[2019] UT 43
UTS/AP/19/0002

DECISION NOTICE OF SHERIFF NIGEL ROSS

in the case of

MRS LINDA SEARLE, 1 Northbank Cottages, Bathgate, EH48 4BX

Appellant

and

FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER, Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT

and

MR MARC BLEAZARD, 155 Telford Road, Edinburgh, EH4 2PX;
MS KIMBERLEY WHYTE, 155 Telford Road, Edinburgh, EH4 2PX

Respondents

FTT Case Reference FTS/HPC/PR/18/2051

2 July 2019

Decision

The Tribunal refuses the appeal; adheres to the decision of the First-tier Tribunal dated 28 October 2011; recalls the suspension of the effect of the award of £1,875 so that the sum is now due and payable.

Note:-

[1] The respondents were the tenants of the appellant's property in Edinburgh from July 2013 to mid-2018. They signed a tenancy agreement and paid a deposit of £625. The appellant failed, until 1 September 2017, to lodge this deposit in an approved scheme, in

breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (the "2011 Regulations"). The respondents in July 2018 raised tribunal proceedings for payment of a sum under regulation 10, of up to three times the deposit, on the basis the deposit had not been lodged for in excess of four years.

[2] The appellant opposed the award, claiming that the respondents had entered into a new tenancy agreement in September 2017, replacing the old agreement, and that the deposit was timeously lodged by reference to the new tenancy agreement. The appellant's position was that the claim was in respect of a lease which had ended in late 2017, and was therefore time-barred, the time-limit being three months from expiry of a lease.

[3] The First-tier Tribunal ("FtT") held a hearing on evidence, following which they issued their decision of 28 October 2018 in which they rejected the evidence on behalf of the appellant, found the original 2013 tenancy agreement had not been terminated in 2017, that there was no new tenancy agreement, that the tenancy had terminated in July 2018, and accordingly that the claim was both timeous and valid. They awarded a sum of three times the deposit for a serious breach of the 2011 Regulations.

[4] The appellant challenged that decision in various respects. She lodged grounds of appeal. The FtT granted part-permission for an appeal, the permitted grounds being (a) that the FtT had inverted the burden of proof; (b) that the FtT had failed to direct itself properly in law, and (c) that the FtT had acted ultra vires. No review or appeal of that restricted permission was lodged. The appellant did request a review by the FtT of their findings in fact, but that is not the function of review.

[5] At the hearing on 28 June 2019, the respondents intimated that they were unable to attend due to domestic difficulties, but that they were content for the appeal to proceed in their absence. The appellant, assisted by her son David Searle, appeared.

Grounds of appeal

[6] As an underlying theme, the appellant stated that she was on medication for a medical condition. She had intended to conduct the FtT proceedings herself, but at a late stage had asked her son to conduct this for her. She claimed that the case had therefore not been fully presented. She required to accept, however, that no request had been made of the FtT to adjourn proceedings, and that her son had been able to present the evidence he had. No sufficient case was made out, accordingly, that the FtT had erred in hearing the case. In relation to her grounds of appeal:-

[7] Ground (a) was that the FtT had appeared to require the appellant to prove the existence and validity of the 2017 tenancy agreement. This, she claimed, was an inversion of the burden of proof. This ground proceeds on a misconception. The respondents' case did not rely on the 2017 agreement. It relied on a 2013 agreement. It was not their case that the 2017 agreement was in any way relevant, and therefore they had nothing to prove and no interest in that agreement, which they claimed was never knowingly concluded. The appellant, on the other hand, relied on an alleged contract in 2017. She was relying on it, and therefore the evidential burden was on her to prove its validity. In that she did not succeed. The FtT dealt with that question correctly. This ground of appeal requires to be repelled.

[8] Ground (b) claims an error in law, in failing to apply contract law correctly. Some reference was made to English common law authorities which vouch the principle that it is

not possible for a party to sign a contract and then to avoid liability by claiming they did not read it. That is a recognised principle under both Scots and English law, but it does not reflect the facts in this case. The FtT did not decide that the respondents had intended to sign a new tenancy agreement in 2017, or that they did so. They decided that, while the respondents did sign a document in 2017, it was probably not the same document that the appellant produced in evidence. Accordingly, the appellant failed to prove the existence of the claimed 2017 agreement. It was not a case where one party voluntarily signed an agreement then ignored it. Instead, the claimed 2017 agreement was not proved to exist, and so that principle was not engaged. This ground of appeal requires to be repelled.

[9] Ground (c) was that the FtT acted ultra vires. The basis for this was initially unclear, but the appellant relied on questions of competency to deal with contract law. This ground is not a sound one, because the question for the FtT involves considering what legal documents existed, and what the effect of those documents might be. These documents are contracts, and therefore questions of contract are at the core of what the FtT requires to consider in any given case. Some confusion about the word "competent" became evident, but after discussion were resolved: "competency" is a term of art, and refers not to ability or training, but the formal legal power, to deal with a question of fact or law. This ground of appeal requires to be repelled.

[10] Accordingly, of the grounds which the FtT permitted to proceed, none of those grounds reveal any error on the part of the FtT, either in their fact-finding process, or in their application of the law once those facts were decided. For those reasons the appeal must be refused. The payment of the award of £1,875 was suspended pending the appeal, but that suspension will now be lifted and the sum is now payable.

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 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.*