

SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY AT
DUMFRIES

[2019] SC DUM 40

DUM SD 23-19

NOTE NO 3 BY SHERIFF GEORGE JAMIESON

in the cause

JAMES TAYLOR REID and ROBERT KIRKLAND REID

Pursuers

against

SIAN REDFERN (Assisted Person)

Defender

Act: Shields

Alt: Latham

Jurisdiction (*forum competens*) in section 23 actions

[1] I have written this Note in response to further submissions from parties' agents on the question as to whether the First Tier Tribunal or the sheriff is the competent *forum* in respect of an action of removing under section 23 of the Rent (Scotland) Act 1984 ("the 1984 Act") (originally section 32 of the Rent Act 1965, "the 1965 Act"). For ease of reference, I shall refer to these types of proceeding in this Note as "section 23 actions".

The answer

[2] The short answer in respect of the present section 23 action is "the sheriff"; the print of section 23(1) of the 1984 Act in the Parliament House Book ("PHB") appears to be in error by stating the First Tier Tribunal has jurisdiction.

[3] There is also an apparent error in relation to the text of section 25(1) as printed in PHB, which omits the definition of the expression “the court” used in section 23(1) of the 1984 Act.

Explanation for these opinions

[4] The explanation for these opinions is somewhat complex.

Amendments to Part III of the 1984 Act relating to *forum competens*

[5] The competent *forum* for jurisdiction in section 23 actions has consistently been “the court” as set out in section 23(1) of the 1984 Act (originally section 32(1) of the 1965 Act).

[6] However, the Housing (Scotland) Act 2014 (“the 2014 Act”) made provision for amendment of Part III of the 1984 Act, which appeared to have the effect of transferring the *sheriff’s* jurisdiction in respect of section 23 actions to the First Tier Tribunal. These amendments were as follows.

[7] Paragraph 7 of schedule 1 provided for amendment of section 23(1) of the 1984 Act so as to provide that the owner could not enforce his right to recover possession from the former tenant or, in relation to a Part VII contract, the person having the right to use the dwellinghouse under the Part VII agreement “otherwise than by proceedings in the First Tier Tribunal” (i.e substituting “First Tier Tribunal” for “court”).

[8] The 1965 Act defined the expression “the court” as used in section 32(1) of the 1965 Act and the 1984 Act defined the expression “the court” as used in section 23(1) of the 1984 Act as meaning “the sheriff” (section 35(1)(b), 1965 Act, section 25(1), 1984 Act). Paragraph 9 of schedule 1 of the 2014 Act provided for the repeal of the section 25(1) definition of “the court”.

[9] Section 36 of the 1965 Act provided that the requirement in section 32(1) of the 1965 Act for “the taking of proceedings in the court for the recovery of possession” bound the Crown.

[10] Section 26 of the 1984 Act also provided that the requirement in section 23(1) of the 1984 Act for “the taking of proceedings in the court for the recovery of possession” bound the Crown.

[11] Paragraph 10 of schedule 1 of the 2014 Act provided for the amendment of section 26 of the 1984 Act so that the reference to “court” was substituted by a reference to “the First Tier Tribunal”.

[12] As so amended, section 26 reads: “In so far as this Part of this Act requires the taking of proceedings in the First-tier Tribunal for the recovery of possession or confers any powers on the Tribunal, it shall be binding on the Crown”.

[13] Section 27 of the 1984 Act reinforced the definition of “the court” as meaning the sheriff by providing:

“Where an application is made to the sheriff for an order under this Part of this Act, it shall be made by way of summary cause within the meaning of the Sheriff Courts (Scotland) Act 1971”.

[14] Paragraph 11 of schedule 1 of the 2014 Act provided for the repeal of section 27 of the 1984 Act.

[15] In 1976, summary cause procedure superseded the former summary procedure for recovery of possession of dwellinghouses in the sheriff court under the Small Debts (Scotland) Acts 1837 to 1899.

[16] Accordingly, while there was no direct equivalent of section 27 in the 1965 Act, section 45 of that Act did provide for actions of removing under section 32(1) of the 1965 Act

to be brought under the provisions of the Small Debts (Scotland) Acts 1837 to 1899 for summary removing in the sheriff court.

