Upper Tribunal for Scotland

[2020] UT 6
UTS/AP/19/0015

DECISION NOTICE OF SHERIFF NIGEL ROSS

on an appeal
in the case of

MR JAMES MALLOCH, 109 Pilton Avenue, Edinburgh, EH5 2HP

Appellant

and

BERNISDALE HOMES LIMITED, 1A Rosebery Crescent Lane, Edinburgh, EH12 5JR per D J Alexander, 1 Wemyss Place, Edinburgh, EH3 6DH; Anderson Strathearn, 1 Rutland Court, Edinburgh, EH3 8EY

Respondent

FTT Case Reference FTS/HPC/CV/18/2810

22 January 2020

Decision

The tribunal, having considered the parties' submissions, neither party requiring an oral hearing, refuses the appeal.

Reasons

[1] The appellant was formerly a tenant of the respondent in relation to a residential dwelling in Edinburgh. The parties entered into a tenancy agreement dated 8 November 2016, which was also the date of entry. The initial term of the tenancy was until 7 November

2017, with a provision that the tenancy would continue thereafter on a monthly basis until terminated by either party. The tenancy was a short assured tenancy. The appellant thereafter occupied the property in terms of the tenancy agreement until the respondent served notice to quit, in terms of which the tenancy was terminated in December 2018.

[2] The monthly rent was £1,165 a month. Prior to the commencement of the tenancy, the parties came to an arrangement whereby the appellant would pay rent in a lump sum prior to entry. The appellant paid an advance of 12 months' rent, in the sum of £13,980. This arrangement was reflected in the tenancy agreement.

[3] At or towards the end of the tenancy, the appellant raised this application for repayment to him of the sum of £13,980. He relies on the terms of section 89 of the Rent (Scotland) Act 1984 (the "1984 Act") (as applied to assured tenancies by section 27 of the Housing (Scotland) Act 1988), which provides:-

> "Avoidance of requirements for advance payment of rent in certain cases.
>
> (1) Where a protected tenancy which is a regulated tenancy is granted, continued or renewed, any requirement that rent shall be payable -
> (a) before the beginning of the rental period in respect of which it is payable, or
> (b) earlier than six months before the end of the rental period in respect of which it is payable (if that period is more than six months),
> shall be void, whether the requirement is imposed as a condition of the grant, renewal or continuance of the tenancy or under the terms thereof; and any requirement avoided by this section is, in the following provisions of this section, referred to as a "prohibited requirement".
> (2) Rent for any rental period to which a prohibited requirement relates shall be irrecoverable from the tenant.
> (3) Any person who purports to impose any prohibited requirement shall be liable to a fine not exceeding level 3 on the standard scale, and the court by which he is convicted may order any amount of rent paid in compliance with the prohibited requirement to be repaid to the person by whom it is paid.
> (4) Where a tenant has paid on account of rent any amount, which by virtue of this section of this section is irrecoverable by the landlord, then, subject to subsection (6)

> below, the tenant who paid it shall be entitled to recover that amount from the landlord who received it or his personal representatives…"

[4] The appellant seeks an order for recovery of the amount of £13,980, being the amount of the deposit. By decision dated 18 February 2019 the First-tier Tribunal ("FtT") refused that application.

The facts

[5] The facts which the FtT found to be proved are not fully set out in the decision. Some basic facts are omitted, such as whether and when and in what sum payments were made. Decisions require clarity as to the facts the FtT found proved, what evidence it rejected, and the reasons. Failure to do so can cause difficulty in cases which are appealed. The FtT might address this in future cases.

[6] For present purposes, the gaps in the decision are filled by the facts set out in the parties' submissions in this appeal. From these sources, it becomes evident that the FtT accepted that the appellant had paid the sum of £13,980 before the commencement of the lease, and that the appellant had not overpaid rent. It was also decided that this pre-payment was not imposed by the respondent. Instead, it was an arrangement suggested by the appellant, and acceded to by the respondent, to address the appellant's personal financial difficulties. The appellant's view was that he would not pass an "affordability" test if the respondents were to assess his means, owing to his low income. To meet this, he offered to pay 12 months' rent in advance to secure the property. The advantage to him was that he would secure the tenancy which he would otherwise lose out on. The respondents agreed to that proposal.

[7] This appellant's case does not rely on any actual hardship. There is no suggestion that the appellant has overpaid rent or has been treated unfairly. Indeed, the respondent refers to granting a considerable rent-free period between 2017 and 2018 for separate reasons which are unexplained. The present claim was brought within the two-year limit imposed by s.89(6).

[8] Neither side has provided this tribunal a copy of the tenancy agreement. The principal provisions have, however, been summarised in the FtT decision. The rent clause states:-

> "The rent is £1165.00 per calendar month payable twelve months in advance. Thereafter the rent is payable by way of monthly direct debit (subject to a successful credit and reference check). Payment of the full monthly rental will only be accepted from one account. It is your responsibility to ensure the correct amount is collected from your bank account. The first twelve month's rent is payable at or before the entry date. The landlord or landlord's agent may increase the rent after the termination date specified in Clause 2 above…".

