



DECISION OF

Sheriff Kelly

**ON AN APPEAL FROM A
DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND
IN THE CASE OF**

Mr Saif Monir,
per Govan Law Centre

Appellant

- and -

Mrs Alison Hussain
per Apex Services

Respondent

FTS Case Reference: FTS/HPC/EV/23/1633

Glasgow, 2 July 2024

Decision

The decision of the First Tier Tribunal for Scotland, Housing and Property Chamber dated 1 February 2024 granting an order for recovery of possession is quashed. The application is remitted to the First Tier Tribunal for Scotland, Housing and Property Chamber to be determined by a differently constituted Tribunal.

Introduction



[1] The respondent in this appeal, Mrs Hussain, submitted an application to the First Tier Tribunal for Scotland, Housing and Property Chamber (“FTS”) for an eviction order under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”). The basis of the application was, in terms of ground 1A of Schedule 3 to the 2016 Act, that the applicant intended to sell the property let to the appellants to alleviate financial hardship.

[2] The parties entered into a tenancy agreement commencing on 12 April 2020. There were no problems regarding rent arrears in the course of the tenant’s occupation of the premises. A rent relief order was made on the basis of non-compliance with a repairing standard enforcement order.

[3] A case management discussion was held on 22 August 2023, when an evidential hearing was assigned. A Direction was issued to parties (pp.120-121 of the FTS bundle) requiring parties to provide details of any witnesses they wished to call at that hearing and to lodge documents upon which they intended to rely. In terms of the Direction the applicant was also required to provide:

“Any financial or other documentation that the Applicant wishes to provide to the Tribunal in support of the eviction ground that she is relying upon (1A), namely that the landlord intends to sell to alleviate financial hardship.” (para.3)

[4] At the evidential hearing on 21 November 2023 the applicant failed to attend. No motion to adjourn the hearing was made and it proceeded in her absence. The FTS records in its decision the evidence of the tenant at paragraph 9, submissions made on behalf of the applicant at paragraphs 10 and 11, submissions on behalf of the tenant at paragraph 12 and summaries of parties’ summing up at paragraphs 13 and 14.

[5] At the conclusion of the evidential hearing, the FTS determined that further evidence was



required and, in terms of rule 21 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, (“the 2017 Regulations”) issued a Direction to parties (pp.62-63). This required the applicant to provide:

“Correspondence from the applicant’s current mortgage lender dated after 1 November 2023, confirming the up to date status of the mortgage over the property, including the amount currently owing, the date that the mortgage will reach its term and that there is no option to remortgage or extend the mortgage term”.

[6] There was then an exchange of material as the applicant endeavoured to comply with that Direction and the respondent was afforded an opportunity to comment upon what had been submitted. This material is listed at paragraph 5 of the FTS decision. Supplementary submissions are further summarised at paragraphs 15 and 16.

FTS Decision

[7] The FTS made 29 separate findings in fact, pp.11 – 13. It went on to provide reasons for the decision. It was satisfied that the applicant was entitled to sell the property and that it was her intention to sell or at least market the property for sale within 3 months of her ceasing to occupy the property. These findings are not challenged in this appeal.

[8] At paragraph 8 of its reasons for decision, at p.15, the FTS note that the figures provided to it regarding the applicant’s income and expenditure had not been considered to be accurate. Material submitted said to verify their content was not accepted by the FTS and accordingly the FTS disregarded the income and expenditure figures produced by the applicant:

“on the basis that they appear to contain discrepancies, were not sufficiently comprehensive and could not be considered sufficiently reliable”. (para.8)

[9] The FTS went on to look at the information it had before it in respect of the applicant’s



current mortgage lender showing monthly payments and the difference between the monthly rental income and the monthly mortgage payments it found were due. It expressly rejected the submission made by the respondent's representative that rental income had been abated by some 40% due to the failure to effect repairs at the property. The basis for so doing was that:

“... the legislation does not qualify ‘financial hardship’ in that way”.(para.8)

[10] At paragraph 9 of its reasons for decision, the FTS considered the mortgage over the property. It was reaching its term on 1 May 2024 with a redemption figure of around £177,000 that had to be repaid. For the FTS, this was considered to be “the most significant factor in establishing the applicant was suffering financial hardship...”

[11] The FTS summarised the evidence:

- i. The applicant's currently lender will not extend the mortgage to help her remortgage.
- ii. If the mortgage was not paid back there would be a repossession which would be to the detriment of the applicant's financial situation and future credit rating.

