Neutral Citation Number: [2024] UKUT 53 (LC)

Case No: LC-2023-583

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: CH1/29UQ/MNR/2023/0078

21 February 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RENT DETERMINATION – assured tenancy – assured shorthold tenancy – statutory tenancy – juridciation of the First-tier Tribunal under section 14 of the Housing Act 1988

BETWEEN:

SALVATION ARMY HOUSING ASSOCIATION

Appellant

-and-

PHILIP KELLEWAY

Respondent

Flat 9, Charles Court,
Pembury Road,
Tunbridge Wells,
Kent

Upper Tribunal Judge Elizabeth Cooke
Determination by written representations

Mr Sam Phillips for the appellant, instructed by Devonshires Solicitors.

The following cases are referred to in this decision:

London District Properties Management Limited v Goolamy [2009] EWHC 1367 (Admin)

Prudential Assurance Co Ltd v London Residuary Body [1992] 2 AC 386

Introduction

1. This is an appeal, not from a decision of the First-tier Tribunal ("the FTT"), but from its reasoning in reaching that decision. It is brought by the Salvation Army Housing Association, and the respondent is the appellant's tenant, Mr Philip Kelleway. The appeal has been decided under the Tribunal's written representations procedure, and the appellant's representations were drafted by Mr Sam Phillips of counsel.

The legal background

2. Two areas of law are relevant to this appeal. The first is the nature of an assured tenancy, and the second is the rent control procedure in sections 13 and 14 of the Housing Act 1988.

Assured tenancies

3. The Housing Act 1988 introduced two new forms of tenancy; the assured tenancy, defined in section 1 as a tenancy of a dwelling-house let as a separate tenancy, and the assured shorthold. The principal difference between them is that the assured tenancy has security of tenure while the tenant under an assured shorthold does not. The 1988 Act was amended by the Housing Act 1996, and section 19A of the 1988 Act now provides that every assured tenancy entered into since 28 February 1997 is an assured shorthold tenancy unless it is within the list of exceptions set out in Schedule 2A to the 1998 Act.

4. Paragraph 3 of Schedule 2A sets out one of those exceptions as follows:

> "An assured tenancy which contains a provision to the effect that the tenancy is not an assured shorthold tenancy."

5. So a tenancy of a house let as a dwelling where the tenancy agreement states that it is an assured tenancy is an assured tenancy, not an assured shorthold tenancy.

6. If an assured tenancy is a periodic tenancy it cannot be brought to an end by the landlord by notice to quit; the landlord can recover possession only by obtaining an order of the court on proof of one of the grounds set out in Schedule 2 to the 1988 Act. A fixed term assured tenancy will expire at the end of its term, but the tenant is then able to remain in possession under a statutory tenancy arising under section 5 of the Housing Act 1988 and, again, the landlord can recover possession only by court order on proving a statutory ground.

7. This appeal is not about the recovery of possession, but the provision for a statutory tenancy to arise is relevant to the regime for the determination of rent in sections 13 and 14 of the 1988 Act.

Provisions about rent control in section 14 of the Housing Act 1988

8. Section 13 of the 1988 Act provides, so far as relevant:

> "13. (1) This section applies to—
> (a) a statutory periodic tenancy …; and
> (b) any other periodic tenancy which is an assured tenancy, other than one in relation to which there is a provision, for the time being binding on the tenant,

