



SHERIFF APPEAL COURT

**[2022] SAC (Civ) 34
GLW-CA108-21**

Sheriff Principal C D Turnbull
Sheriff Principal D C W Pyle
Appeal Sheriff D J Hamilton

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in appeal by

24 DRURY STREET LIMITED

Pursuer and Respondent

against

BRIGHTCREW (MANAGEMENT) LIMITED

Defender and Appellant

Pursuer/Respondent: A Jones KC, (sol adv); Brodies LLP

Defender/Appellant: Lindsay KC; TLT LLP

2 December 2022

Introduction

[1] The pursuer and respondent (“the landlord”) acquired the landlord’s interest in a lease dated 27 September 2006 (“the lease”), whereby the defender and appellant (“the tenant”) leased the premises at Renfield Street and Drury Street, Glasgow. It is a matter of admission that as at 13 November 2020 the tenant was in arrears of rent totalling £63,166.67.

[2] On 13 November 2020, the solicitors then acting on behalf of the landlord gave notice to the tenant relative to the non-payment of rent. Insofar as material for present purposes, the notice (“the 13 November notice”) is in the following terms:

“We hereby GIVE NOTICE on behalf of the Landlord that you are required to make payment of the arrears within 14 weeks of the day of service upon you of this Notice.

If you fail to comply with the terms of this Notice, which is served in accordance with Clause 6(a) of the Lease and Sections 4 and 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, the Lease may be terminated.”

[3] As at 24 February 2021 payment of the outstanding rent had not been made. On that date, the solicitors then acting on behalf of the landlord gave notice to the tenant that the lease was irritated with immediate effect. The tenant was required to remove from the property. They declined to do so.

[4] The landlord commenced proceedings against the tenant seeking declarator that the tenant had incurred an irritancy of the lease and that the parties thereto and their successors were no longer bound thereby; and to ordain the tenant to remove from the premises.

[5] After sundry procedure the sheriff at Glasgow heard the parties in debate. The sheriff subsequently sustained certain pleas-in-law for the landlord and excluded from probation the tenant’s averments which, read short, challenged the validity of the 13 November notice; and asserted that the 13 November notice had been superseded by a subsequent notice given on behalf of the landlord; and repelled the tenant’s general plea to the relevancy and specification of the landlord’s averments and their specific pleas directed to the validity of the 13 November notice. Having done so, the sheriff allowed a proof before answer, in effect, to determine whether the irritancy was purged by the tenant; and whether the landlord had waived any right to irritate the lease.

The Lease

[6] Clause 6(a) of the lease is in the following terms:

“Subject to the provisions of The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 as amended, if the Rent or any other sum payable hereunder is at any time in arrears (whether demanded or not in the case of Rent), or breaches any of its obligations without remedying them within such reasonable period (being fourteen days only for payment of arrears of Rent or other monies) as the Landlord specifies in a notice requesting the remedy of such breach or if the Tenant becomes insolvent or apparently insolvent, is sequestrated, makes any arrangement with creditors, goes into liquidation, receivership or is managed by an administrator or, being a company with unlimited liability applies for limited liability or vice versa, then and in any such event, the Landlord may notify the Tenant and bring the Lease to an end forthwith and repossess the Premises, but without prejudice to any subsisting rights and claims of the Landlord under the Lease, such irritancy not being purgeable at the Bar; Provided that:

(a) in the case of a breach which is capable of being remedied the Landlord shall not be entitled to terminate this Lease as aforesaid until it shall first have given notice of the breach to the Tenant and to every creditor in any then existing standard security affecting this Lease which has been notified to the Landlord prescribing a time which in the opinion of the Landlord is reasonable in the circumstances within which such breach must be remedied and the Tenant or any such creditor shall have failed to remedy the breach within the time limit prescribed in the notice (declaring that where the breach is the failure to pay any sum of money a reasonable time shall be a period of fourteen days); and ...”

Clause 8 of the lease provided that any notice in terms of the lease must be in writing and is treated as served 48 hours after posting if served by recorded delivery post.

[7] In so far as relevant for the purposes of this appeal, section 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 is in the following terms:

“4. — Irritancy clauses etc. relating to monetary breaches of lease.

(1) A landlord shall not, for the purpose of treating a lease as terminated or terminating it, be entitled to rely —

(a) on a provision in the lease which purports to terminate it, or to enable him to terminate it, in the event of a failure of the tenant to pay rent, or to make any other payment, on or before the due date therefor

or such later date or within such period as may be provided for in the lease; or

(b) on the fact that such a failure is, or is deemed by a provision of the lease to be, a material breach of contract, unless subsection (2) or (5) below applies.

(2) This subsection applies if—

(a) the landlord has, at any time after the payment of rent or other payment mentioned in subsection (1) above has become due, served a notice on the tenant—

(i) requiring the tenant to make payment of the sum which he has failed to pay together with any interest thereon in terms of the lease within the period specified in the notice; and

(ii) stating that, if the tenant does not comply with the requirement mentioned in sub-paragraph (i) above, the lease may be terminated; and

(b) the tenant has not complied with that requirement.

