocation and certainty of tenure.

[14] In his written submissions the applicant strays beyond these grounds and into arguments about competing analogies some of which derive from the law in relation to leases, none of which were previously explored either at first instance or on appeal. These are no doubt referred to in response to the answers and written submissions lodged by the respondent which point to a failure to offer an alternative position.

The respondent's position

[15] The respondent invites the court to refuse the application on the basis that first of all that the proposed appeal is not arguable because there has been no identified error of law and while the decision was drawn from analogy with existing case law there has been a failure to explain either why the court was wrong to take such an approach or to identify a distinction which would prevent the existing authorities applying to the present circumstances. There is no distinction between perfection of a title so that a transfer by an unconfirmed executor creating an interest in land is viewed, retrospectively, as valid *ab initio*, and perfection of a title so that a notice to quit terminating an interest in land, served by an unconfirmed executor is viewed, retrospectively, as valid *ab initio*. There is no rational basis for distinction between either scenario and there is no arguable case to the contrary in the proposed grounds of appeal.

[16] *Esto* the proposed appeal is arguable, it has poor prospects of success as there is no supporting authority for the proposition which the applicant seeks to advance and the authorities drawn on by analogy do not support the applicant's contention.

[17] The respondent also argues that the proposed appeal does not raise substantial and important points which require further consideration as the present case arose from unusual factual circumstances. Furthermore there are no other compelling reasons to allow a second appeal. The appeal as between the parties is academic and would achieve no practical benefit. The respondent should not be put to the time and expense of opposing an appeal in such circumstances.

Decision

[18] In order to meet the test set down in section 38(b) of the 1971 Act the appeal must be more than merely arguable. I agree that in determining suitability for certification the criteria of prospects of success and the wider application of some important point of law or principle have to be considered. The applicant would require to persuade this court that there was some identifiable error in the approach taken by the sheriff appeal court. His proposed grounds do not do so. The arguments advanced concentrate on the fact that neither party was able to identify a case in which a notice to quit had been retrospectively validated by subsequent confirmation. They do not challenge the principle of retrospective ratification by subsequent confirmation which has been held to apply across a wide range of factual scenarios. The proposed appeal does not raise any novel question or any important point of principle or practice which has not yet been established. It serves to do no more than challenge the application of established principles of retrospective validation to the facts in this case. In essence the applicant is simply seeking to rerun the appeal in the hope of obtaining a different outcome than that achieved at first instance and before this court.

[19] The authorities relied upon by the respondent and discussed at length in the opinion of this court are long standing and well established. The starting point is *Currie on*

Confirmation of Executors (9th Edition) at 14.03 which deals explicitly with validation by subsequent confirmation and makes plain the principle that:

> "If the executors purport to deal with or transfer the deceased's estate before they are confirmed, confirmation granted subsequently will validate the purported dealing or transfer retrospectively:- *Mackay* v *Mackay*, 1914 S.C. 200 per Lord Strathclyde at 203 (assignation of copyright); *Garvie's Trs.* v *Garvie's Tutors*, 1975 S.L.T. 94 (transfer of lease); *Chalmers' Trs.* v *Watson* (1860) 22 D. 1060 (unconfirmed trustee voted at a meeting regarding a composition offer in a sequestration).
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> No doubt confirmation was required in order that [the trustees] might secure an active title to intromit with and administer the estate, but it seems to me to be perfectly clear that if they subsequently obtained confirmation the defect in their title could be effectively cured, and the cure could draw back to the date of the assignation."

[20] The examples given (although proceeding on different factual circumstances) support the general proposition that confirmation validates the acts of unconfirmed executors and cures any defect in title. There is no rational basis to suggest that principle does not apply to a notice to quit and the applicant can point to none. The challenge being to the application of a principle rather than to the principle itself there is no basis upon which any decision of the Court of Session could have wider application.

[21] The applicant seeks to draw a distinction between an administrative act of an executor and an action which affects third parties. However he can point to no basis for such a distinction and none of the authorities relied upon assist him in that regard. He gives no reason why, based on sound principle which is not challenged, a notice to quit, which had the effect of intimating to the applicant that formal steps were in train to terminate his lease is anything other than a good notice proceeding as it did on an underlying sound title and is capable of retrospective validation by the subsequent grant of confirmation.

