SHERIFF APPEAL COURT

[2020] SAC (Civ) 16
GLW-B2049-19

Sheriff Principal C D Turnbull

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in appeal by

KEITH DOCHERTY

Pursuer & Respondent

against

TOLLCROSS HOUSING ASSOCIATION LIMITED

Defender & Appellant

Pursuer & Respondent: SF Cavanagh, solicitor; Brown & Co Legal LLP
Defender & Appellant: Upton, advocate; Shepherd & Wedderburn LLP

11 September 2020

Introduction

[1] This appeal is brought against the decision of the sheriff (reported at [2020] SC GLA 12[1]) to grant decree ordering the defender and appellant to consent to the pursuer and respondent's application to assign the tenancy of a property in Glasgow (hereinafter referred

[1] see www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020scgla12.pdf?sfvrsn=0

to as "the property") in terms of Part 2 of schedule 5 of the Housing (Scotland) Act 2001 (hereinafter referred to as "the 2001 Act").

[2] The pursuer and respondent is the tenant and the defender and appellant the landlord of the property, in terms of a Scottish Secure Tenancy Agreement, executed on 16 May 2008. In this opinion the pursuer and respondent is hereinafter referred to as "the tenant" and the defender and appellant as "the landlord".

[3] The tenant, his wife and their two children resided in the property from May 2008 until on or around 9 August 2019, at which time the tenant's wife left the property and moved to a new home elsewhere in Glasgow. The tenant and his two children continued to reside in the property and did so as at the date of the hearing before the sheriff (on 6 January 2020).

[4] On 28 August 2019 the tenant applied to assign the tenancy to his daughter. By letter dated 4 September 2019 the landlord refused to consent to the tenant's application to assign the tenancy. The landlord stated that they would not consent to the application as by doing so it would result in the property being under-occupied as defined within the landlord's allocations policy.

[5] On or around 30 August 2019, the tenant's daughter made attempts to change the arrangements for payment of the rent due for the property. This application was refused. The tenant's daughter was not told why the landlord's housing officer's had refused this application. In or around September 2019 a friend of the tenant's daughter moved into the third bedroom of the property. That friend continued to reside in the property as at the date of the hearing before the sheriff.

The sheriff's decision

[6] The sheriff heard evidence from the tenant, the tenant's daughter; and the landlord's housing officer. The sheriff found that, notwithstanding the reason given by the landlord in their letter to the tenant of 4 September 2019, there were other reasons which had informed their refusal of the tenant's application to assign the tenancy. These included that (i) the tenant had not followed the correct process; and (ii) not all information had been disclosed to the landlord about the tenant's family circumstances.

[7] The sheriff also found that the landlord had failed to have regard to factors which were *prima facie* relevant to their consideration of whether to consent to the tenant's application or not. The sheriff found that the landlord had (i) failed to enquire further into what would happen at the property in the event of the assignation being consented to; (ii) failed to carry out enquires at their own hand about who was occupying the property as at 4 September 2019; (iii) failed to advise the tenant of the fruits of any enquiry as to who was residing at the property and obtain a response from him; (iv) failed to take into account the fact that the tenant and his family had resided at the property for a significant period of time with no reported anti-social behaviour complaints; (v) failed to have regard to the proper and timeous settlement of rent obligations by the tenant over the term of the tenancy; (vi) failed to have regard to the prospective assignee being in a position to continue to settle the rent timeously; and (vii) failed to have regard to the potential good behaviour of the prospective assignee.

[8] The sheriff concluded that the landlord's refusal of the tenant's application to assign the tenancy was not reasonable and directed the landlord to consent to the tenant's application.

The grounds of appeal

[9] The note of appeal for the landlord identifies two questions for consideration by this court, namely:

1. Did the sheriff err in considering the question of reasonableness not at the date of the hearing but as at the date of the landlord's original consideration on or about 4 September 2019?
2. Did the sheriff err in concluding that the property was not under occupied as of 4 September 2019?

Submissions for the parties

[10] Both parties lodged written notes of argument in advance of the hearing of the appeal and supplemented those with oral submissions. The court does not propose to set out the terms of parties' submissions in full. It has had regard to all that was said by both parties in reaching a decision. Insofar as relevant to the decision of the court, the relevant parts of parties' submissions are set out below. Put short, the landlord contends that the sheriff erred in holding that the landlord took into account irrelevant factors; erred in holding that the landlord failed to communicate given matters to the respondent in the course of making its decision; and erred in holding that the appellant failed to take into account relevant factors. The tenant contends that there is no basis upon which this court would be entitled to interfere with the discretionary decision made by the sheriff at first instance.

