



DECISION OF

Sheriff T Kelly

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

Mr Jagjiwan Singh Jhammat, Ms Prabhjot Kaur

Appellant

- and -

Mr Harry Morris
per Campbell McCartney Solicitors

Respondent

FTS Case reference: FTS/HPC/CV/21/0383

Glasgow, 2 July 2024.

Decision

The Upper Tribunal allows the appeal and remits the parts of the applications bearing reference numbers HPC/CV/21/0383 and HPC/CV/21/0384 contained in paragraphs 17 of the papers apart in each of the applications to the First Tier Tribunal for Scotland, Housing and Property Chamber to determine in light of this decision.

Introduction

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[1] Application was made to the First Tier Tribunal for Scotland, Housing and Property Chamber (“FTS”) alleging unlawful eviction. The respondent let to the appellants the property at 21 Strathmore Gardens, Glasgow. Damages were sought for unlawful eviction in terms of section 36 of the Housing (Scotland) Act 1988 (“the 1988 Act”). Two separate applications were submitted under references FTS/HPC/21/PR/0384 and FTS/HPC/CV/21/0383. These were dealt with as separate applications in respect of rules 69 and 70 of the First Tier Tribunal for Scotland, Housing and Property Chamber (Procedure) (Regulations) 2017 (“the 2017 Regulations”).

[2] The FTS decided that the appellant had been unlawfully evicted and awarded the sum of £22,000 in damages. It deducted a sum in respect of rent arrears. It refused the appellants’ claims in respect of other losses. These claims arise in both applications and are each buttressed by schedules and amount to a claim in the sum of £57,058.64. They were both rejected on the facts and no challenge is mounted against the FTS findings in this regard.

[3] The FTS found that the appellants were not entitled to recover further sums sought for inconvenience in light of what it construed as a statutory prohibition contained in section 36(5) of the 1988 Act.

Appeal

[4] The FTS refused permission to appeal to the Upper Tribunal on 19 November 2023. The Upper Tribunal granted permission on 15 February 2024 only in respect of ground of appeal 1.

Hearing: 21 May 2024

[5] The appellants’ Mr Jhammat and Mrs Kaur were personally present. The respondent was personally present and represented by Ms McCall, Advocate and Mr Campbell, solicitor.



Appellants

[6] The appellant Mr Jhammat adopted his note of argument and moved the Upper Tribunal to uphold the appeal and quash the decision of the FTS. The appellants contend that the two applications dealt with different causes of action. The application under rule 69 of the 2017 regulations was in respect of statutory damages arising from the loss of the right to occupy the premises. The application under rule 70 of the 2017 regulations dealt with the appellants' claim for payment in respect of damages for acts after the loss of the property such as loss of possessions, personal suffering and the like.

[7] The FTS erred when it decided it could not award statutory damages under section 36 of the 1988 Act and damages for inconvenience. Damages in respect of section 36 are separate from damages paid in respect of personal injury.

[8] The additional significant inconvenience caused as a result of the unlawful eviction was described as non-patrimonial loss – the loss of the use of home, loss of personal belongings (including medical equipment, religious items and items with emotional significance including photographs and jewellery). The move away from the family home caused the appellants' children disruption including additional travelling to school. An application for homelessness was made and the family stayed in hotels for five nights and then homeless accommodation which was unsuitable. The children were upset. They had lost toys and other items. The appellants' son received counselling. It was an embarrassing and unpleasant experience.

[9] This was a distinct from a claim for statutory damages under sections 36 and 37 of the 1988



Act. Liability to pay damages under section 36 is for the “loss of the right to occupy the premises”. There was no double recovery sought. The part of the decision of the FTS which effectively struck out the appellants’ claim for inconvenience in respect of these matters was an error of law and should be quashed.

Respondent

[10] Counsel for the respondent submitted that the decision of the FTS on this point was in accordance with current practice, consistent with the terms of section 36(5) of the 1988 Act and correct in light of the authorities.

