Upper Tribunal for Scotland

Ref: UTS/AP/21/0031

DECISION

by

Upper Tribunal Judge Pino Di Emidio

in an Appeal in the case of

Mrs Alice Mande Elias Woro, 89 Warren Road, Dartford, DA1 1PS

Appellant

and

Mr Ian Brown, 35 Coupar Street, Dundee, DD2 2QD

Respondent

First-tier Tribunal Case Reference: FTS/HPC/CV/21/0773

Act: Tosh, Advocate; BKF (written submissions)
Alt: no appearance

13 October 2022

The Upper Tribunal for Scotland allows the appeal and quashes the decision of the First-tier Tribunal dated 6 July 2021; remakes the decision and makes an order for payment of the sum of £6,237.21 with interest at the rate of 4% a year from 6 July 2021 until payment.

Note of reasons for decision

[1] This appeal raises a question about whether the First-tier Tribunal had a duty in undefended proceedings to raise on its own motion a question going to the relevancy of the application. The question related to the validity and enforceability of a personal guarantee granted in connection with a private residential tenancy. The appellant also maintains that the First-tier Tribunal erred in law when it determined that the personal guarantee was unenforceable. The respondent did not participate in the appeal or the first instance proceedings. This appeal has been dealt with on written submissions and without a hearing.

Procedural History

[2] The appeal arises from an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland by the appellant for an order for payment under a personal guarantee granted by the respondent relating to a private residential tenancy of a property at C28 Tullidelph Road, Dundee, DD2 2DF. The application was not defended.

[3] On 14 May 2021 at a case management discussion the First-tier Tribunal fixed an evidential hearing to deal with two issues. It also gave a direction to the appellant in relation to the matters causing concern. The first issue was a request for clarification of the sum claimed. That was an appropriate question to raise so that the First-tier Tribunal could be clear what the extent of the remedy being sought actually was. The second issue was a question about the validity of the guarantee. This second issue, on the face of it, raised a question of relevancy. On 22 June 2021 an unopposed evidential hearing took place on the second issue. In a written decision dated 6 July 2021 the First-tier Tribunal determined that the guarantee was not valid and enforceable. It refused the application for an order for payment of money.

[4] The appellant was granted permission to appeal by the First-tier Tribunal on five points. She made an application to this Tribunal to amend her first ground of appeal and this was allowed in part. Her fifth ground has been refused by this Tribunal for want of insistence. The appellant submits correctly that if her first ground, as amended, is well founded that is sufficient for the determination of the appeal in her favour.

Appellant's submissions

[5] The appellant's counsel produced a full and well-argued written submission which I do not propose to narrate in detail. In essence, the submission on the amended ground 1 was that the First-tier Tribunal was not entitled to inquire into the question of the validity of the guarantee.

Reasons for Decision

Ground 1 as amended

[6] Section 16(1) of the Housing (Scotland) Act 2014 is in the following terms:

> "The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal—
> (a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),
> (b) a Part VII contract (within the meaning of section 63 of that Act),
> (c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43))."

[7] The case has proceeded on the basis that type of tenancy which applied in this case was included in this provision. In *SW v Chesnutt Skeoch Limited* 2021 SLT 276 (Ex. Div.) the Court of Session construed the term "arising from" in section 16(1) in a broad way. At paragraphs 29 of the Opinion of the Court delivered by Lord Doherty the following statement appears in a discussion of the intention behind the enactment of section 16:

> "The purpose of transfer of these disputes to the [First-tier Tribunal] was to improve those matters for both landlords and tenants (but in particular for tenants). It was no part of that purpose that the grounds for raising an action, or the issues to be taken into account when deciding a case, should change. "

[8] The First-tier Tribunal does not appear to have questioned whether it had jurisdiction to deal with the issue raised in the application. On the basis of the decision in *SW* it was correct not to raise any question as to competency.

[9] The salient aspects of the first ground of appeal as amended are set out in the following passage:

> "The FtT erred in law in considering the merits of the application in the absence of any written representations, appearance or other action by the respondent to resist the order for payment sought. In particular, the FtT erred in raising of its own motion and proceeding to determine questions of the validity and enforceability of the guarantee and the quantum of the sum sought. Those were not matters *pars judicis*."

The expression *pars judicis* means "what a judge has a duty to do".

[10] Prior to the transfer of jurisdiction to the First-tier Tribunal a case of this kind would have come before a sheriff in an action seeking decree for payment to enforce the guarantee. If the action was undefended the sheriff could not have declined to grant decree even if he or she had concerns about the validity or enforceability of the guarantee. This is because it would not have been *pars judicis* for the sheriff to do so.

[11] The question of what is and is not *pars judicis* in the sheriff court was recently considered in *Cabot Financial UK Limited v McGregor* 2018 SC (SAC) 47. The Sheriff Appeal Court concluded, following earlier authority, that questions of relevancy and specification did not normally fall within the sheriff's inherent jurisdiction in simple procedure proceedings in the absence of an appropriate plea by the respondent defending the proceedings. The Opinion of the Court contains the following passages in the discussion of *pars judicis*.

