OUTER HOUSE, COURT OF SESSION

[2019] CSOH 73

CA93/19

OPINION OF LORD ERICHT

In the cause

M7 REAL ESTATE INVESTMENTS PARTNERS VI INDUSTRIAL PROPCO LIMITED

Pursuer

against

AMAZON UK SERVICES LIMITED

Defender

Pursuer: D M Thomson QC; Brodies LLP
Defender: Richardson QC; CMS Cameron McKenna Nabarro Olswang LLP

1 October 2019

Introduction

[1] This action raises a short point of interpretation of section 34 of the Sheriff Courts (Scotland) Act 1907. That section provides a procedure under which a landlord, on giving the requisite period of notice prior to the end of a lease, can eject a tenant at the end of the lease without raising an action of removing. The section contains the following proviso (the "Proviso"):

> "Provided that if such written notice as aforesaid shall not be given the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year"

[2] The issue in this case is this. Is the Proviso of general application, so that if no notice is given tacit relocation arises whether or not the landlord uses the procedure under section 34? Or is the Proviso limited to the procedure, so that tacit relocation under the Proviso only arises if the landlord is using that procedure?

Statutory provisions

[3] Section 34 provides as follows (emphasis added):

> "34 Removings.
>
> Where lands exceeding two acres in extent are held under a probative lease specifying a term of endurance, and whether such lease contains an obligation upon the tenant to remove without warning or not, such lease, or an extract thereof from the books of any court of record, shall have the same force and effect as an extract decree of removing obtained in an ordinary action at the instance of the lessor, or any one in his right, against the lessee or any party in possession, and such lease or extract shall, along with authority in writing signed by the lessor or any one in his right or by his factor or law agent, be sufficient warrant to any sheriff officer or messenger-at-arms of the sheriffdom within which such lands or heritages are situated to eject such party in possession, his family, sub-tenants, cottars, and dependants, with their goods, gear and effects, at the expiry of the term or terms of endurance of the lease:
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> Provided that previous notice in writing to remove shall have been given—
>
> (A) When the lease is for three years and upwards not less than one year and not more than two years before the termination of the lease; and
>
> (B) In the case of leases from year to year (including lands occupied by tacit relocation) or for any other period less than three years, not less than six months before the termination of the lease (or where there is a separate ish as regards land and houses or otherwise before that ish which is first in date):
>
> **Provided that if such written notice as aforesaid shall not be given the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year**:
>
> Provided further that nothing contained in this section shall affect the right of the landlord to remove a tenant who has been sequestrated under the Bankruptcy (Scotland) Act 1856, 1985 or 2016 (taken from a joint bundle), or against whom a decree of cessio has been pronounced under

> the Debtors (Scotland) Act 1880, or who by failure to pay rent has incurred any irritancy of his lease or other liability to removal:
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> Provided further that removal or ejectment in virtue of this section shall not be competent after six weeks from the date of the ish last in date:
>
> Provided further that nothing herein contained shall be construed to prevent proceedings under any lease in common form; and that the foregoing provisions as to notice shall not apply to any stipulations in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes or to subjects let for any period less than a year."

[4] Section 34 forms part of a group of sections under the heading "**Removings**".

[5] Section 34 is concerned with removal where the landlord has given notice.

[6] Section 35 is concerned with removal where the tenant has not granted a letter of removal:

> "**Letter of removal.**
>
> Where any tenant in possession of any lands exceeding two acres in extent (whether with or without a written lease) shall, either at the date of entering upon the lease or at any other time, have granted a letter of removal, such letter of removal shall have the same force and effect as an extract decree of removing, and shall be a sufficient warrant for ejection to the like effect as is provided in regard to a lease or extract thereof, and shall be operative against the granter of such letter of removal or any party in his right within the same time and in the same manner after the like previous notice to remove: Provided always that where such letter is dated and signed within twelve months before the date of removal or before the first ish, if there be more than one ish, it shall not be necessary that any notice of any kind shall be given by either party to the other."

[7] Section 36 is concerned with removal where there is no written lease and either party has given notice:

> "**36 Notice to remove**.
>
> Where lands exceeding two acres in extent are occupied by a tenant without any written lease, and the tenant has given to the proprietor or his agent no letter of removal, the lease shall terminate on written notice being given to the tenant by or on behalf of the proprietor, or to the proprietor by or on behalf of the tenant not less than six months before the determination of the tenancy, and such notice shall entitle the proprietor, in the event of the tenant failing to remove, to apply for and obtain a

summary warrant of ejection against the tenant and everyone deriving right from him."