Discussion

Preliminary issue

[11] Before turning to the two questions identified for consideration by this court, it is first necessary to consider the sheriff's jurisdiction in cases of this nature. That jurisdiction derives from Part 2 of schedule 5 to the 2001 Act which, insofar as relevant for the purposes of this appeal, is in the following terms:

> "9. A tenant under a Scottish secure tenancy who, in pursuance of section 32(1), wishes to assign, sublet or otherwise give up to another person possession of the house or any part of it or take in a lodger must make a written application to the landlord for the landlord's consent, giving details of the proposed transaction, and in particular of any payment which has been or is to be received by the tenant in consideration of the transaction.
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> ...
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> 11. On an application under paragraph 9 … the landlord may —
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> (a) consent, or
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> (b) refuse consent, provided that it is not refused unreasonably.
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> 12. The landlord must intimate its consent or refusal and, in the case of refusal, the reasons for the refusal, to the tenant in writing within one month of receipt of the application.
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> 13. If the landlord fails to comply with paragraph 12, it is to be taken to have consented to the application.
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> 14. A tenant who is aggrieved by a refusal may raise proceedings by summary application.
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> 15. In such proceedings the court must, unless it considers that the refusal is reasonable, order the landlord to consent to the application."

[12] The sheriff concluded that the function of the court was to consider the question of reasonableness *de novo*. The landlord maintains that that is the correct approach. In his written note of argument the tenant stated that the sheriff proceeded on the basis that the question of whether the refusal was reasonable required to be assessed as of the date of the

hearing before the sheriff, however, he also advanced an *esto* argument to the effect that if the sheriff had considered matters as at the date of refusal by the landlord (ie 4 September 2019) he was correct to do so. In support of this *esto* argument reference was made to paragraph 56 of the Explanatory Notes to the 2001 Act which states, *inter alia*, that "Part 2 of schedule 5 provides, among other things, a right of appeal to the court by a tenant whose landlord refuses consent" (underlining added).

[13] In reaching the view he did, the sheriff was referred to and placed reliance upon the decision of Sheriff Braid (as he then was) in *East Lothian Council* v *Duffy* 2012 SLT (Sh Ct) 113. As the sheriff's decision to consider the question of reasonableness *de novo* was, at the very least, heavily influenced by that decision, it is appropriate to consider it in some detail.

[14] In *East Lothian Council*, the pursuer allowed its tenants, the defenders, to sublet the tenanted property temporarily, for up to one year, after which the defenders were required to return to the property or to terminate their tenancy. The defenders gave notice to the pursuer that they would not be returning to the subjects and asked whether the residents of the subjects, who were qualifying occupiers by virtue of section 14(6)(b) of the 2001 Act, might take over the tenancy. The pursuer responded in writing, purporting to acknowledge the defenders' notification to end the tenancy. The defenders thereafter requested consent for the assignation of the tenancy to the qualifying occupiers, which request was refused. Notably, the defenders unsuccessfully challenged that decision by way of summary application. The pursuer subsequently sought to recover possession of the subjects. The qualifying occupiers were sisted as parties to the action and assumed its defence. Amongst other lines of defence they contended that there were no reasonable grounds for the pursuer refusing to consent to an assignation of the tenancy. Somewhat curiously, the qualifying

occupiers invited the court to treat the action for recovery of possession as if it were the summary application.

[15] The sheriff's consideration of the issue of reasonableness in *East Lothian Council* requires to be viewed in context. As the sheriff observed at para [71] of his judgment, as it was not disputed that the ground for recovery of possession specified in paragraph 5 of Schedule 2 to the 2001 Act existed, by virtue of section 16(2) of the 2001 Act, he was required to make an order for possession if it was reasonable to do so.