The legal basis of the claim

[9] The appellant claims repayment of the 12 month deposit by reference to s.89(2) and 89(4) of the 1984 Act. These are set out above.

[10] The section forms part of Part VIII of the 1984 Act, which prohibits premiums or loans payable by the tenant. The purpose of Part VIII is to prevent landlords demanding extra payment over and above the rental payment (Rennie: *Leases* (2015) 22-83). It is an offence to demand a premium or loan or certain other requirements. In addition, s.89 provides that any requirement to pay rent in advance in excess of 6 months is void and, as a result, unenforceable.

[11] The remedies for requiring advance payment are in s.89. These remedies include (i) unenforceability of such a requirement (s.89(1)); (ii) rent becoming irrecoverable (s.89(2));

(iii) fines following criminal prosecution, together with orders for repayment (s.89(3)); and (iv) where payment has been made under such a prohibited requirement, repayment of that sum (s.89(4)). Of these, (i), (ii) and (iii) are not relevant to the present claim. The appellant seeks an award under s.89(4). He claims that the provision in the tenancy agreement, which required him to make a 12-month pre-payment, was a prohibited requirement, even though it was his idea.

Amount claimed

[12] S.89(4) provides that the tenant is entitled to recover any amount "paid on account of rent" which is irrecoverable under the section. Rental payments are irrecoverable when made "for any rental period to which a prohibited requirement relates" (s.89(2)). A prohibited requirement is "any requirement that rent shall be payable (a) before the beginning of the rental period in respect of which it is payable." (s.89(1)).

[13] Although not analysed by the FtT, it is apparent that the arrangement was that the appellant would make only a single payment, of 12 months' advance rent, or £13,980. The respondent argues that the relevant rental period was one month, but there is no factual material to support that proposition. The sum related to 12 months' rental, not one month. Accordingly, the "rental period" referred to in s.89(2) is 12 months. If any remedy were available under s.89(4), it would therefore be for the full sum sought of £13, 980.

Decision

[14] The appellant is not entitled to payment of the sum of £13,980 from the respondent.

[15] The FtT found in fact that the respondent had entered into an arrangement with the appellant, for a 12-month pre-payment of rent, at the instance and request of the appellant.

The appellant made that request, to get around the fact that his income was insufficient to meet the financial requirements which the respondent would otherwise impose. On an ordinary reading of s.89(1), the section strikes at any "requirement" which was "imposed", whether as a condition of the grant, renewal or continuance of the tenancy or under the terms thereof.

[16] The FtT's findings were that the pre-payment arrangement was neither a "requirement", nor was "imposed". Where the appellant requested such an arrangement, he could not argue that the requirement was "imposed" upon him, or that the respondent made pre-payment a "condition of the grant" of the tenancy. The appellant argues that only the terms of the written agreement may be looked at. It is clear, however, that s.89 contemplates that pre-contract discussions will be relevant. To that extent the appellant's argument is incorrect.

[17] The wording of s.89 does not merely relate to pre-contract discussions, but also any imposition of the requirement "under the terms thereof". It follows that, irrespective of what parties may have agreed, if the terms of the tenancy impose a prohibited requirement, then the s.89 sanctions will operate.

[18] The terms of clause 3 of the tenancy agreement stipulate "The first twelve months' rent is payable at or before the entry date". That requirement is absolute. No words of qualification or explanation are inserted. On the evidence, however, the pre-payment was not imposed "under the terms thereof" for the purposes of s.89(1). Clause 3 reflects the parties' agreement, upon which the FtT made findings. It did and does not separately operate to impose a different or additional requirement. It makes no new requirement or imposition. It reflects the parties' consensus. Accordingly, s.89(4) is not triggered.

Other issues

[19] The appellant relies on a published article by a legal practitioner who he describes as an expert, and criticises the FtT for not following that view. The FtT, however, required to come to their own conclusion on the law, and did not err in not considering itself bound by the opinion of a commentator. The FtT would have been in error if they delegated their own interpretation of the law to any other source. They did not do so.

[20] The respondent purports to introduce a defence of unjust enrichment. There is no indication that this was argued before the FtT. It seeks to claim that any repayment should not be made because the appellant would be unjustly rewarded by, in effect, paying no rent for the one-year period to which the advance rental payment related. However, a claim based on unjust enrichment would require to be made before it could be considered. It is not by itself a defence. The respondent made no such claim or counterclaim for payment. No relevant discussion, evidence or analysis was attempted either by parties before or during the FtT hearing. Accordingly the FtT did not have that matter before them, and did not deal with it. More substantively, in the absence of detailed argument and authoritative legal precedent, it is not self-evident that the equitable remedy of unjust enrichment would be available where, as here, it might operate to defeat the effect of an express statutory penalty. On the other hand, the terms of s.89 do not expressly extinguish such a claim. The argument would require full and careful submission before being decided. In the event, it is not necessary to decide the matter.