



DECISION NOTICE OF SHERIFF IAN HAY CRUICKSHANK

in the case of

Mr James Stronach, 138 Victoria Street, Stromness, Orkney, KW16 3BU

Appellant

and

Dr Timothy Kasoar and Miss Alice Bucker, Flat 6, 9 Garvald Street, Edinburgh, EH16 6FB

Respondents

FTT Case Reference FTS/HPC/PR/20/0450

22 June 2021

Decision

Grants leave for an extension of time to lodge the application for permission to appeal; thereafter, having further considered the appellant's application refuses permission to appeal the decision of the First-tier Tribunal Housing and Property Chamber dated 10 December 2020 on the grounds set out in appellant's Form UTS-1 dated 6 May 2021.

Introduction

[1] An application was lodged with the First-tier Tribunal Housing and Property Chamber ("the FtT") under Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 seeking an order for payment where the

landlord had failed to carry out duties in relation to a tenancy deposit. The application was also under the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”).

[2] At a Case Management Discussion on 10 December 2020 the FtT determined that the appellant had failed to comply with the 2011 Regulations. He had not paid the deposit of £300 into an approved scheme within the required time limit. The FtT upheld the application and determined that a fair and proportionate sanction was £450 and made an order against the appellant in that sum.

[3] Mr. Stronach (“the appellant”) seeks permission to appeal the decision of the FtT dated 10 December 2020. Leave to appeal was refused by the FtT on 5 March 2021.

Leave to appeal not lodged timeously

[4] The application for leave to appeal was not lodged timeously. In terms of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 the application was lodged out with the permitted 30 days after the day of receipt of the notice of refusal of permission to appeal by the FtT (Rule 3(9)). The FtT’s decision to refuse leave to appeal was dated 5 March 2021. The appellant, who lives and works in Malaysia, attempted to lodge his application on 22 April 2021. The application was acknowledged by the Upper Tribunal on 23 April 2021 but returned to the appellant for correction. The appellant returned the corrected application and accompanying documents on 7 May 2021.

[5] Whilst not excusing the late lodging of the application in its entirety, I accept there may have been some initial confusion, and difficulty, in identifying the correct contact details for the Upper Tribunal on the appellant’s part. There may have been some further

email communication difficulties thereafter. With some hesitation I have concluded it is in the interests of justice to allow an extension of time for lodging the application.

Hearing of application

[6] Having allowed the extension of time to lodge the application I elected to invite the appellant and respondents to a hearing which was conducted on 9 June 2021. The parties attended via the WebEx platform.

[7] In advance of the hearing on 6 June 2021 the appellant provided written submissions in addition to the Form UTS-1. The respondents also lodged written submissions. Both parties adopted their respective written submissions and were given an opportunity to expand these in oral submissions at the hearing before me.

Grounds of appeal

[8] The grounds of appeal are as follows:

(1) The appellant did not have a fair opportunity to present his case at the Case Management Discussion on 10 December 2020 due to communication difficulties during the hearing. The hearing concluded whilst the appellant's mobile telephone disconnected and he was deprived of the opportunity of providing a closing statement to the FtT.

(2) The FtT erred in finding that the respondents were entitled to an award in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 given that the respondents had unlawfully withheld rent due and, having willingly entered into the arrangement regarding the deposit, their actions in pursuing the matter were driven by spite.

(3) Esto the FtT was entitled to make an award under the 2011 Regulations it erred in exercising its discretion in making the award at the level it did.

Discussion

[9] The appellant submitted that in September 2019 the parties had entered into “an arrangement” and in addition to a monthly rent of £300 a deposit of £300 was paid. It was accepted this had not been paid into an approved scheme. At the FtT the appellant conceded a formal lease had been created albeit he had not appreciated that at the time. When the tenancy came to an end, with certain deductions being made, the remainder of the deposit was repaid to the respondents on 7 February 2020.

[10] The appellant submitted that at the Case Management Discussion he had attended from Malaysia by mobile telephone. The reception had been terrible and he submitted he had been disadvantaged as he lost signal and had to dial back into the hearing on several occasions. The sound quality had been poor. Towards the end of the meeting when he should have been given an opportunity to summarise his case the appellant lost signal and was unable to rejoin the meeting. By the time he managed to reconnect the Hearing had concluded. The appellant claimed this to be detrimental and unfair.

[11] Separately, the appellant submitted that the respondents had only brought up the issue of failure to lodge the deposit with an approved scheme following the appellant’s decision to deduct certain sums from the deposit. The appellant considered it was “morally wrong and totally unfair” for the FtT to find against him and impose a sanction. The respondents wanted to punish him and they had suffered no loss. The respondents had been happy with the arrangement with the deposit. If, however, the FtT was correct in imposing a sanction the appellant argued that at best the respondents should have been

awarded a nominal sum. He suggested an award of £1 would be appropriate in the circumstances.

[12] In their submissions the respondents did not consider the appellant had been disadvantaged by a poor telephone connection. Whilst they accepted that the appellant had lost connection on a small number of occasions their recollection was that the chairing member paused proceedings on all but the last occasion to allow the appellant to rejoin. On the final instance the legal member of the FtT was about to announce his decision and there was no lost opportunity for the appellant to make further representations.

