Upper Tribunal for Scotland

2023UT11
Ref: UTS/AP/22/0028

DECISION OF

Sheriff Ian Hay Cruickshank

ON AN APPLICATION FOR PERMISSION TO APPEAL (DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND) IN THE CASE OF

Ms Pei H Tan, 13 Haremoss Drive, Portlethen, Aberdeenshire, AB12 4UX

Appellant

- and -

Mr Angelo Van Wyk, 16 Schoolhill Drive, Portlethen, Aberdeenshire, AB12 4PN

Respondent

FTS Case reference: FTS/HPC/PR/22/1059

4 April 2023

Decision

Refuses permission to appeal the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) dated 5 September 2022.

Introduction

[1] This is an appeal against a decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the FTS") dated 5 September 2022. The FTS ordered the appellant to pay the sum of £2,400 to the respondent by way of sanction under Regulation 10 (1)(a) of the Tenancy

Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). The FTS determined the appellant was in breach of her obligations under Regulation 3. The penalty imposed was equivalent to twice the deposit.

[2] The appellant sought permission to appeal which was refused by the FTS in its written decision dated 8 November 2022. The FTS did not consider that the grounds of appeal raised any arguable points of law. The appellant now seeks permission to appeal from the Upper Tribunal in terms of section 46(3)(b) of the Tribunals (Scotland) Act 2014.

[3] Having received this application for permission to appeal I assigned the matter to a hearing. This was conducted via the Webex platform on 14 March 2023. The appellant was in attendance and presented her application with the assistance of a Chinese interpreter. The respondent also attended and participated in the hearing.

Grounds of appeal

[4] The appellant seeks to advance two grounds of appeal. These can be summarised as follows:

1. The FTS erred in finding in fact that the Private Residential Tenancy between the parties commenced on 1 December 2020 when there was insufficient evidence to support that finding.
2. The FTS erred in law in concluding that the Private Residential Tenancy created under the Private Housing (Tenancies) (Scotland) Act 2016 commenced on 1 December 2020 given the tenant's immigration status prior to 17 February 2021 and

wrongly concluded that the property was the tenant's only or principal home as at the earlier date.

Matter in dispute before the FTS

[5] The matter in dispute before the FTS was the point in time when a Private Residential Tenancy ("PRT") had been created. The respondent had moved from South Africa. He first leased the subjects on 1 December 2020 having paid a deposit in advance of that date. No written contract was initially entered into. The appellant considered that the arrangement had been by way of a holiday let. She did not consider that it was appropriate to enter into a PRT until the tenant had received permission to stay in the UK. The tenant was granted a Biometric Residence Permit ("BRP") and documentation regarding this was exhibited to the appellant on 17 February 2021. Thereafter a written agreement was entered into. The appellant lodged the deposit with an approved scheme on 16 March 2021.

[6] Given that there was a factual dispute between the parties the FTS assigned the matter to an evidential hearing. The decision of the FTS states this proceeded by teleconferencing. Both parties attended and represented themselves. Each party lodged written submissions prior to the hearing.

[7] The FTS recorded the position as presented by both parties. It is unnecessary to repeat that at length. In particular, the FTS noted the respondent's account, including the facts given by him surrounding his, and his family's move from South Africa. The work related reason for his move was noted as was his immigration status. The tenant submitted the appellant had been unhappy to provide him with a PRT and he put her on notice that he intended to raise an

application with the FTS to force her to provide a written PRT. At that point, being in March 2021, a written PRT was given and the entry date was stated as 1 December 2020.

[8] The appellant objected to certain chapters of oral evidence given by the respondent. The appellant submitted that documentary evidence was necessary to substantiate the respondent's version of events. This objection was noted by the FTS. The appellant further stated that she was fairly new to being a landlord and had entered what she regarded as a holiday let without having taken legal advice. The appellant confirmed that she had been prepared to provide a PRT once she had seen documentation satisfying her that the respondent had the right to reside in the UK. She advised the FTS that when she was put on notice that the respondent might raise an application she contacted the Scottish Association of Landlords and was told to seek legal advice but she did not do this.

[9] The FTS concluded that the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") did not require a tenant to have a residence visa to enter into a PRT. There was no legal requirement on the landlord to check the immigration status of a prospective tenant in Scotland. This was not a case related to immigration status, the housing issue was the central focus of the case. With reference to the relevant legislation the FTS did not accept a holiday let was created on 1 December 2020. The FTS summarised all of the surrounding facts and circumstances which it accepted. The FTS concluded that these facts were not suggestive of someone treating the property as a temporary home. The FTS concluded that the property was treated as a principal home from the outset and, in fact, it remained so until the appellant served a Notice to Leave, with the respondent vacating in January 2022. At paragraph 25 of their decision the FTS stated it

found the evidence of the respondent to be consistent but did not find the appellant's evidence to be either consistent or credible in relation to certain matters.

