

**SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY AT
DUMFRIES**

[2019] SC DUM 35

DUM-SD23-19

NOTE (No 2) BY SHERIFF GEORGE JAMIESON

in the cause

JAMES TAYLOR REID and ROBERT KIRKLAND REID

Pursuers

against

SIAN REDFERN (AP)

Defender

Act: Shields

Alt: Latham

Introduction

[1] In a related process, I held that the defender was not entitled to a grant of occupancy rights under section 18(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 in respect of the farmhouse situated on the farm tenanted by the pursuers.

[2] In my first Note in the current proceedings, I considered parties' submissions on whether the defender *was instead* protected from *brevi manu* ejection from the farmhouse by the pursuers by virtue of section 23 of the Rent (Scotland) Act 1984 ("the 1984 Act"), one of six sections currently in Part III of the 1984 Act entitled - "Protection against harassment and eviction without due process of law".

[3] The reasons for section 23 applying to the defender are set out in my first Note in this case, to which reference can be made for the facts and the law applying to this case.

[4] The pursuers now concede this point. The question of law now in dispute between the parties is - in which *forum* must the action for the defender's removing from the farmhouse under section 23 of the 1984 Act be brought - the sheriff court, or the First Tier Tribunal (Housing and Property Chamber)?

An incidental question

[5] But before the question of which *forum* has jurisdiction to entertain the section 23 action can be answered, I must first address whether the sheriff actually has competence to adjudicate on this question.

Jurisdiction to determine jurisdiction

[6] Section 102(A1) of the 1984 Act as inserted by paragraph 24(a) of schedule 1 to the 2014 Act provides:

“The First-tier Tribunal has jurisdiction, either in the course of any proceedings relating to a dwelling-house or on an application made for the purpose by the landlord or the tenant, to determine any question as to the application of this Act (other than Part IX) or as to any matter which is or may become material for determining any such question”.

[7] Section 102(1) of the 1984 Act as amended by paragraph 24(b) of schedule 1 to the 2014 Act provides:

“The sheriff shall have jurisdiction, either in the course of any proceedings relating to a dwelling-house or on an application made for the purpose by the landlord or the tenant, to determine any question as to the application of Part IX of this Act or as to any matter which is or may become material for determining any such question”.

[8] Part IX of the 1984 Act confers power on the sheriff to mitigate hardship in relation to certain heritable securities created over a dwellinghouse before 8 December 1965.

[9] These applications are made to the sheriff under section 93(1) of the Act by way of summary application (see section 103 of the 1984 Act).

[10] Section 102(A1) of the 1984 Act confers jurisdiction on the First Tier Tribunal to determine any question as to the application of the 1984 Act (other than Part IX) either *incidentally* to pending proceedings before the First Tier Tribunal, *or* in a standalone application to the First Tier Tribunal by the landlord or tenant of the dwellinghouse.

[11] Section 102(1) of the 1984 Act likewise confers jurisdiction on the sheriff to determine any question as to the application of Part IX of the 1984 Act either *incidentally* to pending proceedings before the sheriff, *or* in a standalone application to the sheriff by the landlord or tenant of the dwellinghouse.

Tribunal rules of procedure

[12] Rule 79 makes provision for an application to the tribunal under section 23 of the 1984 Act to evict an occupier upon termination of tenancy. The rule refers to the applicant as the owner and the other party as the occupier. Although the heading of the rule refers to termination of a tenancy, expressions in these rules are capable of bearing the same meaning as in the 1984 Act (Interpretation Act 1978, section 11), and so on the face of matters extend to the rights of occupancy referred to in section 23(2A) of the 1984 Act. Further, rule 1 of the tribunal procedure rules defines a party to any proceedings before the First Tier Tribunal as including a “former residential occupier”, which potentially includes proceedings in the tribunal under section 23 of the 1984 Act. Perusal of the tribunal’s website suggests that the relevant application form is Form E.

[13] Rule 90 governs stand-alone applications to the tribunal by a tenant under section 102(A1) of the Act to determine the application of the 1984 Act.

[14] The pursuers do not dispute that they would be able to bring the issue of jurisdiction *qua* tenants before the First Tier Tribunal under rule 90 of the tribunal rules of procedure (application under section 102(A1)). They contend however that that is not a necessary or a proper reading of sections 102(A1) and 102(1) of the 1984 Act. Perusal of the tribunal's website suggests that the relevant application form is Form G.

Defender's submissions

[15] The defender's agent submitted that the First Tier Tribunal was the appropriate *forum* to determine the incidental question of jurisdiction under section 102(A1) of the 1984 Act.

[16] She submitted that in terms of section 102(A1) the First Tier Tribunal had jurisdiction to determine any question as to the application of the 1984 Act (except Part IX), including in which *forum*, the sheriff court, or the First Tier Tribunal, the present action under section 23 was to be brought.

[17] She accordingly submitted that I should either sist or dismiss the present action in order to allow the pursuers an opportunity of applying to the First Tier Tribunal under rule 90 to allow the First Tier Tribunal to determine whether the sheriff or the First Tier Tribunal is the *forum competens* in the current action for removing under section 23 of the 1984 Act.

Pursuers' submissions

[18] The pursuers' agent made two submissions on the incidental question.