(3) The period to be specified in any such notice shall be not less than—

(a) a period of 14 weeks immediately following the service of the notice; or

(b) if any period remaining between the service of the notice and the expiry of any time provided for in the lease or otherwise for the late payment of the sum which the tenant has failed to pay is greater than 14 weeks, that greater period.

(3A) ...

(3B) ...

(4) Any notice served under subsection (2) above shall be sent by recorded delivery and shall be sufficiently served if it is sent to the tenant's last business or residential address in the United Kingdom known to the landlord or to the last address in the United Kingdom provided to the landlord by the tenant for the purpose of such service."

Ground of Appeal

[8] The tenant appeals to this court against the sheriff's decision on the ground that the notice was invalid because it failed to specify the actual date when the 14 weeks expired, bearing in mind, first, the provision in the lease about deemed service and, secondly, the rule on the computation of time when the word "within" was employed in the specification of a period.

[9] During the course of his submissions, senior counsel for the tenant accepted that the correct course, in accordance with the well-known line of authority on the construction of notices of irritancy, was to identify whether the notice meets the strict requirements for formal validity and, only if it does, should the court go on to construe the meaning of the notice by use of the device of the reasonable person in the position of the contractually specified recipient (*West Dunbartonshire Council v William Thompson and Son (Dumbarton) Ltd* 2016 SLT 125). He submitted that the failure to specify the actual date of expiry of the period went to the fundamental or formal validity of the notice.

Decision

[10] We have no difficulty in rejecting the ground of appeal. The short answer is that neither the Act nor the irritancy clause in the lease requires the landlord to specify the start date or the end date of the 14 week period. Instead, the Act merely requires that "the period" be specified (section 4(3) and 4(3)(a)). We agree with senior counsel for the landlord that the function of clause 8 of the lease, that service occurs 48 hours after posting, is simply to allow the parties to calculate when service occurs in order to calculate the beginning and the end of the 14 week period. We acknowledge that in the computation of time when something is specified to be done "within" a period it means that the first and last days are

excluded (*Esson Properties Ltd v Dresser UK Ltd* 1997 SC 304). But that does not affect the validity of the notice in this appeal given that it complies with the strict terms of the Act in its employment of the word “within”.

[11] During the course of the hearing, a question arose as to whether a requirement to pay “within 14 weeks of the day of service” complied with the statutory requirement to give not less than 14 weeks’ notice. The court was addressed by parties on this issue. We accept that there is an underlying tension in section 4 of the Act: it requires the landlord to serve a notice “requiring the tenant to make payment of the sum which he has failed to pay together with any interest thereon in terms of the lease *within* the period specified in the notice” (section 4(2)(a)(i)) but then goes on to specify the “period” as, *inter alia*, the “period to be specified in any such notice shall be not less than a period of *14 weeks* immediately following the service of the notice” (section 4(3)(a)) [italics added].

[12] The same tension appears in the Scottish Law Commission report (Scot. Law Com No. 75) which was the forerunner of the Act (para 4.3):

“We remain of the view that in cases of default by a tenant in the making of monetary payments (whether of rent or otherwise) where a minimum period for remedy of the default can be prescribed by legislation, a statutory procedure of the kind we originally envisaged is the most appropriate means for protecting the tenant. We have given careful consideration, in the light of consultation, to what the prescribed period should be and have come to the view that the relevant notice should specify a period of not less than 14 days from the date of its service. We therefore recommend that, where there is default in the making of a monetary payment under a lease, the landlord should not be entitled to rely on such default as grounds for termination of the lease unless he has given the tenant written notice specifying *a period of not less than 14 days* for the remedying of the default in payment and stating that, unless the default is remedied *within the period specified*, irritancy may result.” [italics added]

That would suggest that the Commission did not have regard to the distinction to be made between the two terms. Be that as it may, the case law emphasises that such notices should be construed strictly, given the potential for harsh financial consequences of an irritancy.

However, the other side of that coin is that a landlord must be careful to ensure that the notice complies strictly with the terms of the statute, no matter any tension within it.

[13] In our opinion, the notice in this case does comply with the irritancy clause in the lease and the requirement to comply with the Act, in that it correctly identifies – and repeats – the term “within” and the “period”. That this has the potential to cause confusion in the mind of the tenant (although it is by no means a given that the tenant’s legal advice will point to such) is a consequence of the Act, not the notice. Whether the potential inconsistency within the Act will be judicially resolved is a matter for another day – indeed it will arise only in the event that a tenant leaves payment of arrears of rent until the very last moment.

[14] We will refuse the appeal. The appellant will be found liable to the respondent in the expenses occasioned thereby. We shall certify the appeal as suitable for the employment of senior counsel.