Submissions before the Upper Tribunal

[10] The appellant submitted that the evidence upon which the FTS concluded the PRT had commenced on 1 December 2020 was insufficient to support that conclusion. The FTS should not have found in fact that the PRT commenced on that date but had, in fact, commenced on 17 February 2021. This was the date upon which the tenant had been able to provide evidence that he had been granted a BRP. Prior to that date there was only an agreement between the parties that there was in place a holiday let and nothing more. If the FTS had concluded the PRT commenced on 17 February 2021 it would have been the case that the deposit was lodged with the approved scheme within 30 days of commencement of the PRT and no breach of the 2011 Regulations had occurred.

[11] The appellant submitted that the FTS had not properly considered all the evidence she had provided. The evidence provided by the respondent had not been sufficient in quality to lead to the conclusion that a PRT commenced in December 2020. The true nature of the agreement between the parties was that a holiday let was offered in the first instance and a PRT only commenced as from the date the respondent provided evidence that he had permission to stay in the UK. Looking at, and weighing the evidence properly, the FTS erred in finding that the property could be regarded as the respondent's principal home from the original entry date. The evidence contradicted this conclusion.

[12] The appellant submitted that the FTS had not given proper consideration to the respondent's immigration status. If at the outset he only had a visitor's visa it was incorrect to conclude that the property was the respondent's principal home at that point. The appellant accepted that there were differences in immigration law between Scotland and other parts of the UK. That said, the date upon which the respondent exhibited his BRP was the main evidence in the case when it came to determining the date upon which the PRT commenced.

[13] The respondent submitted that the FTS had not erred in law. It had correctly concluded that a PRT had commenced on 1 December 2020. The FTS had focused on the provisions of the 2016 Act and did not consider matters relating to immigration status as the latter was not relevant in the circumstances. The FTS had been correct in reaching this conclusion.

[14] The respondent submitted that the FTS had identified the true nature of the contract between the parties. The issue had been whether the parties had agreed that a PRT would be created as from 1 December 2020 upon confirmation that the respondent had obtained a BRP. The respondent fulfilled his obligation in this respect. The respondent stated that there had been issues in obtaining a written tenancy agreement. This had only been provided upon his suggestion that the matter should be brought before the FTS. Thereafter a tenancy agreement was provided and backdated to the date when the respondent first took occupation. The FTS had considered the evidence and focused on whether the tenanted property was, in fact, the respondent's principal residence. They had correctly concluded that it had been throughout the entire period of the lease.

Discussion

[15] A PRT is created by statute. It is defined by section 1 of the 2016 Act as follows:

> **"1 Meaning of private residential tenancy**
>
> (1) A tenancy is a private residential tenancy where—
>
> (a) the tenancy is one under which a property is let to an individual ("the tenant") as a separate dwelling,
>
> (b) the tenant occupies the property (or any part of it) as the tenant's only or principal home, and
>
> (c) the tenancy is not one which schedule 1 states cannot be a private residential tenancy.
>
> (2) A tenancy which is a private residential tenancy does not cease to be one by reason only of the fact that subsection (1)(b) is no longer satisfied."

[16] Section 3 of the 2016 Act is in the following terms:

> **"3 Writing not required to constitute private residential tenancy**
>
> (1) A purported contract becomes lawfully constituted, despite not being constituted in a written document as required by section 1(2) of the Requirements of Writing (Scotland) Act 1995, when—
>
> (a) a person occupies a property as the person's only or principal home in pursuance of the purported contract's terms, and
>
> (b) the tenancy which the purported contract would create, were it lawfully constituted, would satisfy the conditions in paragraphs (a) and (c) of section 1(1).
>
> (2) Any term of a purported contract which is unrelated to a private residential tenancy is not to be regarded as a term of the contract for the purpose of subsection (1)."

[17] Schedule 1 of the 2016 Act lists tenancies which cannot be a PRT. Paragraph 6(1) of the schedule states that a tenancy cannot be a PRT if the purpose of it is to confer on the tenant the right to occupy the let property for a holiday.

[18] Although a PRT does not require to be in writing there is a statutory duty on the landlord to provide the tenant with a document setting out all the terms of the tenancy (section 10(1) of the 2016 Act). This must be provided before the end of the "specified day" which is defined in terms of section 10 (2) of the 2016 Act as follows:

> "(2) The day referred to in subsection (1) is—
> (a) the day on which the tenancy commences, if the tenancy is a private residential tenancy on that day, or
> (b) the day falling 28 days after the day on which the tenancy became a private residential tenancy, if it became one after the day on which the tenancy commenced."