> "[34] ….the practice and procedure of the court in relation to undefended proceedings involved not only the court's duty or inherent jurisdiction but the application of the court rules on procedure and practice. The principles which derive from the case law are well established and are not thought to be controversial. It is *pars judicis* both at common law, and under statute, for the court to notice whether the cause falls within its jurisdiction (Civil Jurisdiction and Judgments Act 1982). The court is bound to consider whether it has jurisdiction irrespective of whether this is raised by any party. It is also *pars judicis* to notice questions of competency either in respect of the form of the proceedings or the remedy sought. Accordingly, a sheriff may dismiss an undefended ordinary cause action (and summary cause in terms of SCR 8.3) if the action is incompetent or 'that there is a patent defect in jurisdiction' …
> "[35] Questions of relevancy and specification do not normally fall within the court's inherent jurisdiction. Relevancy and indeed specification ought to be raised by the defender, normally by plea. The court has no power to take notice of how relevant the averments which support the crave or claim might be. .."

[12] The court went on to say that the intention of Parliament was to emphasise the court's active role in controlling how cases progressed in simple procedure not to extend the

court's inherent jurisdiction. (See paragraphs 49, 52 and 72). *Moneybarn (No 1) v Harris* 2022 SAC (Civ) is a further recent decision to similar effect (see the Opinion of the Court at para 12).

[13] Does it make any difference that the matter was dealt with by the First-tier Tribunal? The answer to that question depends on whether the First-tier Tribunal was entitled when dealing with undefended proceedings brought before it to take cognisance on its own motion of an issue of relevancy, rather than of competency. The jurisdiction to deal with issues arising from private rented tenancies was conferred by section 16(1) of the 2014 Act, quoted above. Prior to the transfer of jurisdiction the sheriff would not have had power to interfere on the basis of lack of relevancy in undefended proceedings. The power transferred to the First-tier Tribunal by statute was no wider than that which was previously exercised by the sheriff. Therefore when the First-tier Tribunal purported to determine these undefended proceedings on the ground of relevancy it erred in law.

[14] This Tribunal is satisfied that the first ground of appeal is well founded in law and that the appeal should be granted. Therefore the decision of the First-tier Tribunal will be quashed. This Tribunal can re-make the decision in terms of section 48(2) (a) of the Tribunals (Scotland) Act 2014 and do anything that the First-tier Tribunal could do if re-making the decision (section 48(3)(a)). In the circumstances there is nothing to be gained by remitting the case to the First-tier Tribunal as this was an undefended application which raised no point of competency. Therefore the order for payment sought by the appellant will be granted. The appellant also seeks interest under Rule 41A of the First-tier Tribunal Rules of Procedure 2017 from the date of the First-tier Tribunal's decision at the rate of 8%. Interest will granted but at the rate of 4% from 6 July 2021.

Other grounds of appeal

[15] It is appropriate to say something about the other grounds of appeal on which the First-tier Tribunal granted permission to appeal. The appellant urged this Tribunal to re-visit

an issue raised in that part of her application to amend which had been refused. I decline to revisit that issue which was that the First-tier Tribunal erred in concluding that the guarantee was a traditional document which required to comply with section 2 of the Requirements of Writing (Scotland) Act 1995. As it is, nothing turns on it given the decision on amended ground 1.

Ground 2

[16] The appellant is well founded in submitting that the approach of the First-tier Tribunal to section 1(3) and (4) of the 1995 Act contained an error of law because the First-tier Tribunal had made findings of fact to the effect that the guarantee stated on its face that it was onerous in nature. It followed that the appellant acted in reliance on the guarantee, was affected to a material extent by entering into the tenancy and would be affected to a material extent if the respondent was permitted to withdraw from it. Had it been necessary to decide the appeal on this ground, the appeal would have been successful.

Grounds 3 and 4

[17] These grounds were conveniently taken together in the appellant's written submission. In essence, the submission is that there was no rational basis for the First-tier Tribunal's conclusion that the guarantee was not clear and rational. The appellant prayed in aid the interpretative principle *falsa demonstratio non nocet* (a false demonstration does not hurt). The First-tier Tribunal found that the document of guarantee contained an error because it referred to a short assured tenancy rather than a private residential tenancy. Despite this minor error it was clear that the guarantee on its face related to the grant of the private residential tenancy. The intention of the parties was clear i.e. the guarantee was intended to secure the obligations of the tenant under the lease. This submission is also well founded though it is not necessary to decide the appeal on this ground.

Observation

[18] The frustration of the First-tier Tribunal at the unsatisfactory state of the document of guarantee relied on by the appellant is understandable. It was unsatisfactory in a number of

respects. However the First-tier Tribunal went too far in seeking to intervene on grounds of relevancy.

Appeal provisions

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

Sheriff Pino Di Emidio
Member of the Upper Tribunal for Scotland