[22] In any event the issue has recently been subject to consideration by the Inner House in *Pattinson* v *Matheson* [2022] CSIH 43; 2023 SC 280, per Lord President (Carloway) at [22]

in relation to the service of a notice of intimation of a transfer of interest in two crofts. The issue had been referred to the Court of Session by the Land Court and concerned the interaction of section 11(1) of the Crofters (Scotland) Act 1993 and section 16(2) of the Succession (Scotland) Act 1964. It was held that a subsequent grant of confirmation retrospectively validated the transfer. Even had the notice been deficient, the respondent's actions in completing and intimating the further documentation and endorsing a docket on the confirmation were sufficient to effect the transfer. Although the comments of Lord Carloway were strictly obiter they directly meet the issue which arises before this court and make plain the approach which the Court of Session would take to the application of the principle in this case. The court obviously considered a pragmatic approach to be preferable to an argument based on form.

[23] I therefore agree with the submissions of the respondent to the effect that the appeal, even if arguable is unlikely to succeed. In any event arguability is not a sufficient basis to justify a second appeal.

[24] Finally there is no other compelling reason for the Court of Session to hear the appeal. *Uphill* v *BRB (Residuary) Ltd* [2005] EWCA Civ 60; 2005 1 WLR 2070 makes clear that what is required is an arguable material error of law with an emphasis on the truly exceptional nature of the jurisdiction. The test is a high one which is not met in this case.

[25] On the contrary there is a strong argument that as this appeal, turning as it does on its own facts and circumstances, is now entirely academic. The applicant has removed from the premises for different reasons. Although there is no absolute rule preventing the appellate court from considering questions which are or have become academic there must be good reasons for such an appeal proceeding in the public interest. In the context of public law the issue was discussed recently in *Y* v *Glasgow City Council* [2025] CSIH 30,

First Division (Lord Doherty) at [42]. While the court has a discretion in such cases, even in a matter of public law, that discretion had to be exercised with circumspection and an academic appeal should only be entertained where there was a good reason in the public interest to do so, eg where a discrete issue of statutory interpretation was involved which did not require detailed examination of the facts and where a substantial number of similar cases had been or might be brought, so that it was desirable to resolve the issue quickly. *R* v *Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450.

[26] No such considerations apply in this case which is a private law matter. Any future dispute on the wider issue of retrospective validation of the acts of an unconfirmed executor will inevitably depend on the application of the facts to the well-established principles which are unchallenged.

[27] As previously mentioned the written submissions lodged by the applicant in support of certification stray beyond the grounds of appeal and focus on matters which were not advanced either at first instance or before this court. A large section discusses Scottish lease and property authorities. This is purportedly done in order to demonstrate a competing analogy which the respondent identifies as absent from the grounds of appeal. The cases referred to are said to demonstrate the importance of the timing of service of an effective notice to quit because of its consequences for the termination of the lease. It has been repeatedly stated that a notice to quit is of a juridical character rather than an administrative character. However "juridical" simply means "relevant to the administration of the law or legal process". A notice to quit is nothing more than a necessary legal step in the process of terminating a lease. The distinction which the applicant seeks to draw is of no relevance to the question of retrospective validation of an executor's pre confirmation actions.

[28] The English authority referred to at paragraph 6 of the written submissions turns on equitable considerations which are not part of the law of Scotland and in any event no such argument was advanced at first instance or on appeal. Thus there can have been no identifiable error in the court's approach to such a submission.

[29] Finally the submissions anent tacit relocation are comprehensively dealt with in paras [39] and [40] of the opinion of this court. The matter of a defective notice to quit has already been adjudicated upon by the Inner House in *Rockford Trilogy Ltd* v *NCR Ltd* [2021] CSIH 56; 2022 SC 90, per Lord Justice Clerk (Dorrian) at [7]. Accordingly there is no reason for the matter to be revisited or reconsidered. Again the court is unlikely to deviate from its recent pragmatic approach.

[30] For these reasons I do not consider that the case is suitable for certification for an appeal to the Court of Session. I shall refuse the application and make an award of the expenses occasioned thereby in favour of the respondent.