[17] Section 25(2) of the 1984 Act (which replaces section 35(2) of the 1965 Act) provides that nothing in Part III of the 1984 Act affects any jurisdiction of the Court of Session in relation to actions of removing.

[18] Section 102(3) of the 1984 Act originally provided however that if the pursuer brought a section 23 action in the Court of Session rather than before the sheriff, then the pursuer was not entitled to any expenses.

[19] Paragraph 24(d) of schedule 1 to the 2014 Act provided for amendment of section 102(3) of the 1984 Act so as to read:

“If under any provision of this Act a person takes proceedings in the Court of Session which he could have taken before the First-tier Tribunal, he shall not be entitled to recover any expenses”.

Pursuers’ submissions on *forum competens*

[20] The pursuers’ agent first referred me to section 16(1) of the 2014 Act which had the purpose of transferring from the sheriff to the First Tier Tribunal “the functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements”: (a) regulated tenancies under the 1984 Act; (b) Part VII contracts under the 1984 Act; and (c) assured tenancies under the Housing (Scotland) Act 1988.

[21] She then referred me to section 16(3) of the 2014 Act, providing that schedule 1 to that Act “makes minor and consequential amendments”. She submitted that those “minor and consequential” amendments could relate *only* to the transfer from the sheriff to the First Tier Tribunal of jurisdiction in relation to regulated and assured tenancies and Part VII contracts (the “occupancy agreement” referred to in section 16(1)), and therefore those amendments

could not have the effect of making any *other* transfer of jurisdiction from the sheriff to the First Tier Tribunal.

[22] She then referred me to the provisions of The Housing (Scotland) Act 2014 (Commencement No. 7, Amendment and Saving Provision) Order 2017 (SSI 2017, No. 330) (“the Commencement Order”), in relation to the amendments effected by schedule 1 of the 2014 Act to Part III of the 1984 Act previously discussed in this Note.

[23] She referred in particular to the schedule to the Commencement Order which brought section 16(3) of the 2014 Act into force *only* in relation to paragraphs 1 to 6, 8 and 10 to 48 of schedule 1 on 1 December 2017.

[24] She noted that the Commencement Order had brought paragraph 7 (amendment of section 23(1) of the 1984 Act) into force on 1 December 2017 *only* for “the purpose of proceedings in relation to a regulated tenancy... and an assured tenancy...”, and therefore submitted that as section 23(1) of the 1984 Act had only been amended in respect of these types of proceedings, it had no application to the present case.

[25] Finally, she referred to the Explanatory Note to the Commencement Order which explained the purpose of paragraph 7 of schedule 1 to the 2014 Act as follows:

“The third entry in the table in the schedule commences paragraph 7 of schedule 1 of the Act only for the purpose of proceedings in relation to a regulated or assured tenancy. Paragraph 7 makes a consequential amendment to section 23(1) (prohibition of eviction without due process of law) of the Rent (Scotland) Act 1984. As section 23 applies to various types of tenancy and excepts others, including Part VII contracts, it is commenced only in relation to those types of tenancy in respect of which jurisdiction is transferring to the First Tier Tribunal for Scotland.”

Defender's submissions on *forum competens*

[26] The defender's position was to the effect it was for the First Tier Tribunal to determine this question under section 102(A1) of the 1984 Act. I repelled that plea for the reasons given in my second Note in this case.

Discussion

[27] I am of the opinion that that schedule 1 to the 2014 Act has amended Part III of the 1984 Act in certain important respects.

[28] Thus, paragraph 10 has amended section 27, to refer to the First Tier Tribunal instead of the sheriff, in the context of section 23 binding the Crown; paragraph 11 has repealed section 27 requiring section 23 actions to be brought under summary cause procedure in the sheriff court; and paragraph 24(d) has amended section 102(3) to provide that a person who raises a section 23 action in the Court of Session which he could have taken before the First-tier Tribunal shall not be entitled to recover any expenses in the Court of Session.

[29] Yet the schedule has *not* been fully commenced. Paragraph 9 (repeal of section 25(1) definition of "the court" as used in section 23(1)) has not been commenced at all, while paragraph 7 (amendment of section 23(1) to substitute "First Tier Tribunal" for "court") has been brought into force only for the purposes of proceedings in relation to regulated and assured tenancies.

