Upper Tribunal for Scotland

[2020] UT 12
UTS/AP/19/0032

DECISION OF SHERIFF F MCCARTNEY

on an appeal in the case of

SW
per Brown & Co. Legal LLP,
Legal Services Agency, 9 Sir Michael Street, Greenock, PA15 1PQ

Appellant

- and -

CHESNUTT SKEOCH LIMITED, 30 East Main Street, Darvel, KA17 0HP

Respondent

FTT Case Reference FTS/HPC/CV/18/3093

28 November 2019

Decision

The Upper Tribunal dismisses the appeal. This is a decision notice in terms of Rule 29 (2) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016.

Reasons for Decision

Introduction

[1] This is an appeal against the decision of the First-tier Tribunal ("FtT") of 13 May 2019. That decision arose from an application by the Respondent for unpaid rent and certain

losses arising from the termination of an assured tenancy between the parties. A payment order was made against the Appellant in the sum of £3,915.

[2] One of the issues before the FtT had concerned the capacity of the Appellant to enter into a tenancy agreement. On the morning of the hearing the Appellant's representatives indicated they were no longer arguing that particular matter, but instead sought to argue that the lease should be reduced on the grounds of facility and circumvention. The written arguments for the Appellant lodged on 3 May 2019 introduced the argument on reduction. The FtT refused to consider the argument on reduction of the lease to be considered, deciding that (1) the FtT had no jurisdiction to determine reduction of a lease and (2) even if it did have jurisdiction, it could not deal with that issue as no application had been made for reduction of the lease in terms of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Rules").

The relevant law

[3] Section 16 of the Housing (Scotland) Act 2014 gave the FtT its jurisdiction relative to assured tenancies. That section reads:

> "16 Regulated and assured tenancies etc.
>
> (1) 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 12 of the Housing (Scotland) Act 1988 (c.43)).
>
> (c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).
>
> (2) But that does not include any function of jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

(3) Part 1 of Schedule 1 makes minor and consequential amendments."

[4] The 2017 Rules provide a number of rules specific to the making of an application to the FtT, but in particular Rules 4, 5 and 8.

[5] Rule 4 provides:

"4. Application

An application to the First-tier Tribunal must be in writing and may be made using a form from the First-tier Tribunal."

[6] Rule 5 of the 2017 Rules provides:

"5. Requirements for making an application

(1) An application is held to have been made on the date that it is lodged if, on that date, it is lodged in the manner as set out in Rules 43, 47 to 50, 55, 59, 61, 65 to 70, 72, 75 to 91, 93 to 95, 98 to 101, 103 or 105 to 111 as appropriate.

(2) The Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President, must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgment have been met.

(3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held to be made on the date that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgment.

(4) Where the address of a party is not known to the person making an application under these Rules, the applicant must state this in the application and complete a request for service by advertisement in accordance with paragraph (5).

(5) Any request for service by advertisement must provide details of any steps taken to ascertain the address of the party and be accompanied by a copy of any notice required under these Rules which the applicant attempted to serve on the other party and evidence of attempted service.

(6) The First-tier Tribunal may direct any further steps which should be taken before the request for service by advertisement will be granted.

(7) Any relevant notice period begins on the date the advertisement is published in accordance with rule 6A.

(8) The First-tier Tribunal must not grant the request where any-

(a) documents requested under paragraph (3) are not received, or
(b) further steps directed under paragraph (6) are not taken, within such reasonable period from the date of such request or such direction as the Chamber President considers appropriate."

[7] Rule 8 of the 2017 Rules states:

"8.- Rejection of application

(1) The Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President, must reject an application if-

(a) they consider that the application is frivolous or vexatious;
(b) the dispute to which the application relates has been resolved;
(c) they have good reason to believe that it would not be appropriate to accept the application;
(d) they consider that the application has been made for a purpose other than a purpose specified in the application; or
(e) the applicant has previously made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, there has been no significant change of any material considerations since the identical or substantially similar application was determined.

(2) Where the Chamber President, or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, makes a decision under paragraph (1) to reject an application the First-tier Tribunal must notify the applicant and the notification must state the reason for the decision."

[8] Rule 9 of the 2017 Rules sets out:

"9.- Notification of acceptance of application

(1) Where Rule 8 does not apply, the First-tier Tribunal must, as soon as practical, give notice to each party–
(a) setting out the detail of the application in such a manner as the First-tier Tribunal thinks fit; and

(b) specifying the day by which any written representations must be made.

(2) The day specified for the purposes of paragraph (1)(b)-
(a) must be at least 14 days after the day on which the notice is given; and
(b) may, at the request of any party, be changed to such later day as the First-tier Tribunal thinks fit.

(3) The First-tier Tribunal must notify each party of a change mentioned in paragraph (2)(b)."