[13] The respondents did not agree that they had accepted an informal arrangement in relation to the lease of the property. They had been given no option. The respondents submitted that the law placed no obligation on the tenant to insist that a landlord protect a deposit or abide by relevant legislation. In any event the respondents submitted that the appellant had presented no additional facts that had not been presented by him at the Case Management Discussion. They argued that the appellant had not identified any error in law on the part of the FtT.

Conclusion

[14] This is an appeal in terms of section 46 of the Tribunals (Scotland) Act 2014. As such, an appeal is to be made on a point of law only. In terms of section 46(4) permission to appeal may be given only if I am satisfied that there are arguable grounds for the appeal. My function, as a member of the Upper Tribunal, is limited as it is not an opportunity to rehear the factual matters previously argued before the FtT.

[15] An error of law would include (i) an error of general law, such as the content of the law applied; (ii) an error in the application of the law to the facts; (iii) making findings for

which there is no evidence or which is inconsistent with the evidence and contradictory to it, and (iv) a fundamental error in approach to the case: for example, by asking the wrong question or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal could properly reach (*Advocate General for Scotland v Murray Group Holdings* 2016 SC 201 at paras 42 to 43). It is for the appellant to satisfy me that there are arguable grounds for appeal which point to an error of law.

[16] The application before the FtT was brought under Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 seeking an order for payment where the landlord had failed to carry out duties in relation to a tenancy deposit. The application was further in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

[17] Regulation 3 of the 2011 Regulations, so far as relevant to the present case, is in the following terms:

3.—

(1) A landlord who has received a tenancy deposit in connection with a relevant tenancy must, within 30 working days of the beginning of the tenancy—

(a) pay the deposit to the scheme administrator of an approved scheme; and

(b) provide the tenant with the information required under regulation 42.

(1A).....

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(2A)

(3) A “relevant tenancy” for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement —

(a) in respect of which the landlord is a relevant person; and

(b) by virtue of which a house is occupied by an unconnected person, unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions “relevant person” and “unconnected person” have the meanings conferred by section 83(8) of the 2004 Act.

[18] Regulation 9 of the 2011 Regulations is in the following terms:

9. —

(1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.

(2) An application under paragraph (1) must be made no later than 3 months after the tenancy has ended.

[19] Regulation 10 of the 2011 Regulations, so far as relevant to the present case is in the following terms:

10.

If satisfied that the landlord did not comply with any duty in regulation 3 the First-tier Tribunal —

(a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit....

[20] The material facts before the FtT are not in dispute. Whereas the appellant had reluctantly accepted that a formal lease existed between the parties he conceded that the

deposit had not been placed in an approved scheme. With that concession the appellant argued before the FtT that it was inappropriate in the circumstances of the case for a sanction to be imposed.

[21] In relation to the first ground of appeal I do not consider the appellant was deprived of a fair opportunity to present his case at the Case Management Discussion. Whereas there were communication difficulties during the hearing it is clear from the written decision of the FtT that all of the information which the appellant presented was fully recorded. The respondents' recollection of the Case Management Discussion was that the hearing was paused when the appellant was disconnected. At the hearing before me the appellant did not provide any further relevant factual information which was not recorded by the FtT in their written decision. The appellant did not suggest that the FtT had erroneously recorded his submissions nor did he point to any material information absent from the decision. Accordingly, I do not consider there to have been any prejudicial error due to communication difficulties in the conduct of the Case Management Discussion.

[22] With regard to the second ground of appeal the FtT did not err in law in finding that the respondents were entitled to an award in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011. The FtT properly determined that this was a relevant tenancy to which the 2011 Regulations applied. In terms of Regulation 10 of the said regulations where the FtT is satisfied that the landlord did not comply with any duty in regulation 3 then the Regulation states that the FtT "must (my emphasis) order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit". Thereafter it is a matter for the discretion of the FtT to determine the level of any award. Accordingly, in my judgement, on the facts the FtT correctly interpreted and applied the relevant law.

[23] With regard to the third ground of appeal I see no reason to find that the FtT erred in awarding the sanction at the level they did. The maximum sanction could have been £900. In their decision the FtT correctly observed that the amount of any award under the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case. They referred to the case of *Tenzin v Russell* 2015 Hous.L.R. 1. The FtT further referred to *Jenson v Fappiano* 2015 G.W.D 4-89. It is clear that the FtT gave full consideration to what would be a fair, proportionate and just sanction in all the circumstances of this case. In their written decision the FtT took account of various mitigating factors including the fact that the appellant did not engage in the letting of property on a commercial basis and had misunderstood the need for the deposit to be placed in an approved scheme. The FtT also took into account that the appellant had repaid the balance of the deposit at termination of the tenancy and had accepted he was at fault and had contravened the 2011 Regulations. The FtT took account of all relevant factors and fully explained its reasoning for the chosen sanction. In arriving at a sanction of £450 there was no error in law and the FtT cannot be faulted in any way for awarding that sum.

[24] Having given consideration to the submissions of both the appellant and the respondents I am not satisfied that there are arguable grounds for this appeal. I refuse permission to appeal for the reasons above stated.