[12] For the FTS this meant it was reasonable for the applicant to want to sell the property to avoid repossession and to improve her financial position by the release of equity from the property.

[13] The respondent's submission in this regard was that, although the mortgage term was coming to an end, there was no evidence to show that the applicant did not have the financial wherewithal to pay off the outstanding mortgage. She could approach other lenders. The response



in this regard from the FTS was that:

“the Tribunal was satisfied from the submission of her representative that the applicant had discounted other options such as trying to seek out a new mortgage as not viable due to her age and other circumstances”. (para.9)

[14] The FTS further stated:

“In any event the Tribunal did not consider that it was necessary in terms of ground 1A, for the applicant to show that selling the property was the only way to alleviate her financial hardship...

The Tribunal considers that this evidence, in addition to the evidence narrated above concerning the mortgage term ending fairly imminently and the increased monthly mortgage payments is sufficient to establish ground 1A that the applicant was suffering financial hardship and has the intention to sell to alleviate financial hardship”.

[15] At paragraph 10 the FTS considered the question of reasonableness. This aspect of its decision making is not the subject of challenge.

Appeal

[16] What is focused in the ground of appeal is a challenge to finding in fact no.20:

“The applicant is suffering financial hardship and requires to sell the property to alleviate same”.

[17] The appellant also contends that finding in fact no. 20 lacked sufficient evidence to support it (*Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201at [43]; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; 2014 SC (UKSC) 203 at [67]; *Thomas v Thomas* 1947 SC (HL) 45 at 48).

[18] The appellant submits that the FTS fell into error in proceeding to invoke rule 18 of the 2017 regulations. Key facts remained in dispute. The FTS disregarded the schedule of income and expenditure as unreliable. It had no parole evidence from the applicant. All that was before the



FTS were submissions from a representative together with documentary productions. A fuller picture was required. The FTS fell into error in treating the submissions of the applicant's agent as evidence. The representative's submissions about the applicant's financial position were insufficient.

Hearing: 21 May 2024

[19] Mr Dailly, solicitor-advocate, appeared with the appellant personally and Mr Deen of Apex Services appeared with the respondent.

Appellant

[20] On behalf of the appellant, Mr Dailly submitted that there was an insufficiency of evidence before the FTS to enable it to make finding in fact no. 20. Separately, there was an error on its part in proceeding to deal with the matter after the evidential hearing by invoking rule 18 of the 2017 regulations.

[21] Mr Dailly noted the chronology of the application. A case management discussion was held by telephone on 22 August 2023, at the conclusion of which a notice was issued to parties. Mr Dailly noted in particular paragraphs 6 and 8 of that notice (at p.124 of the FTS bundle). For Mr Dailly this was the FTS putting beyond doubt that the onus of proof remained with the applicant to establish financial hardship.

[22] The matter was continued to an evidential hearing which took place on 22 November 2023. At the conclusion of that hearing a Direction was issued to parties noted at [5] above.

[23] Mr Dailly drew my attention to the terms of the note appended to the FTS decision containing reasons for its decision. At paragraph 8 the FTS noted that the statement of income and



expenditure fell to be disregarded on the basis that there were discrepancies; it was not sufficiently comprehensive and was not reliable.

[24] The FTS then proceeded to deal with the other evidence about the property noting at paragraph 8, p.15 of its decision that the applicant had a variable rate mortgage and that mortgage interest rate rises through 2022 and 2023 had increased the mortgage monthly payments between July 2022 and July 2023. Mr Dailly submitted that the evidence in this regard was far from straightforward. From the record of payment he submitted that there was an “expected payment” column and then payments over and above that sum throughout 2022 entered in a separate column (at p.53).

[25] The FTS:

“considered that the most significant factor in establishing that the applicant was suffering financial hardship and intended to sell the property to alleviate same was that the applicant’s interest only mortgage over the property was due to reach the end of its term on 1 May 2024 when the sum of around £177,000 required to be repaid”. (paragraph 9, p.16)

[26] The FTS finding in this regard was that the mortgage could not be renewed and that remortgage was not viable. Its conclusions were based upon the submissions made by the applicant’s representative. For Mr Dailly, this crucial or “most significant factor” required to be established by evidence. As the FTS noted in the wake of the case management discussion, evidence in this regard would be required to be shared between the parties and to be the subject of comment. In the normal course, evidence would be led about these matters and then subject to cross examination. Submissions based upon that evidence would usually follow.

