Upper Tribunal for Scotland

[2019] UT 49
UTS/AP/19/0011

DECISION NOTICE OF SHERIFF N ROSS

On an appeal in the case of

MS KATE AFFLECK, Flat 2F2, 59 Forrest Road, EDINBURGH, EH1 2QP

Appellant

and

MR CHRIS BRONSDON, MRS SARAH BRONSDON, The Old Castle, East Saltoun, East Lothian, Near Pencaitland, Tranent, EH34 5DY;
per Paris Steele,
1 High Street, Haddington, EH41 3ES

Respondent

FTT Case Reference: FTS/HPC/TE/18/2663

9 September 2019

The tribunal refuses the appeal and adheres to the decision of the First tier Tribunal dated 15 January 2019.

Reasons

[1] The Private Residential Tenancy, or PRT, is a creation of the Private Housing (Tenancies) Scotland Act 2016 (the "2016 Act"). The PRT is designed to strike a balance between the interests of tenant and landlord. Some types of tenancy are excluded from classification as a PRT - for example a student let or where there is a resident landlord.

Certain statutory requirements must exist before a tenancy can be a PRT. If those requirements are not met, the tenancy is not a PRT. It may, however, be different type of tenancy, such as a tenancy at common law, or a regulated tenancy, or an assured tenancy, depending on date and circumstances of formation. Different rights and duties will arise. In the present case, the appellant seeks certain remedies under the 2016 Act. Whether she can do so depends on whether she (and her landlords) are parties to a PRT. From the judgement of the First-tier Tribunal dated 15 January 2019 the following findings emerge.

[2] The appellant moved into a flat in Edinburgh on 1 January 2018. She was one of four residents, and replaced an outgoing resident. The flat is owned by the respondents. She did not meet the outgoing tenant. She entered into email correspondence with the respondents, and was sent various details, such as a tenant's handbook and information about the tenancy deposit scheme. The emails included a "New Tenant Registration Form.Doc", which gave the respondents' bank details and sort code, and gave a date of transfer of the first day of each month, and stated a rent amount of £350 per month.

[3] No tenancy agreement was ever provided, but the appellant duly resided in the flat for several months, paying monthly rental, without incident or dispute. She moved room within the flat during this period. The respondents maintained, by their own admission, a lax regime, and did not provide a written lease. Their laxity has led to the current problems.

[4] In about August 2018 a dispute arose. One of the existing tenants moved out and another person moved in. That new tenant asked for a tenancy agreement (as the appellant had done previously, without response). The respondents belatedly supplied a draft tenancy agreement for the appellant to sign.

[5] At that stage it emerged that the respondents and appellant had quite a different idea of what arrangements existed. The respondents claimed that the appellant was jointly and

severally liable for the entire rent of the flat. The appellant, not surprisingly, baulked at that suggestion, which had never previously featured in correspondence between the parties.

[6] The respondents tried to create what was, on the evidence, a legal fiction. They claimed that the appellant was bound by a joint and several lease which had been assigned to her by her predecessor. This position was entirely unstateable – not only could they not produce any such lease, but the predecessor (tracked down by the appellant) denied any assignation had taken place. The respondents produced only an unsigned draft of a lease form from 2012, which they claimed was the lease referred to. Bizarrely, that lease form expressly forbade any assignation without consent. They could produce no such consent. They claimed there was a "rolling lease", but could not produce one. Their correspondence with the appellant did not mention joint and several liability. In legal terms their position was incoherent.

[7] Quite why a tenant would willingly assume, or why it was fair to impose, liability for the unpaid debts of complete strangers, was not explained in evidence. I doubt it could be. It is unprincipled and exploitative for a landlord to force a tenant, for no other reason than that they share a living space, to pay the rent of non-paying third party co-tenants. That is what the respondents have tried to achieve here. That position verges on the oppressive.

[8] There followed five separate draft tenancy agreements, four of which sought to impose joint and several liability. The appellant, understandably, signed none of them, as they all represented one-sided attempts to increase her exposure to liability. Only the fifth draft attempted to identify what part of the flat the appellant would occupy.

[9] The tribunal made "findings in fact" which are largely not findings in fact, upon which I comment below. The tribunal proceeded to find that, contrary to the appellant's position,

there was not a PRT in place between the parties. It found that the parties had not agreed the rent, or who was the tenant, or the subjects. The appellant appeals these findings in law.

Decision

[10] On the facts discussed by the tribunal, their legal analysis is flawed but their conclusion is correct, namely that there was no PRT (as opposed to any other type of tenancy) concluded between the parties.