[8] Section 37 is concerned with the notice to be given for leases of a year or more:

"**Notice of termination of tenancy.**

In all cases where houses, with or without land attached, not exceeding two acres in extent, lands not exceeding two acres in extent let without houses, mills, fishings, shootings, and all other heritable subjects (excepting land exceeding two acres in extent) are let for a year or more, notice of termination of tenancy shall be given in writing to the tenant by or on behalf of the proprietor or to the proprietor by or on behalf of the tenant: Provided always that notice under this section shall not warrant summary ejection from the subjects let to a tenant, but such notice, whether given to or by or on behalf of the tenant, shall entitle the proprietor to apply to the sheriff principal for a warrant for summary ejection in common form against the tenant and every one deriving right from him: Provided further that the notice provided for by this section shall be given at least forty days before the fifteenth day of May when the termination of the tenancy is the term of Whitsunday, and at least forty days before the eleventh day of November when the termination of the tenancy is the term of Martinmas."

[9] Section 37A excludes certain agricultural tenancies from the above provisions:

"**Exception for certain tenancies**

The provisions of this Act relating to removings (including summary removings) shall not apply to or in relation to short limited duration tenancies or limited duration tenancies modern limited duration tenancies or repairing tenancies (taken from electronic bundle of joint authorities) within the meaning of the Agricultural Holdings (Scotland) Act 2003 (asp 11)."

Factual background

[10] The pursuer was the landlord and the defender the tenant of commercial premises in Gourock under a written lease (the "Lease"). The Lease met the prerequisites for the application of section 34. The subjects exceeded two acres in extent. The Lease was probative. The Lease specified a term of endurance: the period of the lease was from 2 August 2004 until 1 August 2019.

[11] By notice dated 7 February 2019 the pursuers agents gave notice to quit to the defender. The notice stated:

> "On behalf of the Landlord, we hereby give you notice that the Lease will terminate as at 1 August 2019 and you are required to remove from the Premises on or before 1 August 2019 being the final day of the term of the Lease and as such the contractual date of termination thereof"

That was a period of notice of slightly under six months, which met the requirement at common law of 40 days' notice to found an action for removing. However, it was less than the period of notice of one year which would have been required in respect of the Lease under section 34.

Defender's submissions

[12] Counsel for the defender invited me to sustain his first plea in law and dismiss the action. He submitted that the language of the Proviso was clear and definite in providing that where the landlord has not given a year's notice the lease is held to be renewed by tacit location for another year. It imposed a consequence on a landlord who failed to give a year's notice. The proviso did not appear in sections 35, 36 or 37. The only relevant case was *Duguid* v *Muirhead* 1926 SC 1078 (OH) at 1083, which was in the defender's favour, as was *Gillies* v *Fairlie* (1920) 36 Sh Ct Rep 6 at 9 to 11 per Sheriff MacKenzie. All the other cases on the 1907 Act (including *Lormor* v *Glasgow City Council* 2014 SC 213) fell to be distinguished as dealing with sections other than section 34 or notices by the tenant. The pursuer's interpretation would render the Proviso meaningless: despite the clear wording of the Proviso, tacit relocation would not occur if the landlord subsequently gave common law notice and proceeded by way of an action of removing. This could not have been the intention of Parliament. The legislation gave new rights to the landlord and in return

greater protection to the tenant. The Proviso made a substantive change to the law in respect of tacit relocation.

Pursuer's submissions

[13] Counsel for the pursuer invited me to sustain his fourth plea in law and grant decree *de plano* in respect of his first, second and third conclusions, which were respectively for declarator that the notice to quit was valid to terminate the lease, declarator that the defender was obliged to remove, and decree for removal. If I were with him, further procedure would be required in respect of his fourth conclusion, which was for damages for occupation of the premises after the termination of the lease on 1 August 2019.

[14] Counsel submitted that the defender's submissions were unsound and since no other defence was or could be advanced the pursuer was entitled to decree *de plano*. He submitted that section 34 was not the only means by which a landlord may give notice to quit in respect of probative leases of three years or more in respect of land exceeding two acres in extent. He submitted that the section provided a new, but additional, means of removing a tenant from leased subjects, which left in place the existing common law alternative of service of a notice to quit, in accordance with the requirements of the common law, followed by an action of removing. The pursuer had given the 40 days' notice which was required for an action of removing. The Proviso did not make a substantive change to the law on tacit relocation. If it did, that was irreconcilable with decisions in cases where the tenant had given notice of less than a year. He referred to *Signet Group plc* v *C&J Clark Retail Properties Ltd* 1996 SC 444 and *Dundee City Council* v *Dundee Valuation Appeal Committee* 2012 SC 463, *Lormor Ltd* v *Glasgow City Council* 2014 SC 213, *MacDougall* v *Guidi* 1992 SCLR 167, Scottish Law Commission, "*Discussion Paper on Aspects of Leases: Termination"*, Discussion

