Upper Tribunal for Scotland

**[2019] UT 48**
UTS/AP/19/0012

DECISION OF SHERIFF NIGEL ROSS

ON AN APPEAL

in the case of

MR KENNETH ANDERSON, 34 Castle Lawns, Sandyford, Dublin
per Broughton Property Management,
61-63 Broughton Street, Edinburgh, EH1 3RJ

Appellant

and

FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER, Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT; and Mr Gavin Stark, 19 Eyre Crescent, Edinburgh, EH3 5EU

Respondent

**FTT Case Reference FTS/HPC/CV/19/0372**

24 July 2019

**Decision**

The Tribunal allows the appeal; finds that the First-tier Tribunal has jurisdiction to hear the present case; remits the application back to the First-tier Tribunal to proceed as accords.

**Note**

[1] The First-tier Tribunal ("FtT") has jurisdiction to hear a dispute under the Private Residential Tenancies (Scotland) Act 2016 (the "2016 Act") only if the dispute is one which is "in relation to civil proceedings arising from a private residential tenancy" (2016 Act section 71).

[2] The present action is based on a personal guarantee purportedly granted by the respondent in favour of the appellant, and relating to the obligations arising under a tenancy. The FtT rejected the application.

**Grounds of appeal**

[3] The appellant submits that the FtT wrongfully rejected the application because (i) it was an error to found on rule 8(1)(a) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (the "2017 rules") to reject the application as frivolous and vexatious; and (ii) FtT has jurisdiction in terms of section 71 of the 2016 Act to hear the application.

**Whether frivolous and vexatious**

[4] The first of these points can be dealt with shortly. The FtT dismissed the application because it considered it "*misconceived and hopeless*", which is one definition of "*frivolous*", itself a ground for dismissing a case under rule 8 of the 2017 rules. This is not a claim which would satisfy that definition, because it involves an arguable claim based on a prima facie entitlement under a letter of guarantee. The question of whether the FtT has jurisdiction to hear the case is a question of law, which requires a judicial answer. The FtT appear to have

pre-judged that question and concluded that there is no jurisdiction, and then to have concluded that the claim must be frivolous for that reason.

[5] The appellant submits that there is jurisdiction. It is argued on his behalf that a guarantee which exists only to enforce rights under a private residential tenancy ("PRT"), and which is drafted by express reference to the PRT terms, and which creates a liability which is defined and identified by the PRT, properly creates a liability "*arising from*" a PRT. That argument might ultimately be unsuccessful, but that does not make it frivolous. It is an arguable question of law, which the FtT were not in a position to dismiss as misconceived and hopeless. The FtT could cite no precedent which would allow them to take such an absolute view. The FtT was obliged to consider this question of law, and give a reasoned opinion, unless the rules allow otherwise.

[6] If jurisdiction were the only issue in this case, then rule 18(1) of the 2017 rules might have allowed the FtT to make a decision without a hearing. Under that rule, however, the parties would have been entitled to make written representations which the FtT would have been obliged to consider. Rule 8 does not cover such preliminary legal issues. The effect of using rule 8(1)(a) has been to make a decision in law without giving the parties an opportunity of making submissions. The effect was that the FtT, in taking that approach, breached rule 2 of the 2017 rules. They erred in doing so.

**Whether a dispute "arising from" a PRT**

[7] The 2016 Act does not attempt to define what the phrase encompasses, except to exclude criminal proceedings. Section 71 provides:-

> "(1) In relation to civil proceedings arising from a private residential tenancy—

(a) the First-tier Tribunal has whatever competence and jurisdiction a sheriff would have but for paragraph (b),

(b) a sheriff does not have competence or jurisdiction.

(2) For the purposes of subsection (1), civil proceedings are any proceedings other than—

(a) the prosecution of a criminal offence,

(b) any proceedings related to such a prosecution."

[8] It is noteworthy that the starting point is to award to the FtT the whole of the powers of a sheriff, and then to limit these by reference to those "*arising from*" a PRT. The tenor is that the FtT is given such powers as is necessary for the purposes of dealing with a particular subject area and, just as significantly, the sheriff court is deprived of those powers. It appears that the traditional narrow approach taken by the courts, in considering exclusion of their own jurisdiction, would in this instance be somewhat at odds with the intention of the legislature.