[11] Reference was made to *Baral v Arif* 2020 HLR 11 and the explanation from the FTS about the choice between statutory damages and common law damages for unlawful eviction.

[12] Turning then to the statutory provisions, Counsel focused upon the liability to pay damages “in respect of...loss of the right to occupy the premises” under section 36(3) of the 1988 Act. Additional damages may be awarded for liability arising apart from sub-section (3), see 36(4). The current law was preserved by sub-section (5) in that the tenant or residential occupier can enforce a liability that arises apart from the operation of the section, again in respect of his loss of the right to occupy premises, subject to the following proviso:

“But damages shall not be awarded both in respect of such a liability and in respect of a liability arising by virtue of this section on account of the same loss”.

[13] The submission of the appellants that sought to draw a distinction between patrimonial and non-patrimonial losses did not have a foundation in the sub-section.

[14] Counsel then referred to *The Law of Leases in Scotland*, Rankine (3rd Ed.) and the operation of the common law in respect of unlawful eviction. Reliance was placed on *Nwokorie v Mason* 1994



26 HousLR 60, an English case dealing with a distinction between exemplary and aggravated damages, and *Smith v Khan* [2018] EWCA Civ 1137; 2018 HLR 31 dealing with the English common law tort of trespass and damages in respect of unlawful eviction.

[15] Counsel then referred to the two separate applications submitted by the appellants and dealt with under two separate references by the FTS. It was not correct to say one of these dealt with statutory damages arising from unlawful eviction and the other dealt with claims unconnected, or supplementary, to that wrong. The application of the statutory prohibition against double counting was to the parts of the applications where both appellants sought £10,000 damages in respect of what they termed was inconvenience. These were, properly understood, damages arising from the loss of the right to occupy. The appeal should be refused. In the event of the appeal being in part upheld, the matter should be remitted to a differently constituted Tribunal.

Reply

[16] Mr Jhammat stated that the appellants were directed to deal with the matters separately in separate applications. He submitted that damages under section 37 of the 1988 Act were different from the additional damages sought. This was the distinction between each of the applications. These were not damages sought in respect of the same loss.

Decision

Statutory provisions

[17] Section 36 of the 1988 Act provides:

“36 Damages for unlawful eviction.

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(1) This section applies if, at any time after 3rd December 1987, a landlord or any person acting on his behalf unlawfully deprives the residential occupier of any premises of his occupation of the whole or part of the premises.

(2) This section also applies if, at any time after 6th July 1988, a landlord or any person acting on his behalf—

(a) attempts unlawfully to deprive the residential occupier of any premises of his occupation of the whole or part of the premises; or

(b) knowingly or having reasonable cause to believe that the conduct is likely to cause the residential occupier of any premises—

(i) to give up his occupation of the premises or any part thereof; or

(ii) to refrain from exercising any right or pursuing any remedy in respect of the premises or part thereof,

does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence,

and, as a result, the residential occupier gives up his occupation of the premises as a residence.

(3) Subject to the following provisions of this section, where this section applies, the landlord shall, by virtue of this section, be liable to pay to the former residential occupier, in respect of his loss of the right to occupy the premises in question as his residence, damages assessed on the basis set out in section 37 below.

(4) Any liability arising by virtue of subsection (3) above—

(a) shall be in the nature of a liability in delict; and

(b) subject to subsection (5) below, shall be in addition to any liability arising apart from this section (whether in delict, contract or otherwise).

...

(5) Nothing in this section affects the right of a residential occupier to enforce any liability which arises apart from this section in respect of his loss of the right



to occupy premises as his residence; but damages shall not be awarded both in respect of such a liability and in respect of a liability arising by virtue of this section on account of the same loss.”