[30] What is to be made of this seeming puzzle?

[31] First, it should be noted that section 23 applies to Part VII contracts. This may not be immediately clear on a first reading of section 23(1), but there can be little doubt about this because reference to Part VII contracts was inserted into section 32(1) of the 1965 Act by section 42 of the Tenants' Rights, Etc (Scotland) Act 1980 ("the 1980 Act"), the heading to

which confirms “prohibition of eviction without due process of law” was to apply to Part VII contracts.

[32] Part II of the 1984 Act is a consolidating measure and therefore section 23(1) is in the same terms as section 32(1) of the 1965 Act as amended *inter alia* by section 42 of the 1980 Act. The Commencement Order did not commence the transfer of jurisdiction for part VII contracts, so ostensibly section 23 actions in respect of these contracts are not transferred from the court to the First Tier Tribunal.

[33] This may either have been a mistake (it will be recalled from paragraph [25] of this Note that the Explanatory Note to the Commencement Order states that these contracts *are excluded* from the scope of section 23), or, as these contracts are no longer capable of being entered into and are unknown in modern practice, it was considered unnecessary to transfer this jurisdiction from the court to the First Tier Tribunal.

[34] I also find it difficult to understand why jurisdiction in respect of section 23 actions relating to regulated tenancies was transferred to the First Tier Tribunal. My reading of section 23(1) is that the section applies:

“Where any premises have been let as a dwelling under a tenancy which is *not* a statutorily protected tenancy within the meaning of this Part of this Act” (emphasis added).

[35] Section 25(1) defines “statutorily protected tenancy” as including a “protected tenancy” under the 1984 Act. A regulated tenancy is a protected tenancy, or a statutory tenancy which replaces it upon termination; in both cases, the landlord needs an order from the First Tier Tribunal to evict the tenant, so it is not clear what scope section 23 has for applying to such tenancies.

[36] The Commencement Order appears therefore to have transferred jurisdiction to the First Tier Tribunal in respect of protected tenancies, but this seems to make no sense as protected tenancies are excluded from the scope of section 23.

[37] Similar considerations apply in respect of assured tenancies. On termination of the contractual tenancy, a statutory tenancy comes into existence, and the landlord may only recover possession of the dwellinghouse on an order for eviction from the First Tier Tribunal. Section 23 seems to have no practical relevance to assured tenancies, yet the Commencement Order applies section 23 to such tenancies.

[38] But, whatever the relevance of section 23 to regulated tenancies, Part VII contracts and assured tenancies, I ultimately agree with the pursuers' agent that there has been *no* transfer of jurisdiction from the sheriff to the First Tier Tribunal where the proceedings do not relate to a regulated or assured tenancy.

[39] First, her submissions on *forum competens* seem compelling, notwithstanding the difficulties involved in attempting to understand the Commencement Order's partial commencement of paragraph 7 of schedule 1 to the 2014 Act.

[40] Secondly, if there is any doubt in the matter, the presumption in law against transfer of jurisdiction from the sheriff to a statutory tribunal which I discussed in my Note No. 2 in this case applies to any consideration of these commencement provisions.

[41] On considering whether the presumption in favour of the sheriff retaining jurisdiction in section 23 actions other than those relating to regulated or assured tenancies has been redargued by anything in schedule 1 to the 2014 Act or the Commencement Order, I have taken into account apparent considerations to the contrary. However, in my opinion these considerations are not sufficiently compelling to infer that a contrary intention should be inferred from section 16 of the 2014 Act and the Commencement Order.

[42] First, section 27 relating to summary cause procedure in the sheriff court has been repealed.

[43] Secondly, the requirement that the Crown is bound by section 23 where it must bring proceedings in the First Tier Tribunal in terms of amended section 27 seems to remove the similar protection where the action requires to be brought before the sheriff.

[44] Thirdly, the substitution of the First Tier Tribunal for the sheriff in section 102(3) seems to remove the protection against an award of expenses if the owner brings proceedings in the Court of Session where the section 23 action is to be brought before the sheriff.