[16] At para [62] of the sheriff's judgment the issue of the summary application and the possible future assignation of the tenancy were considered. The sheriff's observations, insofar as relevant to the present appeal, are worth setting out in full:

> "Although the solicitor for the qualifying occupiers submitted that I should order the pursuer to consent to an assignation of the tenancy by the defenders to the qualifying occupiers, she was unable to point to any authority which showed that such a course would be competent in the present proceedings. I do not consider that such an order, in this action, would be competent.
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> …
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> …, the fact is that the action was dismissed, and it is simply not possible to undo that in the present proceedings. It would therefore be incompetent for me to treat this action as if it subsumed the now defunct summary application so as to make the order that the qualifying occupiers would like me to make, that they acquire the tenancy. It follows from this that the best outcome the qualifying occupiers can hope for in this action is that it be dismissed, in the hope that the tenancy might in the future be assigned to them. Indeed, I accept, in principle, the argument that if a court were to find that a refusal to consent to assign was unreasonable and that a future summary application might be successful, then it may well be that it would be unreasonable to grant decree for recovery of possession, at least in some circumstances … . Accordingly, although this action is not itself an appeal against the refusal of consent, it is relevant to consider whether it is unreasonable to refuse consent."

[17] Leaving aside the fact that there had been an application to assign; that application had been refused; and the defenders' subsequent summary application had been dismissed, the observations of Sheriff Braid are entirely logical. They do, however, have no application

to cases of the present class. In an action for recovery of possession, the issue of reasonableness must be considered at the point in time that a ground, or grounds, of possession are established. In a summary application in terms of Part 2 of schedule 5 to the 2001 Act, the aggrieved tenant is challenging a landlord's refusal. In such proceedings, the court must consider the reasonableness of "the refusal" (see paragraph 15). The word "the" in that phrase is not redundant. It is a direct reference to the decision of the landlord. That is what the court must consider. The terms of paragraph 15 are clear. Unless the court considers the landlord's refusal to have been reasonable, it must order the landlord to consent to the application.

[18] The court's function, at first instance, is to assess the reasonableness of the landlord's refusal. It is not to consider matters *de novo* as at the date of the hearing before the sheriff (which in this case was some four months after the landlord's refusal). That is the clear and unambiguous purpose of the relevant provisions. Resort to the terms of the Explanatory Notes (see para [12] above) is not necessary.

Statutory provisions

[19] In light of the conclusion the court has reached on the preliminary issue, the appeal requires to be resolved on the basis of the law as it stood on 4 September 2019. The following provisions of section 32 of the 2001 Act are relevant for the purposes of this appeal:

> "(1) It is a term of every Scottish secure tenancy that the tenant may assign, sublet or otherwise give up to another person possession of the house or any part of it or take in a lodger—
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> (a) only with the consent in writing of the landlord, and

(b) in the case of an assignation, only where the house has been the assignee's only or principal home throughout the period of 6 months ending with the date of the application for the landlord's consent to the assignation under paragraph 9 of schedule 5.

(2) A landlord whose consent is required under subsection (1) may refuse such consent only if it has reasonable grounds for doing so.

(3) There are, in particular, reasonable grounds for refusing such consent if—

(a) a notice under section 14(2) has been served on the tenant specifying a ground set out in any of paragraphs 1 to 7 of schedule 2,

(b) an order for recovery of possession of the house has been made against the tenant under section 16(2),

(c) it appears to the landlord that a payment other than—

(i) a rent which is in its opinion a reasonable rent, or

(ii) a deposit which in its opinion is reasonable, returnable at the termination of the assignation, subletting or other transaction and given as security for the subtenant's obligations for accounts for supplies of gas, electricity, telephone or other domestic supplies and for damage to the house or contents,

has been or is to be received by the tenant in consideration of the assignation, subletting or other transaction,

(d) the transaction for which consent is sought would lead to overcrowding of the house in such circumstances as to render the occupier guilty of an offence under section 139 of the 1987 Act, or

(e) the landlord proposes to carry out work on the house or on the building of which it forms part so that the proposed work will affect the accommodation likely to be used by the subtenant or other person who would reside in the house as a result of the transaction."

[20] In their submissions, the landlord placed reliance upon the terms of sub-sections 32(3)(f) and (g) of the 2001 Act. These provisions were added to section 32 by section 12(2)(c) of the Housing (Scotland) Act 2014, with effect from 1 November 2019.

As such, in light of the conclusion I have reached upon the preliminary issue, these provisions have no application to this appeal.