[18] As can be seen from cases such as *Baral*, it is open to aggrieved tenants who claim unlawful eviction to choose the statutory basis of claim under section 36 of the 1988 Act (and the computation of damages in accordance with section 37), or, alternatively, pursue a claim for damages at common law. It cannot do both. This is the effect of section 36(5).

[19] Statutory damages in respect of section 36(3) are those that arise “in respect of loss of the right to occupy the premises”. The preservation of the common law is provided for by sub-section (5). The prohibition against double counting or duplication of recovery in respect of the same loss is provided for in sub-section (5).

[20] Counsel for the respondent came to accept that, in the event that the respondent’s claim for loss of physical property (a claim in the sum of around £57,058.64) was a sound one, that must be on the basis that it did not arise from the loss of the appellants’ right to occupy the premises.

[21] The resolution of this appeal comes to a consideration of what was claimed by the appellant before the FTS and what the FTS decided about that. There were two separate applications before the FTS. They are to be found in the FTS bundle. There are papers apart in respect of each of the separate applications. They are similar though not identical.

[22] Under reference HPC/CV/21/0383, paragraph 17 of the paper apart says this:

“The exclusion of the applicants from the Subjects by the respondent is unlawful. It constitutes a breach of the express terms of the Tenancy Agreement, aforesaid. It is also unlawful at common law. As a result of the unlawful eviction the applicants have suffered loss and damage. The applicants seek damages under section 36(3) of the 1988 Act. Having regard to section 37 of the 1988 Act,



the applicants reasonably estimate their loss in that regard to be in the sum of £22,000. This sum has been sued for in a Rule 69 application which has been submitted to the Tribunal alongside the present application and which has been given the Tribunal reference FTS/HPC/PR/21/0384. Reference is made to the report by David A Ross, of Allied Surveyors Scotland PLC, which is produced. In implement of the unlawful eviction, the respondent (or Safe Lettings acting on his behalf) removed and disposed of the applicants' possessions with a value reasonably estimated to be in the sum of £57,058.64. The items lost are detailed on the schedule appended hereto. The applicants have been subjected to significant inconvenience as a result of the unlawful eviction. They suffered the loss of the use of their home. They suffered the loss of their personal belongings including loss of medical equipment, religious items, and items with emotional significance including photographs and jewellery. The children required to move away from their friends and are required to travel a longer distance to school. They required to make an application for homelessness assistance with the local authority, and were required to stay in hotels for five nights. They were then moved to homeless accommodation which was unsuitable for them. The applicants' children were very upset by what happened. They lost toys and other items which are important to children. The applicants' son (Bhramdeep) required to have counselling at school. The unlawful eviction was an embarrassing and unpleasant experience for the applicants. In respect of the significant inconvenience suffered by the applicants they claim damages in that respect in the sum of £10,000 each." (at pp.2220 – 2221)

[23] In respect of the other application, HPC/CV/21/0384 paragraph 17 of the paper apart says this:

"The exclusion of the applicants from the Subjects by the respondent is unlawful. It constitutes a breach of the express terms of the Tenancy Agreement, aforesaid. It is also unlawful at common law. As a result of the unlawful eviction the applicants have suffered loss and damage. The applicants seek damages under section 36(3) of the 1988 Act. Having regard to section 37 of the 1988 Act, the applicants reasonably estimate their loss in that regard to be in the sum of £22,000. Reference is made to the report by David A Ross, of Allied Surveyors Scotland PLC, which is produced. In implement of the unlawful eviction, the respondent (or Safe Lettings acting on his behalf) removed and disposed of the applicants' possessions with a value reasonably estimated to be in the sum of £57,058.64. The items lost are detailed on the schedule appended hereto. The



applicants have been subjected to significant inconvenience as a result of the unlawful eviction. They suffered the loss of the use of their home. They suffered the loss of their personal belongings including loss of medical equipment, religious items, and items with emotional significance including photographs and jewellery. The children required to move away from their friends and are required to travel a longer distance to school. They required to make an application for homelessness assistance with the local authority, and were required to stay in hotels for five nights. They were then moved to homeless accommodation which was unsuitable for them. The applicants' children were very upset by what happened. They lost toys and other items which are important to children. The applicants' son (Bhramdeep) required to have counselling at school. The unlawful eviction was an embarrassing and unpleasant experience for the applicants. In respect of the significant inconvenience suffered by the applicants they claim damages in that respect in the sum of £10,000 each." (at pp.2251 – 2252)