[19] The 2016 Act seeks to strike a balance between the interests of landlord and tenant. The legislation provides security of tenure to tenants where the property is their principal home. There will be situations where an individual, for work or other reasons, resides in more than one property. It is clearly a matter of fact when a property becomes a principal home. The decision of the tenant as to which property they regard as their principal home is of relevance but will require support from the surrounding facts and circumstances in each case. Some guidance may be provided by case law in a different context. In *Roxburgh DC* v *Collins* 1991 SLT (SH. Ct.) 49, which related to right to succession of a tenancy, Sheriff Principal Nicholson referred to the type of factors which could be determinative of establishing whether a property was to be regarded as a person's principal home. A property could be regarded as such where there was a "real tangible and substantial connection with the house in question that it, rather than any other place of residence, can properly be described as having been his…principle residence" (*Roxburgh* at 51).

[20] Furthermore, in the context of whether a property was a tenant's only or principal home and therefore an assured tenancy in terms of section 12(1) of the Housing (Scotland) Act 1988, as opposed to it being a holiday let, was considered in the case of *St Andrews Forest Lodges Ltd* v *Grieve* [2017] SC DUN 25. To that extent, the provisions relating to an assured tenancy had broadly similar statutory exceptions in relation to other types of leases which could not be an assured tenancy as are present under the 2016 Act in relation to PRT's. In that case, Sheriff Collins determined a tenancy did not become a holiday let simply because one party wished to describe it as such. He concluded that whether or not a holiday let existed as opposed to any other type of tenancy was a matter for the Court to determine in light of the evidence before it (at paragraph 54). I agree with this conclusion.

Decision

[21] This is an appeal in terms of section 46 (3)(b) 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 if I am satisfied that there are arguable grounds for appeal. As has been repeated in numerous UT decisions, the function of the Upper Tribunal is limited as it is not an opportunity to rehear the factual matters previously argued before the FTS. My task is to decide whether the grounds of appeal disclose an arguable error of law on the part of the FTS.

[22] Turning to the appellant's first ground of appeal, it is her contention that the FTS erred in finding in fact that the PRT commenced on 1 December 2020 when there was insufficient evidence to support that finding. The appellant criticises the decision reached on the quality of the evidence which was presented by the respondent. In effect, the appellant submits that the

FTS should not have been satisfied with the oral evidence provided without documentary evidence to back-up what was presented. It is entirely a matter for the FTS whether it considers the evidence presented is sufficient in quality for it to reach the findings in fact in any particular case. The Upper Tribunal could only interfere with a decision of the FTS if findings in fact had been made for which there was no evidence or which was inconsistent with the evidence or contradictory to it.

[23] Based on the evidence presented the FTS concluded that the property was the respondent's principal home as from 1 December 2020. They were entitled to do so in my view. In essence the appellant is aggrieved because the FTS preferred the version of events provided by the respondent above her own. That is the function of the FTS when there is a factual dispute. The FTS must decide what evidence it accepts and what findings in fact it makes based on that evidence. The FTS must then apply the law to the facts it finds established. The evidence it accepted in this case was perfectly sufficient in quality, and sufficient in law, to reach the decision which the FTS reached. On that basis, the first ground of appeal has no merit and permission to appeal is refused.

[24] In relation to the appellant's second ground of appeal, the FTS concluded that there was no legal requirement to check the immigration status of a prospective tenant before entering into a PRT. Ultimately, in the course of this appeal, I did not understand the appellant to argue otherwise. Submissions relating to the legal significance of immigration status and its legal impact on the creation of a PRT were not expanded upon to any material degree. In any event I

cannot find any support for the proposition that, in law, the immigration status of a tenant would be an impediment to the formation of this type of statutory tenancy.

[25] The basis of the appellant's second ground of appeal, as I understand it, is more limited. The appellant submits that if a person does not have permission to stay in this country then this would logically lead to a conclusion that any agreement to lease a property could not, at that point, make the property a principal home and therefore the tenancy could not be a PRT.

[26] To determine this ground of appeal the whole facts as found established by the FTS must be considered. The immigration status of the respondent was but one of these facts. The other facts included that a deposit was paid on 12 November 2020. The respondent moved into the property on 1 December 2020. The property had not been advertised for let as a holiday home. The respondent had purchased items of furniture and paid Council Tax from the date he moved in. The respondent had not considered the lease to have been a holiday home. He had arrived in the UK with a large quantity of luggage for work purposes and had given up his property in South Africa. He had travelled with his family to the UK. When he returned to South Africa he stayed in hotels. He had worked from the property and his children had been home schooled there until their visas allowed them to enroll in the local school. These facts led the FTS to conclude that, in law, a PRT had been entered into and that the same commenced on 1 December 2020.

[27] The FTS determined there was an evidential basis to support the conclusion that there was a real, tangible and substantial connection with the property in question that it, rather than any other place of residence, could properly be described as having been the respondent's

principle home from the original entry date. On that basis, applying the relevant law to these facts, The FTS concluded that a PRT had been entered into as at commencement of the lease. In this respect there was no error in the application of the law to the facts. Accordingly, permission to appeal on the second ground of appeal is refused

Sheriff Ian H Cruickshank
Judge of the Upper Tribunal for Scotland