[45] In my opinion, the first of these considerations is not conclusive as to a transfer of jurisdiction to the First Tier Tribunal. This is a procedural provision only, not a jurisdictional provision (as was section 45 of the 1965 Act), and an unnecessary one at that as section 32 of the Sheriff Courts (Scotland) Act 1971 requires summary cause procedure in any event.

[46] Further, while the second and third considerations may appear to point to a complete transfer of jurisdiction to the First Tier Tribunal, they could in my opinion be interpreted as applying the amendments *only* to section 23 actions in the First Tier Tribunal, thus leaving these protections unamended and extant in the case of section 23 actions in the sheriff court.

[47] Finally, as the section 25(1) definition of “the court” has *not* been repealed by the Commencement Order, I conclude that the Parliament’s intention must have been to preserve jurisdiction in respect of section 23 actions in the sheriff court which did not relate to regulated or assured tenancies.

[48] Notwithstanding the apparent error in the Explanatory Note to the Commencement Order about Part VII orders being exempted from section 23 of the 1984 Act, the Note does

confirm the Parliament's intention to restrict the transfer of jurisdiction from the sheriff to the First Tier Tribunal only in respect of regulated and assured tenancies.

Result

[49] I conclude that the sheriff retains jurisdiction in respect of section 23 actions other than those relating to regulated or assured tenancies, which jurisdiction has been transferred to the First Tier Tribunal since 1 December 2017.

[50] I shall arrange a further hearing for parties' agents to address me on further orders in the case in light of these conclusions.

Postscript

[51] I think a far better method might have been employed to give effect to the Parliament's intention to transfer jurisdiction from the sheriff to the First Tier Tribunal in respect of section 23 actions relating to regulated and assured tenancies.

[52] It appears anomalous to me that that the sheriff retains jurisdiction in respect of section 23 actions relating to Part VII agreements even if the retention of such jurisdiction is not likely to be of much practical effect.

[53] It also appears pointless to me to have extended the section 23 protection to regulated and assured tenancies as tenants of these tenancies have other statutory protections available to them against eviction without an order of the First Tier Tribunal.

[54] Section 16(1) of the 2014 Act transfers the sheriff's civil jurisdiction to the First Tier Tribunal in respect of regulated tenancies, assured tenancies and Part VII contracts in any event, so if there are found to be any residual situations covered by section 23, the First Tier Tribunal would deal with these under the general transfer of jurisdiction,

[55] The irony is that section 23 is in reality only needed for those few types of tenancies of dwellinghouses where there is no other statutory form of protection and which are out with the jurisdiction of the First Tier Tribunal in the first place.

[56] In my opinion, it would have been far simpler to have effected the transfer of jurisdiction from the sheriff to the First Tier Tribunal by:

- (i) Including assured tenancies within the section 25(1) definition of “statutorily protected tenancy” (*cf* sections 8(a) and (e) of the Protection from Eviction Act 1977 as respect England and Wales) and thereby excluding them from the scope of Part III of the 1984 Act, and
- (ii) Changing the definition of “court” in section 25(1) to read “the sheriff or, in the case of regulated tenancies or Part VII contracts, the First Tier Tribunal”.

[57] Further useful amendments would be to replace the reference to the First Tier Tribunal with a reference to “the court as defined in section 25(1) of this Act” in sections 27 and 102(3) of the 1984 Act (binding the Crown and no expenses to the pursuer if the section 23 action is brought in the Court of Session).

[58] I note that in terms of section 102 of the 2014 Act:

- (1) The Scottish Ministers may by order make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, any provision made by or under this Act.
- (2) An order under subsection (1) may modify any enactment (including this Act).

[59] It may therefore be appropriate for the Scottish Ministers to consider rectifying these issues by means of such an Order.

[60] Finally, if the conclusions I have reached in this judgment are correct, then I would respectfully suggest that the print of sections 23 and 25(1) of the 1984 Act in the PHB appears to be in error - section 23(1) for substituting "First Tier Tribunal" for "court", and section 25(1) for omitting the definition of "the court". Consideration might therefore be given by the editors of the PHB to suitable changes to the print of these provisions of the 1984 Act.