[24] The appellants characterised their claims in respect of these paragraphs as "significant inconvenience" and "inconveniences". These are also summarised at paragraph 8 of the appellants' note of argument in proceedings before the Upper Tribunal, where they are characterised as "inconvenience" and "non-patrimonial losses".

[25] The FTS dealt summarily with both of these parts of the applications by saying that they were claims caught by the prohibition against double counting. The part of FTS decision not to make any award in respect of the claimed sums for each of the appellants is brief. The FTS says this:

"v. The Applicants are not entitled to both statutory damages in terms of s36 (3) of the Housing (Scotland) Act 1988 in respect of their "loss of the right to occupy the premises " and common law damages for inconvenience due to the loss of occupation since that would amount to a double recovery and is prohibited by s36 (5) which provides that "damages shall not be awarded both in respect of such a liability and in respect of a liability arising by virtue of this section on account of the same loss.vi. The orders sought by the Applicants for an award

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of the sum of £10,000.00 to each Applicant in the Application with reference FTS/HPC/CV/21/0383 are therefore refused.”

[26] There is no analysis of the content of the paragraphs 17 in each of the papers apart. It must, however, have refused to make any award on the basis that these aspects of their claims were made up of damages arising from “the loss of the right to occupy premises”.

[27] Claims in respect of inconvenience are claims that arise from the loss of the right to occupy the premises. That the appellants claimed homelessness, and their treatment in that regard, flows from the fact that they no longer have the property they let from the respondent as their home. The same may be said for upset and increase in traveling to and from (presumably different) schools experienced by the children. The embarrassment and unpleasant experience – not further specified – can be inferred to refer to those experiences which too must have arisen from the fact that the rental property the appellants occupied is no longer available.

[28] The same cannot be said for the physical moveable property mentioned in each of paragraphs 17 - medical equipment, religious items, photographs, jewellery and toys. It might be said that these ought to have been included in the schedule that amounted to a claim for £57,058.64. There were items of jewellery in that schedule together with photographs. Religious photos and books are also on the schedule. Neither medical equipment nor toys are mentioned.

[29] The respondent concedes that the appellants’ claim – of some £57,058.64 - relating to the loss of their moveable property is not covered by the prohibition against double counting. It is accepted that such a loss is not a loss that arises by virtue of the appellants’ “loss of the right to occupy premises”.

[30] The FTS approached the matter on the basis that only one of the applications contained a



claim for inconvenience, FTS/HPC/CV/21/0383 – see finding in fact and law v. The paper apart in both applications had such claims; there must be an element of overlap. However, those parts of paragraph 17 in the papers apart in each of the applications go on to deal with claims for loss of moveable property ought to have been the subject of separate determinations.

[31] Those parts of the claim forms ought to have been the subject of a decision from the FTS. There has been no individual consideration of them. That failure amounts to an error of law.

[32] In all the circumstances I direct that those parts of the appellants' claim be remitted to the FTS for a determination on each of the items claimed there. It appears that at least some of those matters may not be caught by the prohibition contained in section 36(5) of the 1988 Act.

[33] The FTS decision and fact finding in respect of the claim for damages for £22,000 and the rejection of the claim in respect of the loss of property in the sum of 57,058.64 is unaffected.

Conclusion

[34] The parts of each application where section 36(5) of the 1988 Act does not prohibit recovery of loss (paragraphs 17) are remitted to the FTS to determine upon.

Sheriff 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

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or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.