[9] The FtT relied on *Sauchiehall Street Properties One Ltd* v *EMI Group Ltd* 2015 Hous.L.R 24, where the sheriff found jurisdiction over a guarantee claim not established. The sheriff relied on the distinction between landlord and tenant on one hand and debtor and creditor on the other. That decision, however, was in relation to a quite different test, namely whether the action had "*as its object*" the tenancy of immovable property. That is a much more restricted and focused test than the present. Accordingly *Sauchiehall Street Properties One Ltd* is not of assistance in interpreting the 2016 Act.

[10] The appellant founded on *Parker and another* v *Inkersall Investments Ltd* [2018] SC DUM 66. The sheriff made some observations in the context of an argument for expenses, one party having conceded the jurisdiction argument. He made obiter remarks which do not resolve the question of jurisdiction, but emphasised the unrestricted nature of the

powers, such as interdict, declarator or damages, which appear to have been transferred to the FtT. *Parker and another* does not assist in resolving the present case. I do, however, agree with the sheriff's view that the powers transferred to the FtT appear to be wide-ranging.

[11] Whether a dispute "*arises from*" a PRT depends, in my view, on the individual circumstances of each case. It is a matter of fact and degree. It is unlikely to be enough simply to point to a tenuous causal connection, such as bankruptcy arising through the failure to pay rent and which is not covered. This case involves a purported guarantee, and it is possible to envisage that such a claim might be tenous, for example if the guaranteed debt arose mainly for reasons not connected to a PRT, or only loosely connected in time. The question is a mixed question of fact and law in each case.

[12] On the present facts, my view is that the guarantee does arise from the PRT, for the following reasons:-

[13] First, the purported letter of guarantee requests the grantee to enter into a proposed tenancy agreement, which is then identified as being between a named individual and over an identified property. The obligations to pay rent and other charges are all defined by the terms of the lease referred to, and endure only as long as the tenant remains bound by the lease. The obligation is one of indemnity under that contract, not a free-standing liability, and the obligation increases according to the terms of the lease. The letter of guarantee is inextricably bound up with the terms of the lease. It appears entirely artificial to describe this guarantee as not arising from the PRT. It has no logical existence or purpose without it.

[14] Second, the natural and ordinary effect of the words "*arising from*" is unrestricted and imprecise, and invites a wide, inclusive approach. It is quite the opposite of a defined award. It tends to show that the legislature intended the FtT to deal with all PRT-related events, to the exclusion of the sheriff court, and not just the core lease.

[15] Third, the particular lease form in this case is an adaptation of the "*Scottish Government Model Private Residential Tenancy Agreement for the Private Rented Sector*" issued in October 2017. It does not form part of the 2016 Act, but is issued with the introduction that: "*This is the Scottish Government's Model Private Residential Tenancy Agreement ("Model Tenancy Agreement") which may be used to fulfill* [the landlord's] *duty* [under the 2016 Act]." The Model Tenancy Agreement includes, at clause 38, a clause entitled "*The Guarantor*", which sets out an obligation to pay any rent or other obligations due to the landlord under the agreement. Where wording is ambiguous, as it is here, my view is that this Model Tenancy Agreement is available as an aid to understanding the overall intention of the legislature. It is directly analogous to the more traditional *Pepper* v *Hart* sources. The Scottish Government passed the 2016 Act and provided the Model Tenancy Agreement to allow the 2016 Act to be implemented. It follows that a guarantee of performance of the PRT was regarded as an integral part of the lease. It forms one of the clauses of the lease itself. It is difficult to conclude that an obligation, created within a standard clause of a Model PRT lease, was intended by the legislature to be treated as not arising from the PRT.

[16] The actual copy lease produced is an odd mixture of fonts, styles, numberings and formats, and a reference to "irritation" rather than irritancy of a lease. Model clause 38 has been removed and replaced with the separate letter of guarantee. As the representative of the appellant submitted, that was intended to insert a better-worded guarantee in place of the relatively short wording of Model clause 38, and not for any other purpose. In my view, it does not matter whether the guarantee is drafted as part of the lease or separately.

[17] For these reasons and on the facts of this case, the guarantee arises from the PRT within the meaning of the 2016 Act, and therefore the FtT has jurisdiction.

[18] That exhausts the present remit. The respondent observed that the guarantee has purportedly been triggered by the indebtedness of a co-tenant who is not named on the letter of guarantee and in respect of which he did not undertake any liability. The lease described in the letter of guarantee appears to be materially different from the lease subsequently entered into. I informed parties that I cannot deal with matters not under appeal, and the matter will require to be remitted to FtT for consideration.

*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.*