[9] Rule 70 of the 2017 Rules states:

"70.- Application for civil proceedings in relation to an assured tenancy under the 1988 Act

Where a person makes any other application to the First-tier Tribunal by virtue of section 16 (First-tier Tribunals jurisdiction in relation to regulated and assured tenancies etc) of the 2014 Act, the application must-

(a) state –
(i) the name and address of the person;
(ii) the name and address of any other party; and
(iii) the reason for making the application;

(b) be accompanied by –
(i) evidence to support the application; and
(ii) a copy of any relevant documentation; and

(c) be signed and dated by the person"

The hearing before the Upper Tribunal

[10] The Appellant's representative sought to argue that the FtT had jurisdiction to hearing an application for reduction, that a valid application was before the FtT by virtue of the written submissions that had been lodged with the FtT on the 3 May 2019 which satisfied the requirements of the 2017 Rules, but that in any event, the arguments over reduction of the lease should have been considered as a defence to the claim even without an application. The Respondent opposed the appeal. The Appellant's representative sought to lodge additional documentation before the tribunal, being a copy of the 2017 Rules, which was not

opposed, and a copy of the written submissions and bundle of documents lodged by the Appellant before the FtT. This was opposed by the Respondent, but I allowed those documents to be lodged, noting that the Respondent had already had sight of the documents.

[11] There are two issues in this appeal; (i) whether the FtT had jurisdiction to hear an application for reduction of a tenancy through facility and circumvention and if so, (ii) whether it had such an application before it or required an application before it. Those points will be dealt with in reverse order.

Whether there was an application

[12] The 2017 Rules provide a clear procedure for applications made to the FtT. Rule 5 provides that before an application is deemed to be accepted, it is considered by the Chamber President, or an authorised member. An application must comply with certain requirements, depending on its type. For example an application regarding compliance by a property factor with the 2011 Act must comply with Rule 43. That rule sets out a list of information to be provided, including details of the home owner, the factor, addresses, notifications, responses, and copies of statement of services. The application must also be signed and dated by the home owner or the home owner's representative. Rules 47 to 50 set out various requirements for applications on repairing standards; rule 55 on applications regarding disputes over a landlord's right of entry. Relevant to this decision, rule 70 sets out requirements relating to an application for civil proceedings relating to an assured tenancy.

[13] The application before the FtT was lodged in December 2018. The Appellant received intimation of the application at some point in December 2018, and instructed her solicitors in early January 2019. A case management discussion took place on 22 January

2019. At that point the Appellant's representative raised that it would be in dispute as to whether the Appellant had capacity to enter into the tenancy agreement. That argument focused on whether the assured tenancy was void due to the absence of capacity to enter into such any tenancy agreement. The Appellant's agents also indicated that liability and quantification of the sums sought was also challenged. Following that case management hearing, a direction was issued for the Appellant to produce documentation on the issue of capacity issue. A hearing on the application was assigned for 13 May 2019.

[14] On 3 May the Appellant's representative lodged written submissions and an inventory of documents, including correspondence from a social worker, a clinical psychology report and a number of authorities. The written submissions raised a new argument that the assured tenancy was voidable due to facility and circumvention, and the Appellant was seeking an order that the tenancy be reduced. The written submissions did not indicate that it was no longer being argued that the tenancy was void due to the lack of capacity on behalf of the Appellant to enter the tenancy agreement. On the morning of the hearing the Appellant's representatives indicated they were no longer seeking to argue that issue around the lack of capacity.

[15] The Appellant's representative argued that an application did not need to be on a prescribed form, pointing out that rule 4 required an application to be in writing, but by the use of the word 'may' it was not mandatory to use the prescribed form for an application. The written submissions satisfied rule 70 (applications for civil proceedings) in respect that the requirements for the name and address of both parties, the reasons for the application and evidence to support the application were all contained within the written submissions. Accordingly written submissions lodged on 4 May 2019 constituted an application for reduction and the FtT should have considered it.

[16] I do not accept that submissions. If I was to accept the Appellant's submission that an application could be made in that way, it would frustrate the operation of rule 5. That rule sets out that each application to the tribunal is considered by the Chamber President, or a member of the tribunal under delegated powers, to consider whether the application is valid. That does not just rest on the issue of whether the correct information and documentation has been provided, but the Chamber President will also consider Rule 8, which provides for rejection of applications in various circumstances including that the issue has been previously resolved, that the application is frivolous or vexatious, or that there is good reason to believe it would not be appropriate to accept the application. But there may be other good reasons why the 2017 Rules have been drafted as they have. Scrutiny of the application at an early stage may alert the tribunal to the fact that the application is similar to other pending before the tribunal, and should be heard at the same time (rule 12).

[17] Separately the Appellant's representative argued that the FtT should not require a separate application to be made to consider the issue of reduction of the lease. Whilst there was no provision for counterclaims in the 2017 Rules, it was not necessary that there was a specific application to reduce the lease. The reduction of the lease formed part of the defence to the application, and the issue of reduction should be treated as ope exceptionis in terms that the issue was before the FtT without the necessity of an application being made. That had happened previously in the Sheriff Court and Court of Session without specific rules. But now the Sheriff Court Ordinary Cause Rules ("OCR") had a specific rule; OCR 21.3 allowed an objection to a document to be raised as a defence without the need to take specific proceedings for reduction. The tribunal should have taken that approach which was consistent with Rule 2 (1) of the 2017 Rules. Approaching the issue in this way allowed a procedure which was informal, proportionate and flexible as set out in Rule 2 (2).