[27] Mr Dailly came to submit that the error of approach could be found in the fact finding



relative to: (i) the increased liability for mortgage payments – the independent evidence pointed otherwise; (ii) a lack of parole evidence in respect of this disputed question of fact; and (iii) the exclusive focus of the FTS upon the financial situation relative to the property which was the subject of the application.

[28] Mr Dailly also contended that invoking rule 18 of the 2017 Regulations was an error of law. There remained disputed questions of fact between the parties which meant that the invoking of this rule to proceed to a determination was not appropriate. The invoking of the overriding objective did not render it appropriate or proportionate to proceed on this basis.

[29] Mr Dailly renewed his motion that the Upper Tribunal uphold the appeal and quash the decision of the FTS. In that event, there was no alternative but to remit the application to a differently constituted Tribunal. In light of the criticisms there was little scope for the Upper Tribunal to remake the decision.

Applicant

[30] Mr Deen on behalf of the applicant contended that there was a sufficiency of evidence available to the FTS. He repeated the financial position relative to the property in relation to the mortgage coming to term, that the income from the property did not meet the mortgage liability and that repossession was likely. This established financial hardship. Mr Deen urged the Upper Tribunal to adopt a common sense, logical approach. In light of the precarious financial position relative to this property the respondent was likely to be evicted at some point – if not now then in the months to come.

Decision



Statutory Provisions

[31] Ground 1A of schedule 3 to the 2016 Act provides:

“(1) It is an eviction ground that the landlord intends to sell the let property to alleviate financial hardship.

(2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—

(a) the landlord—

(i) is entitled to sell the let property,

(ii) is suffering financial hardship, and

(iii) intends to alleviate that hardship by selling the let property for market value, or at least put it up for sale, within 3 months of the tenant ceasing to occupy it, and

(b) the Tribunal is satisfied that it is reasonable to issue an eviction order.

(3) Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2)(a)(iii) includes (for example)—

(a) a letter of advice from an approved money advisor or a local authority debt advice service,

(b) a letter of advice from an independent financial advisor,

(c) a letter of advice from a chartered accountant,

(d) a letter of engagement from a solicitor or estate agent concerning the sale of the let property,

(e) a recently prepared document that anyone responsible for marketing the let property would be required to possess under section 98 of the Housing (Scotland) Act 2006 were the property already on the market, and

(f) an affidavit stating that the landlord has that intention.”

[32] In order to find this ground established the FTS required to find that the landlord: (i) is



entitled to sell the property, (ii) is suffering from financial hardship, and (iii) intends to alleviate that by selling the property.

[33] The FTS found that the landlord was entitled to sell the property. This was not in dispute. The FTS found that the applicant intended to sell the property for market value or put it up for sale. This was not in dispute.

[34] That the landlord was suffering financial hardship was at issue between the parties.

[35] At the time of submission of the application, the FTS administration wrote to the applicant's representatives noting the application had been accepted and would be proceeded with. It sought other information, intimating to the appellant by letter dated 23 June 2023 addressed to her agent that:

“As your application is made under ground 12A (sic) you will be expected to provide information of the following nature in advance of the case management discussion.

[36] Information that the FTS had intimated would be expected to be provided included: (i) details of the properties owned by the applicant together with details of any loans secured thereon or payments due in respect of the loans; (ii) the employment status of the applicant; (iii) the applicant's income including details of wages, bonuses, benefits and other income; (iv) the applicant's outgoings; (v) the applicant's assets; (vi) the applicant's debts; (vii) evidence from third parties to support the applicant's position (listing the documents at para 1A(3) of schedule 3 to the 2016 Act); and (viii) details of dependent's living with the applicant (pp.167-168 of the FTS bundle).

[37] Neither party could assist the Upper Tribunal in providing the basis, statutory or



otherwise, for requesting this information. There was reference (at para 3 of the note of the case management discussion) that:

“on acceptance of the application the information would be required by the Tribunal in order to establish the eviction ground claimed.” (at p.22 of the FTS bundle)

[38] That such information was to be expected was reinforced by the Direction issued at the end of the case management discussion (para. 3, pp.120 – 121 of the FTS bundle).

[39] At the conclusion of that evidential hearing there remained an outstanding evidential matter of concern to the FTS which featured in a further Direction noted at paragraph 4, page 3 of the FTS decision.