The first question

[21] The first question posed for the opinion of the court is did the sheriff err in considering the question of reasonableness not at the date of the hearing but as at the date of the landlord's original consideration on or about 4 September 2019? The criticism implicit in this question is that the landlord contends that, contrary to his stated intention, the sheriff, in effect, considered the reasonableness of the landlord's decision as at the date it was made, not as at the date of the hearing before him. There is some force in that criticism.

[22] As set out above (see para [12], the sheriff concluded that the function of the court was to consider the question of reasonableness *de novo*, which in turn required a consideration of the question of reasonableness as at the date of the hearing before him. Leaving that error to one side, a consideration of the sheriff's decision leaves the impression that, to a significant extent, the sheriff performed the role incumbent upon him in terms of the relevant provisions of the 2001 Act.

[23] Standing the conclusion that the court has reached on the preliminary issue, the first question falls to be answered in the negative. The effect of the sheriff's error is considered below at paras [26] to [30].

The second question

[24] The second question posed for the opinion of the court is did the sheriff err in concluding that the property was not under occupied as of 4 September 2019? Under occupation in the context of the reasonableness of a refusal to consent to an assignation was

added as a ground to sub-section 32(3) by way of section 12(2)(c) of the Housing (Scotland) Act 2014, with effect from 1 November 2019 (see para [20] above). Notwithstanding the absence of an express ground to that effect as at the date of consideration by the landlord, the issue of under-occupation was one which the landlord was entitled to have regard to when considering the tenant's application to assign. In the event, the landlord's only stated ground of refusal of the application was that granting it would have resulted in the property being under-occupied as defined within the landlord's allocations policy.

[25] The effect of the landlord's evidence before the sheriff was that if the property was occupied by the tenant's two children and the tenant's daughter's friend, the property was not under-occupied (see para [42] of the sheriff's judgment). The evidence before the sheriff entitled him to make the findings in fact he did regarding under-occupation. At or about the time of the landlord's refusal, the property was not under-occupied. The sheriff did not err in this regard. The second question falls to be answered in the negative.

The sheriff's error

[26] Notwithstanding the answers to the questions posed for the opinion of the court, as set out above (see para [22]) the sheriff erred in concluding that the function of the court was to consider the question of reasonableness *de novo*. As such, the matter is at large for this court.

[27] The landlord argued that the refusal was reasonable because, as at the date of the hearing before the sheriff, the conditions in both sub-section 32(3)(a) and sub-section 32(3)(g) were met. In terms of the statute refusal of consent was therefore reasonable.

[28] The landlord's argument is misconceived. As set out above, the nature of the sheriff's jurisdiction required him to consider the reasonableness of the landlord's decision.

That decision was made on or about 4 September 2019. It is not in dispute that, as at that date, the condition set out in sub-section 32(3)(a) had not been met: - the notice upon which the landlord relied was served on 27 December 2019, a mere 10 days prior to the hearing before the sheriff. The condition set out in what is now sub-section 32(3)(g) was not in force as at 4 September 2019. It has no applicability, albeit the circumstances which underlie the sub-section are matters the landlord was entitled to have regard to in reaching their decision on or about 4 September 2019 (see para [24] above).

[29] The sheriff carefully considered the evidence before him. Leaving the error of approach this court has identified to one side, the sheriff's analysis of the evidence and the conclusions he reached upon it are matters upon which no basis has been advanced by the landlord to permit this court to interfere with the conclusion the sheriff reached.

[30] The basis upon which consent was withheld by the landlord was not supported by the evidence. The sheriff identified that there were other reasons which informed the landlord's refusal of the tenant's application to assign the tenancy (see para [6] above); and that the landlord had failed to have regard to factors which were *prima facie* relevant (see para [7] above). The court can find no basis upon which it ought to interfere in the conclusions reached by the sheriff. The sheriff's assessment was carried out by reference to the landlord's decision of 4 September 2019. Indeed, in many ways, it appears as if the sheriff carried out precisely the exercise required of him in terms of the statute, reaching a decision which was open to him on the evidence.

[31] The court has concluded that notwithstanding the error of approach by the sheriff, the conclusion reached by him was the correct one.

Disposal

[32] The questions posed for the opinion of the court will each be answered in the negative. The appeal will be refused and the decision of the sheriff adhered to.

Expenses

[33] The court was invited to reserve the question of expenses. Parties should make written submissions on that issue within 7 days of the date of this opinion.