[18] I reject these arguments. The fact that there is such a rule in the Sheriff Court does not really assist the Appellant. It is a different process. Proceedings in the Sheriff Court have specific rules on pleading within particular timescales in order to provide fair notice to each party as to what is to be determined by the court. It is a leap to transpose a specific Sheriff Court rule to the FtT. Whilst it is asserted that both the Court of Session and Sheriff Court had allowed such a defence to be presented with or without specific rules, no authority was provided for that proposition. Similarly the reliance on specific parts of Rule 2 of the 2017 Rules does not take the Appellant any further. The Appellant's representative correctly conceded that whilst he relied on certain parts of Rule 2 (2) (in respect of the dispute being resolved in a proportionate way, with informality and flexibility), the overriding objective of the FtT was to deal with matters justly and that required consideration as to whether the proceedings were fair to the Respondent. He accepted that the Respondent's representative would not have known that the issue of the Appellant's capacity to enter into the contract was no longer being pursued until the morning of the hearing and would not have understood a different argument was being pursued until that point. Mr Johnstone confirmed that he had arranged for the appellant's father to be in attendance to give evidence at the tribunal hearing on the issue of the Appellant's capacity to enter into the lease, on the basis he understood that was the issue to be determined. Whilst the written arguments did raise the issue of the reduction of the lease, he had not understood that the Appellant's arguments had changed.

[19] I consider that a separate application should have been made to the FtT regarding the reduction of the lease. That allows the FtT to ensure that the objective of Rule 2 requiring applications to be dealt with justly is achieved. If such an application had been

made, it could have been heard alongside the current application, allowing the matter as a whole to be dealt with in a way which was proportionate.

[20] If I am wrong that a separate application required to be made, at the very least the Appellant should have sought to have the written representations dealt with in terms of Rule 14 (amendment of written representations raising new issues). The consent of the FtT would require to be obtained (Rule 14(1)). A period of not less than 14 days must be given to the opponent to consider the written representations and make any representations in response (Rule 14 (2)). The written submissions which first raised the issue of reduction were intimated by email on 3 May 2019 for a hearing that took place on 13 May 2019. By any view, the raising of the issue of reduction of the tenancy came too late. No such application was made by the Appellant to allow these matters to be raised. The fact that Mr Johnstone arranged for a witness to come and give evidence on the issue of capacity underlies the fact that the Appellant has not given adequate notice of their position.

[21] Accordingly I consider that the FtT were correct in law to refuse to consider the issue of reduction of the lease under any of the arguments before me.

Whether a dispute "arising from" an assured tenancy

[22] Sheriff Ross, sitting as an Upper Tribunal judge, considered the question of what "arising from" meant in the context of a private tenancy (Anderson v First-tier Tribunal for Scotland Housing and Property Chamber [2019] UT 48). Whilst his decisions rests on section 71 of the 2016 Act, that wording is similar to the wording in section 16, which governs the jurisdiction in the current case. Section 71 provides the FtT with jurisdiction for a private residential tenancy where the dispute is "in relation to civil proceedings arising from a private residential tenancy" (section 71 of the 2016 Act). Section 16 of the 2016 Act,

relative to the current application, the FtT has the "functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies" (section 16 (1) of the 2016 Act). That includes an assured tenancy. Sheriff Ross considered it was a matter of fact and degree in each case and therefore a mixed question of fact and law.

[23] Sheriff Jamieson considered that the question of what the jurisdiction of the FtT was could be usefully considered by reference to the ordinary jurisdiction of the sheriff, rather than any special or particular statutory functions conferred on the sheriff (*Parker* v *Inkersall Investments Ltd* [2018] SC DUM 66).

[24] It seems to me, that if a valid application had been made to the FtT, then it is arguable that the FtT had jurisdiction to deal with it. The action for reduction can only arise following a lease being entered into. The wording of section 16 of the 2016 Act is potentially wide enough to cover a wide jurisdiction. It transfers the functions and jurisdictions of the Sheriff in relation to assured tenancies to the FtT (section 16(1)). Parliament expressly limited the FtT's jurisdiction in relation to criminal matters (section 16 (2)) but did not seek to place other limitations on the FtT. As Sheriff Ross noted, the "natural and ordinary effect of the words "arising from" is unrestricted and imprecise, and invites a wide, inclusive approach.... 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." (*Anderson* v *First-tier Tribunal for Scotland Housing and Property Chamber* [2019] UT 48 at para [14]).

[25] However, that is not a matter which I need to conclusively determine given my decision on the question of whether the FtT had an application before it, or should have considered making an order for reduction as part of its consideration of the case. Should any such applications come before the FtT in the future, following Sheriff Ross' reasoning, it

will be a matter for the FtT to consider the particular facts and circumstances of that case to determine if it has jurisdiction.