



JUDGMENT BY

**SHERIFF O'CARROLL
JUDGE OF THE UPPER TRIBUNAL**

**IN THE APPEAL AGAINST A
DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND
IN THE CASE OF**

Mr Andrew Brown, Grooms, Glen Estate, Innerleithen, EH44 6PX

Appellant

- and -

Glen Settlement Trust, Glen House, Innerleithen House, Scottish Borders, EH44 6PX

Respondent

FTS Case Reference: FTS/HPC/RS/22/4108

2 November 2023

Decision

The appeal by the Appellant against the decision of the FTS dated 16 March 2023 is dismissed.

Reasons

1. *Introduction.* This is an appeal by the appellant against a decision of the FTS dated 16 March 2023 not to make a determination of rent, the appellant having made a referral by way of



Form AT4 dated 10 November 2022 to the FTS for a determination of rent applicable to his short assured tenancy (“SAT”) under section 34(1) of the Housing (Scotland) Act 1988 (“the 1988 Act”). The reason for the decision was that on the basis of the material before it the FTS was unable to decide that the rent payable for the SAT was significantly higher than the rent that the landlord might be expected to obtain under that tenancy having regard to the level of rents payable under assured tenancies in the locality. In other words, the statutory test which would have entitled the FTS to make a determination of rent of a SAT under section 34 of the 1988 Act (which might loosely be termed a fair market rent) was not met.

2. *Grounds of permission to appeal.* The appellant sought permission to appeal against that decision on two bases. First, the FTS relied on material as to comparable rents charged by the landlord locally, some of which was provided confidentially to the FTS by the respondent, but not to him. That he said was unfair. Second, his tenancy was in law and fact an assured tenancy, not a SAT. The FTS granted permission to appeal on ground 1 but not ground 2.
3. The Appellant renewed his application for permission to appeal on ground 2 to this Upper Tribunal at a hearing in July 2023. That application for permission to appeal was the sole matter raised for decision at that hearing. That ground was abandoned after discussion at the hearing, the Appellant accepting that whatever the merits of such an argument, insisting on such a ground would be self-defeating since section 34 references may only be made in respect of a SAT, not an assured tenancy. In any event, in my opinion there was no discernible error of law on the part of the FTS in treating the tenancy as a SAT.
4. This Upper Tribunal issued its decision together with written reasons on the application for leave to appeal on 27 July 2023 and fixed further procedure including a hearing on the single ground of appeal.
5. *The competency issue.* In the course of preparing for that appeal hearing, examining all the material before the FTS as well as before the Upper Tribunal, I noticed an issue of competency, going to jurisdiction, which had not been taken either before the FTS or on



appeal. Matters of jurisdiction are *pars judicis*, that is, may always be taken note of by a court or tribunal even if not raised by the parties. That issue is as follows.

6. It appears from the certificate dated 22 November 2022 made by a FTS Chairperson who considered the Appellant's application for a reference under section 34 of the 1988 Act at a sift and allowed it to proceed to a FTS hearing, that the date of the Appellant's application to the FTS, by form AT4, was 10 November 2022. It also appears that the application was received by the FTS the following day, 11 November 2022. 11 November 2022 is therefore the date that the application was "made" to the FTS.
7. Unfortunately, it appears that neither that Chairperson, nor the FTS which determined the application noticed that section 34 of the 1988 Act was treated as repealed (in effect, suspended) with effect from 28 October 2022 by schedule 1, paragraph 2(7) to the Cost of Living (Tenant Protection) (Scotland) Act 2022 ("the 2022 Act"). Neither of the parties noticed that either. The 2022 Act was said to be an emergency measure passed by the Scottish Parliament. That Act introduced major changes to the statutory regimes governing housing in the private rented sector, including the introduction for the first time in the modern age of a "rent cap". Being an emergency measure, the 2022 Act was time limited: see section 7(1). Part 1 of the 2022 Act (which deals with the rent cap and associated statutory changes) was due to expire on 31 March 2023. That date of expiry was extended to 30 September 2023 by Regulations made in March 2023 (SSI 2023/82). It was extended once more on 27 September 2023 by Regulations (SSI 2023/275) so that the current expiry date of Part 1 of the 2022 Act is now 31 March 2024. Therefore, since 28 October 2022, section 34 of the 1988 Act is to be treated as repealed until 31 March 2024. Section 34 of the 1988 Act would revive on 1 April 2024, unless the Scottish Parliament were to legislate further.
8. The deemed repeal of section 34 was subject to various savings (in other words, exceptions). They include Schedule 1(2) 2(b) of the 2022 Act which provides that the modifications to the 1988 Act (including the deemed repeal of section 34) have no effect in relation to an application under section 34(1) of the 1988 Act made to the FTS before the day on which



- the paragraph came into force. That paragraph came into force on 28 October 2023 (by virtue of section 13(1) of the 2022 Act (the date of the Royal Assent being 27 October 2022)).
9. The result of that saving is that any application or reference made before 28 October 2022 to the FTS relying on section 34 of the 1988 Act was protected. Any such application could continue to be determined by the FTS (and by the UT on appeal) notwithstanding the deemed repeal of section 34 by the 1988 Act. So far as I am aware, no publicity was given to this ancillary effect of the emergency legislation.
 10. Unfortunately in this case the appellant, for understandable reasons not knowing the effect of the 2022 Act, delayed his application for a reference to the FTS. He says that he was trying to negotiate with the landlord respondent regarding the notice of rent increase which he received in mid-August 2022. The respondent too, understandably, had no inkling that the legislation had that effect. Be that as it may by the time that the Appellant made the application to the FTS relying on section 34, that section had been deemed repealed and he can no longer rely on it. The application was therefore incompetent and the FTS did not have jurisdiction to determine the application.
 11. *The result.* On noticing this, before the hearing on the appeal, I issued directions setting out this analysis and giving the parties the opportunity to take advice and to make submissions at the following appeal hearing. I gave notice that I would consider reviewing the terms of my earlier decision regarding leave to appeal in the light of this new matter under Rule 30 following submissions on this matter.
 12. At the appeal hearing, the appellant, having taken legal advice, conceded that his appeal was bound to fail for the reasons I refer to above. The respondent, not having taken legal advice on the matter, took a neutral position but did not oppose dismissal of the appeal on this ground.
 13. On reconsidering the legislation, my opinion remains the same. That is, the emergency legislation introduced to the Scottish Parliament with the ostensible aim of assisting tenants facing financial pressures had the effect, intentionally or otherwise, of removing the right of tenants under SATs to have a fair market rent fixed under section 34 of the 1988 Act with



effect from 28 October 2022, subject to savings for existing applications. The appellant's reference to the FTS having been made after that date, the FTS had no jurisdiction to consider it.

14. It follows then that the appeal must be dismissed and I do so.
15. It follows then that the single ground of appeal mounted by the appellant does not fall for determination by this Upper Tribunal and I make no findings as regards the soundness or otherwise of that ground of appeal; save to say that the ground would have been very arguable in my view.

Any party aggrieved by this decision may seek permission to appeal to the Court of Session. Such an appeal may only be on a point of law. A party wishing to appeal must apply for permission to do so from the Upper Tribunal. Permission to appeal must be applied for within 30 days of the date on which this decision was sent to a party. Any request for permission to appeal to the Court of Session 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) in terms of section 50(4) of the Tribunals (Scotland) Act 2014, state the important point of principle or practice that would be raised in the further appeal or any other compelling reason there is for allowing a further appeal to proceed.

Member of the Upper Tribunal