Paper No 165 Rankine, *Landownership* pages 549-550; 571, Paton & Cameron, *The Law of Landlord and Tenant in Scotland*, (1967), pages 223-224, McAllister, *The Scottish Law of Leases*, (4th Ed, 2013), paragraph 10.32, Rennie, *Leases*, (2015), paragraphs 20-22 to 20-23. He submitted that there was a presumption of statutory interpretation against the common law being changed by statute unless the enactment was clear and unambiguous and invited me to apply that presumption. (*Leach* v *R* [1912] AC 305, 311 per Lord Atkinson, *George Wimpey & Co Ltd* v *British Overseas Airways Corpn* [1955] AC 169, 191 per Lord Reid, *Stair Memorial Encyclopaedia of the Laws of Scotland*, Volume 12, paragraph 1126; *Hynd's Tr* v *Hynd's Trs* 1955 SC (HL) 1; *Nicol's Trs* v *Sutherland* 1951 SC (HL) 21.)

Discussion and decision

[15] In my opinion, the Proviso does not make a substantive change to the law on tacit relocation. It is not a free-standing provision independent of the procedure for removal without an action for removing introduced by section 34. It applies only when that procedure is used.

[16] I have come to that opinion for the following three reasons.

[17] Firstly, section 34 is procedural and not substantive. This is made clear in *Lormor*, with which I agree and which is in any case binding on me. In that case the appellants argued that "although part of the purpose of sec 34 was to create an expedited procedure, it went beyond this and expressly affected tacit relocation and the termination of the lease" (para [9]). That argument, which in essence is the same argument as that of the defenders in this case, was rejected by the Extra Division. In delivering the opinion of the court Lord Menzies said:

> "We consider that the 1907 Act is properly categorised as a procedure Act. One would not understand a procedure Act to alter parties' substantive rights." (para [21])

[18] In *Lormor* it was the tenant who was seeking to bring the lease to an end whereas in the current case it is the landlord. However in my view *Lormor* cannot be distinguished on that ground. *Lormor*, in accordance with the weight of prior authority, established the principle that the Act is a procedure act which does not alter substantive rights. That principle is of general application and does not vary depending on whether the person seeking to bring the lease to an end happens to be the landlord or happens to be the tenant.

[19] Secondly, an examination of the consequences of the interpretations advanced by each party demonstrates that the defender's interpretation is the correct one. On the defender's interpretation, once the one year deadline has passed without notice, tacit relocation has occurred once and for all purposes. If that were the situation, then tenants could not prevent tacit relocation taking place by subsequently giving notice of less than a year: that this is not the law is amply demonstrated by case law such as *Lormor*, *Signet Group* v *C&J Clark Retail Properties Ltd* and *Dundee City Council* v *DVAC*. On the other hand, on the pursuer's interpretation, tacit relocation will not necessarily occur a year before and parties can be aware of that and plan accordingly.

[20] Thirdly, the correct construction of the words of section 34 in accordance with the principles of statutory construction is that the Proviso does not alter the substantive law.

[21] A proviso is not a free-standing provision. It is a proviso to the principal provision in the section. It must be read along with its principal provision. The scope of a proviso is determined and limited by its principal provision. In this case the principal provision is the introduction of a procedural remedy. The scope of the Proviso is limited to that procedural remedy.

[22] Further, where a well-established principle of the common law is to be altered by statute, clear definite and positive words must be used (*Leach* v *R* at para 311). It has been well recognised by judges and academic writers throughout the many years that section 34 has been on the statute book that its wording is not clear and definite. As Lord Menzies put it in *Lormor* at paragraph [20]:

> "Sections 34-37 of the 1907 Act cannot be regarded as the finest example of the Parliamentary draftsman's art. Both senior counsel accepted that these sections are not a model of clarity. It was observed in Rankine on *Leases* at page 571 that:
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> > 'It is no unfair criticism to say that these sections bear evidence of hasty legislation, looking to the state of the law at the time they were enacted, and that the subsequent Agricultural Holdings Act, as to the subjects to which it applies, only added to the perplexity.'"

In my opinion the well-established common law on tacit relocation is not substantively replaced by such unclear statutory drafting. Rather, the Proviso supplements the common law of tacit relocation by setting out how tacit relocation is to apply when the new statutory procedure is used.

Order

[23] I shall sustain the pursuer's first and second pleas in law and repel the defender's fourth plea in law and grant decree in terms of the first, second and third conclusions. I shall put out the case by order for a discussion of further procedure in respect of the fourth conclusion.