under which the rent for a particular period of the tenancy will or may be greater than the rent for an earlier period.
(2) For the purpose of securing an increase in the rent under a tenancy to which this section applies, the landlord may serve on the tenant a notice in the prescribed form proposing a new rent to take effect at the beginning of a new period of the tenancy specified in the notice, being a period beginning not earlier than—
(a) the minimum period after the date of the service of the notice; and
(b) except in the case of a statutory periodic tenancy
(i) in the case of an assured agricultural occupancy, the first anniversary of the date on which the first period of the tenancy began;
(ii) in any other case, on the date that falls 52 weeks after the date on which the first period of the tenancy began; ….
…
(3) The minimum period referred to in subsection (2) above is—
(a) in the case of a yearly tenancy, six months;
(b) in the case of a tenancy where the period is less than a month, one month; and
(c) in any other case, a period equal to the period of the tenancy.
…
(4) Where a notice is served under subsection (2) above, a new rent specified in the notice shall take effect as mentioned in the notice unless, before the beginning of the new period specified in the notice,—
(a) the tenant by an application in the prescribed form refers the notice to [the FTT]; or
(b) the landlord and the tenant agree on a variation of the rent which is different from that proposed in the notice or agree that the rent should not be varied.
(5) Nothing in this section (or in section 14 below) affects the right of the landlord and the tenant under an assured tenancy to vary by agreement any term of the tenancy (including a term relating to rent).

9. To summarise, if an assured periodic tenancy contains provision for the rent to increase then rent can be increased in accordance with that provision. However, where an assured periodic tenancy does not contain such provision, or when a statutory tenancy comes into effect after the end of a fixed-term assured tenancy, then the rent may be increased by following the procedure in section 13. In *London District Properties Management Limited v Goolamy* [2009] EWHC 1367 (Admin) the High Court held that provisions for rent increase in a fixed-term assured tenancy were no longer in effect during the statutory tenancy that arose after the end of the assured tenancy.

10. The procedure is initiated by the landlord sending a notice which must propose a new rent to take effect at the beginning of a new period of the tenancy, no less than a month after the date of the notice and in most cases on a date at least 52 weeks after the start of the tenancy.

11. Section 13(4) enables the tenant to refer the notice to the FTT. The reference is not an appeal; in response to such a reference the FTT will determine a market rent for the property as prescribed by section 14 of the 1988 Act.

The factual background and the decision in the FTT

12. On 25 May 2018 the appellant granted a tenancy of Flat 9, Charles Court, Tunbridge Wells to the respondent, entitled on its frontsheet:

"ASSURED NON SHORTHOLD TENANCY AGREEMENT WITH STARTER TENANCY (SOCIAL RENT)."

13. Clause 1.1 of the agreement says this:

> "The Tenancy begins on **Monday 28th May 2018** and is an Assured Shorthold monthly Tenancy. The tenancy is for an initial term of one month and continuing month thereafter until it is brought to an end. The terms of this Tenancy are set out in this Agreement."

14. There is an obvious typographical error there. "continuing month thereafter", and I read it as a provision for the agreement to continue "from month to month thereafter".

15. The apparent contradiction with the frontsheet is explained in clause 1.15 which states:

> "**Starter Provisions**
> (1) This Tenancy is a Starter Tenancy. The purpose of a Starter Tenancy is to allow us to decide whether you can manage a long-term tenancy without breaking its terms.
> (2) The Tenancy will be a Starter Tenancy for an initial period 12 months from the Start Date. This (together with any extension period in accordance with clause 1.16(4) below) is known as the 'Starter Period'. During the Starter Period the Tenancy will be an Assured Shorthold periodic tenancy.
> (3) The Tenancy will automatically become an Assured non-Shorthold tenancy (with the same conditions as those set out in this agreement) at the end of the Starter Period unless:
> • We begin legal action to evict you; or
> • We give you 2 months' notice under clause 5.1(1) and begin legal action to evict you within 4 months from the expiry of the notice; or
> • We serve you with a notice of seeking possession under clause 5.1(2) and begin legal action to evict you within 6 months from the expiry of the notice.
> If we begin legal action to evict you, the Starter Period will continue until the court proceedings (including any appeal) have been finally disposed of.
> (4) We may decide to extend the initial 12 month period…

16. The respondent is still living at the property and there is no suggestion that the appellant chose to extend the starter period. It is therefore now an assured tenancy, complying with the exception set out in paragraph 3 of Schedule 2A to the 1988 Act.