[11] The tribunal found that there was no agreement as to who was the tenant, because the tenant could be solely the appellant, or all four tenants. In my view, that was an error, because the correspondence between the parties is clear that the appellant was a stand-alone tenant, and both parties regarded her as such.

[12] The tribunal found that there was no agreement as to subjects. The appellant regarded herself as the tenant of a part only of the flat. The respondents regarded her (but without ever making that clear) as a joint tenant of the whole flat. Neither side is correct. Notably, the appellant is unable to point to which part of the flat was leased to her, and in fact she moved bedrooms during the tenancy. The respondents are unable to point to correspondence where the appellant agreed a joint tenancy. However, the documents and emails (which should have been expressly referred to by the tribunal in findings in fact) make clear that, whatever parties intended, there was an arrangement, capable of amounting to a lease, of a one-quarter *pro indiviso* share of the flat. Accordingly, the subjects are capable of being regarded as settled, by construing the plain meaning of the parties' correspondence. The tribunal was in error in considering the subjects were not agreed. Leases, like all contracts, are interpreted according to what people have said and done, not according to their innermost thoughts.

[13] The third finding made was that there was no true agreement as to rent. The appellant, understandably, thought that her maximum liability for rent was £350 per month. The respondents, privately, thought her minimum liability was £350 but that, at their discretion, they could demand from her £1,400 (everybody's share) per month. The fact they accepted £350 per month did not alter that understanding. The correspondence, however, had it been analysed by the tribunal, shows that the parties agreed in correspondence that the rent would be £350 per month, whatever the respondents' private intentions. The rent, therefore, is identified.

[14] The duration was not specified, but that does not prevent there from being a lease.

[15] Accordingly, the terms of the parties' agreement are capable of amounting to a lease. The tribunal erred in finding otherwise.

[16] The question, however, is not whether it was a lease, but whether it was a specific type of lease, namely a PRT.

[17] The lease was not a PRT. That is because the 2016 Act requires certain features to be present. The application falls at the first hurdle. Section 1 of the 2016 defines a PRT. A tenancy can only qualify as a PRT if "the tenancy is one under which a property is let to an individual (the "tenant") as a separate dwelling" (section 1(1)(a)).

[18] The nature of the appellant's occupancy ought to be the subject of a separate finding in fact. It is clear, from the judgment as a whole, that she does not occupy the property "as a separate dwelling". She is one of four residents, and is entitled to exclusive occupation only of her own bedroom. She has to share all other facilities. Other tenants can come and go. She does not occupy a separate dwelling. She occupies part of a communal dwelling. For that reason, the arrangement does not qualify as a PRT under the 2016 Act. The remedies sought

by the appellant only apply to a PRT. She is not entitled to those. Accordingly, the tribunal came to the right result for the wrong reasons, and I will refuse the appeal.

[19] The tribunal thereafter progressed to identify an ongoing contractual arrangement, against which no appeal is taken. The appellant submits that failure to find a PRT established means that landlords can skirt the law. That is not the case. It means only that 2016 Act does not apply. For all other leases, the pre-2016 law applies according to circumstances.

Footnote: pleas-in-law

[20] This appeal might have been avoided had the tribunal properly applied its mind to the pleas-in-law.

[21] Although a section of the tribunal's decision is described as findings in fact, that section includes a discursive treatment of various inferences and views. It does not provide the necessary facts. Findings in fact are of critical importance. They form the bedrock of the whole decision. They show, without equivocation, what evidence has been accepted by the tribunal as proven and, just as importantly, what evidence is rejected. They provide the only basis of fact from which inferences can be made, logical conclusions reached, and decisions in law justified. They should be stated as a list of facts, as briefly and precisely as possible. Any reasoning for a finding in fact must be explained separately.

[22] The shortcomings here have caused real confusion. The appellant appealed on the basis that the tribunal "ignored" that the appellant and respondent agreed rent of £350 per month. That view is mistaken but (because only reading the entire decision reveals that) understandable. The tribunal made no finding about the effect of the "Statement of Terms Agreed" (which shows that the parties agreed a rent of £350 a month) or the parties' evidence on what was discussed. It is impossible to analyse the parties' arrangement without reaching

a finding in fact about this evidence, but the tribunal did not do so. At the heart of this decision is a dispute about whether the appellant's liability was restricted to monthly payment of £350, or whether it amounted to joint and several liability for the monthly rental of £1,400. There was no dispute that the appellant was actually paying £350 a month as rent, but payment is not the same as liability to pay.

[23] The tribunal ought to have made clear, brief findings in fact, and then findings in law on the legal analysis of those facts. The failure to do so has led to opacity and confusion and an unnecessary appeal.

[24] Findings in fact can be found in every sheriff court judgment, many of which are published online, and these might provide guidance.

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.