[19] First, there was no genuine "question" for determination by the First Tier Tribunal under section 102(A1) of the 1984 Act as, in her submission, jurisdiction in respect of the

action for removing under section 23 had plainly not been transferred to the First Tier Tribunal.

[20] Secondly, she submitted that neither section 102(A1) nor 102(1) of the 1984 Act ousted the jurisdiction of the sheriff to determine the extent of the court's own jurisdiction in respect of the present action of removing.

The Law

[21] I have carried out some independent research in accordance with the guidance given by the Court of Session in *Sheridan v News Group Newspapers Ltd* 2019 SLT 10 at paragraph [29] on page 17. In my opinion, I do not need to invite further submissions from parties' agents on this material.

[22] I have in the first place consulted the Scottish institutional writers. Only Erskine appears to set out general principles relevant to the debate of the incidental question under discussion in this Note. First, "in all grants of jurisdiction...every power is understood to be conferred without which the jurisdiction cannot be explicated" (*Institute of the Law of Scotland*, 1.2.8).

[23] There thus vests an inherent power in every court to determine the incidental question of whether it has jurisdiction in respect of a particular action (Bell's *Dictionary and Digest of the Law of Scotland*, 5th edition 1890, "Incidental Jurisdiction" at page 522). Indeed it is a general rule that "any body possessing jurisdictional powers has the right in the first place to determine the extent of its jurisdiction" (*Interpretation of the Greco-Turkish Agreement Opinion* (1928) PCIJ Series B no 16, paragraph [48] at page 20).

[24] Secondly, "where a new civil jurisdiction is created by statute, with a power to the new-erected court of judging in special matters, it is not understood to be exclusive of the

judge formerly competent to that species of causes, unless the statute constituting the court expressly declare, that the causes therein specified shall be discussed by that court, and no other" (Erskine, *Institute*, 1.2.7).

[25] Bell's *Dictionary* also confirms the principle that the previously established court retains its jurisdiction in a particular matter *unless* this is *expressly* excluded in favour of the new court (*Dictionary and Digest of the Law of Scotland*, 5th edition 1890, "Jurisdiction" at page 611).

[26] Finally, section 22(4) of the Civil Jurisdiction and Judgments Act 1982 falls to be considered. This section applies in respect of the present action as jurisdiction over the defender in Scotland (as opposed to the subject matter of the cause) is founded on the provisions of schedule 8 to that Act.

[27] Section 22(4) of the 1982 Act provides:

"Where a court has jurisdiction in any proceedings by virtue of schedule 8, that court shall also have jurisdiction to determine any matter which –

- (a) is ancillary or incidental to the proceedings; or
- (b) requires to be determined for the purposes of a decision in the proceedings".

[28] This is not a discretionary matter. In order to explicate jurisdiction, the sheriff must of necessity determine the incidental question of jurisdiction (Bell's *Dictionary and Digest of the Law of Scotland*, 5th edition 1890, "Incidental Jurisdiction" at page 522).

Discussion

[29] The defender's submissions are essentially to the effect that section 102(A1) of the 1984 Act deprives this court of jurisdiction to answer the incidental question of whether this court has jurisdiction in these proceedings. She submits (correctly in my opinion) that the

question of *forum competens* is itself a “question” as to the application of a Part of the 1984 Act other than Part IX.

[30] But (agreeing with the second of the pursuers’ submissions on this point), there is nothing in either section 102(A1) or 102(1) of the 1984 Act which stipulates that *only* the First Tier Tribunal may decide this question.

[31] Every court, on the authorities above cited, is presumed to have an inherent jurisdiction to determine the extent of its own jurisdiction as an incidental power in proceedings brought before the court. This presumption can only be redargued by express language.

[32] There are no express words in section 102(A1) ousting the sheriff’s inherent power to determine the extent of the court’s own jurisdiction in the present proceedings. The section does not say, for example, that “only the Tribunal” may determine questions as to the application of the 1984 Act, or state that section 102(A1) is to the exclusion of the jurisdiction of any other court to do so. Accordingly, the court’s incidental jurisdiction to determine this question in these proceedings is unaffected by section 102(A1) of the 1984 Act.

[33] In my opinion, the only exclusive statutory jurisdiction created by section 102(A1) of the 1984 Act is that of bringing a standalone application to the First Tier Tribunal to determine questions as to the application of the 1984 Act (other than Part IX).

[34] The sheriff has no corresponding *statutory* jurisdiction in respect of any Part of the 1984 Act (other than the obsolescent Part IX), but may decide the question incidentally in proceedings pending before the court, either at common law or by virtue of section 22(4) of the Civil Jurisdiction and Judgments Act 1982.

Result

[35] The result is that I do not accede to the defender's motion to sist or dismiss these proceedings in favour of the pursuers making a standalone application to the First Tier Tribunal under rule 90 of its rules of procedure.

[36] While the pursuers *could* apply to the Tribunal under rule 90, they are not obliged to do so, and it was not their desire to do so either. They are on the contrary entitled to a decision from this court on the question of *forum competens*.

[37] I shall accordingly turn my attention to that question as soon as time permits. I shall give parties my decision on the question of *forum competens* in a subsequent Note. Meantime, no further procedure has been ordered in the case.