17. The rent payable is set out at paragraph 1.3. Provision for the rent to be raised by the appellant is made by clause 1.6:

> "(1) We will not give less than **28 days'** notice in writing of any increase in the Net Rent.
> (2) We will normally increase the Net Rent on the first Monday in April following the start of this tenancy and then on the first Monday in April in each year after that. Whilst we are your landlord, any increase will not exceed the amount permitted by any applicable guidance set by

> the Social Housing Regulator. We may increase the rent at other times if required to do so by government legislation or guidance.
> (3) We may decrease the Net Rent at any time."

18. On 23 February 2023 the appellant sent to the respondent a notice in the prescribed form under section 13 of the 1988 Act proposing a new rent to commence on Saturday1 April 2023.

19. The respondent referred the rent to the FTT. The FTT in response sent notice to the parties that it was minded to strike out the reference on the basis that the notice did not provide for the new rent to take effect on the first day of a new period of the tenancy, as section 13(2) requires.

20. The appellant made representations in response saying that it had served the section 13 notice in error and that in fact the tenancy agreement included provision for the increase of rent so that the FTT indeed did not have jurisdiction to determine the rent under section 14 of the 1988 Act.

21. The FTT (a surveyor member sitting alone) said in its decision that in light of the words of clause 1.1 of the tenancy agreement the initial fixed term of the tenancy had expired and that the tenancy is now a statutory periodic tenancy. It therefore struck the reference out because the section 13 notice was defective, and stated that in order to increase the rent the landlord would have to serve a new section 13 notice in the prescribed form

The appeal

22. The appellant appeals, not the FTT's decision to strike out the reference, but its reasons for making that decision, namely that the tenancy is a statutory tenancy and that the rent can only be increased by service of a notice complying with section 13 of the 1988 Act.

23. The FTT refused permission to appeal on the basis that it had no jurisdiction to grant permission to appeal the reasons for the decision rather than the decision itself, and went so far as to state that the application was an abuse of process.

24. The FTT misdirected itself. Section 11 of the Tribunals Courts and Enquiries Act 2007, headed "Right of appeal to the Upper Tribunal", provides:

> "(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
> (2) Any party to a case has a right of appeal….

25. The appellant seeks to argue that the FTT's reasoning was wrong in law, and that is a point of law arising from the FTT's decision. Accordingly the application for permission to appeal was perfectly proper.

26. As to the appeal itself, the appellant is manifestly correct. Clause 1.1 of the tenancy agreement creates a monthly periodic tenancy; a periodic tenancy is one that is comprised of a consecutive series of terms arising one after the other until one of the parties gives notice to bring it to an end (this is long-established, but for a recent statement see *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 at paragraph

394). If the parties intended a letting for a fixed period of one month – highly unlikely for anything other than a holiday letting – then the clause would have been worded very differently, and would not have stated that the tenancy would continue from month to month after the first month. Any doubt is readily dispelled by the provisions later in the agreement for the "starter tenancy" to turn into an assured tenancy if all went well.

27. Therefore this is an assured periodic tenancy with provision for the rent to be increased, and in light of section 13(1)(b) of the 1988 Act section 13 has no application to this tenancy. The FTT indeed had no jurisdiction, but not for the reasons it gave.

28. The respondent has made written representations in response to the grounds of appeal. He has pointed to some typographical errors in the appellant's application for permission, which have no bearing on the grounds of appeal; if the appellant used the wrong postcode for the property that does not invalidate the appeal. He has not given any reason that suggests that the tenancy is not a monthly periodic tenancy as I have described.

29. Accordingly whilst the FTT was correct to strike out the reference, it did so for the wrong reason. The tenancy is not a statutory periodic tenancy, and the increase of rent is not subject to the provisions of sections 13 and 14 of the Housing Act 1988. The reasons given by the FTT for its decision are set aside, although the decision itself stands. The tenancy agreement is an assured periodic tenancy and the landlord is free to follow the contractual provisions for the increase of rent.

Upper Tribunal Judge Elizabeth Cooke

21 February 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.