[40] At paragraph 8, p.15 of its decision, the FTS sets to one side by disregarding, the income and expenditure figures on the basis of discrepancies and unreliability. It goes on to note the position in respect of the mortgage payments due and finds that the liability for rent did not meet these payments.

[41] The FTS looked exclusively at the financial position relative to the property which had been let to the appellant. It did not have before it information in relation to the wider financial picture of the applicant such as the material that had been requested in its letter to Mr Deen of 22 June 2023, in its Direction after the CMD and in the Direction issued after the evidential hearing. The FTS primary focus upon the financial position relative to the outstanding sum required to redeem the security over the property is clear from paragraphs 8 and 9.

[42] I do not consider that the FTS fell into error in its analysis of the limited financial picture it was able to glean from the material submitted to it. Mr Dailly submitted that the applicant



appeared to be paying more than the monthly sum due. It is clear, however, that the expected payment was rising throughout the period 2022 to 2023 (for 2022 see p.53 and the sums on expected payment left-hand column).

[43] There was a disputed issue between the parties in relation to what would happen at the end of the mortgage term on 1 May 2024. On the one hand, the appellant's representative submitted to the FTS that absent any information about savings or capital and efforts in respect of approaches to other security or mortgage providers the FTS could not arrive at a concluded view in relation to financial hardship. As against that, the FTS records the submissions of the applicant's representatives about her attempts to secure a new mortgage as being not viable.

[44] The FTS held that for the applicant to seek a new mortgage was unrealistic. Those submissions made by the applicant's agent were capable of being regarded as evidence. They were hearsay evidence of the applicant's position – that she had effectively ruled out a remortgage.

[45] However, the basis upon which the FTS accepted this submission and rejected the submission made on behalf of the appellant is not made clear by the FTS. How that position was accepted when the contrary position put to the FTS - also in submission - was that it required to take a broader view of what could be done about the mortgage approaching its term date is not the subject of any reasoning. The FTS expresses itself "satisfied" that the applicant's position could be accepted. It does not enlighten the reader as to why that was accepted and the appellant's submission rejected.

[46] The FTS considered that a limited assessment of the financial position of the landlord in relation to this property, with focus upon the income and outgoings relative to it in isolation, was



sufficient to enable it to arrive at a conclusion on financial hardship.

[47] There was no evidence about the applicant's overall financial picture. There was no evidence as to how this particular property and its mortgage liability fitted in with the complete financial picture of the applicant. Absent additional information about her overall financial position, the viability of the applicant seeking a fresh mortgage in light of the value of the property and its potential rental income could not be assessed. The FTS failed to gather a full picture of the applicant's financial situation or circumstances.

[48] As the FTS noted "financial hardship" is not defined the 2016 Act. The FTS' assessment of that factor ought not to be restricted to an assessment of financial hardship in respect of this property alone. In certain circumstances, the FTS assessment of financial hardship may not require *all* of the material referred to in the FTS communication of 22 June 2023 to be produced and analysed. If there was information omitted, the FTS would have to explain why nonetheless it could arrive at a view on the applicant's financial hardship. Here the FTS have assessed the financial position in isolation. It looked at the value of the property, the term of the mortgage and the sum required to redeem it and relied upon the submissions of the agent about the feasibility of that position altering. Its acceptance of that position over the appellant's submission is not reasoned in any way.

[49] The assessment included a finding of inevitability about repossession with all that that entailed. The FTS ought to have assessed the applicant's financial position in the round having regard to the information presented by parties (having prompted, then sought, then directed the provision of more material and rejected as unreliable some of what was produced). The finding



relative to financial hardship was not justified on the basis of the material available to the FTS.

[50] The assessment mandated by ground 1A of schedule 3 to the 2016 Act is not limited to the costs and income associated with the property that is the subject of the application.

[51] The FTS considered that this evidence, in addition to the evidence narrated above concerning the mortgage term ending fairly imminently and the increased monthly mortgage payments, was sufficient to establish ground 1A, that “the applicant is suffering financial hardship and has the intention to sell to alleviate financial hardship”. In arriving at this view on this basis it erred. This amounts to an error of law of the type described by the Court in *Murray* at [43].

Conclusion

[52] The FTS decision falls to be quashed. In all the circumstances it is appropriate that the matter is remitted to the FTS to determine upon by a differently constituted Tribunal.

Sheriff T Kelly
Member of the Upper Tribunal for Scotland

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within 30 days of the date on which this decision was sent to him or her. Any such request for permission 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) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.