Upper Tribunal for Scotland

[2019] UT 45
Ref: UTS/AP/19/0020

DECISION NOTICE OF SHERIFF NIGEL ROSS

in the case of

DARREN ROLLETT

Appellant

and

MS JULIA MACKIE

Respondent

FTT Case Reference FTS/HPC/PR/18/2766

10 July 2019

Decision

The Tribunal refuses the appeal and affirms the decision dated 28 February 2019 of the First-tier Tribunal.

Reasons for Decision

[1] The appeal was heard at a re-scheduled case management discussion on 8 July 2019. Parties agreed that there was no requirement for a further hearing as all relevant issues were before the tribunal.

[2] This appeal is against a decision of the First-tier Tribunal ("FtT") dated 28 February 2019. The FtT awarded the sum of £2150 to the appellant, in respect of the respondent's breach of regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (the "2011 Regulations"). The landlord failed under regulation 3 of the 2011 Regulations to lodge the appellant's deposit of £1075 with an approved scheme. The award is a sum representing twice the deposit. The appellant appeals on the basis that three times the deposit, namely the maximum award available under regulation 10, should have been awarded.

Powers of the Upper Tribunal for Scotland ("UTS") on appeal

[3] As discussed at the CMD, an appeal does not allow the UTS simply to start again, and make its own decision on the facts. An appeal is only on a point of law (Tribunals (Scotland) Act 2014 section 46(2)). What amounts to a point of law breaks down into four broad categories (*Advocate General for Scotland* v *Murray Group Holdings and others* 2016 SC 201).

[4] In the present case, there is no challenge that the FtT erred in interpreting the correct law or made any material error in the facts which it found established. The error is said to be in the application of the sanction. Regulation 3 set out a duty on the landlord, and regulation 10 provides that:

> "If satisfied that the landlord did not comply with any duty in regulation 2, the [FtT] (a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit…"

[5] Regulation 10 therefore involves an element of discretion. The appellant contends that this discretion was exercised wrongly: based on the facts, the FtT ought to have awarded the maximum amount, namely three times the deposit, and erred in awarding only twice the deposit.

[6] This appeal therefore falls into the fourth category in *Advocate General for Scotland* v *Murray Group Holdings and others* (above), namely a category:-

> "…comprising cases where the First-tier Tribunal has made a fundamental error in its 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 tax tribunal could properly reach." (ibid at [43])

[7] So the test for the UTS on appeal is whether the FtT made such a fundamental error.

Whether there was a fundamental error

[8] The FtT applied the correct law, and considered the correct issue, namely what level of penalty was appropriate. They did not take anything irrelevant into account. The appeal is based purely on the level of award.

[9] The appellant referred to the existence of unidentified FtT cases which he says demonstrate that a "serious" breach should lead to an award of three times the deposit, and which therefore indicate that the FtT did not take the correct view of the seriousness of the case. However, other FtT cases were not binding on the FtT, and the decision under regulation 10 is highly fact-specific to each case. Accordingly, awards in other cases, even if the breach is described as "serious" or similar, are of limited assistance and do not establish any underlying principle. Each case has to be examined on its own facts, upon which a discretionary decision requires to be made by the FtT. Assessment of what amounts to a "serious" breach will vary from case to case – it is the factual matrix, not the description, which is relevant. Comparison with other cases is therefore of minimal assistance in the present case. The general principles of the law apply, and these include that for a discretionary decision to be overturned it must be one which no reasonable tribunal could make.

The FtT decision of 28 February 2019

[10] The FtT decision dated 28 February 2019 took the following factors into account, namely: the purpose of the 2011 Regulations; the fact that the appellant had been deprived of the protection of the 2011 Regulations; that the landlord admitted the failure and her awareness of the requirements of the Regulations; that the landlord's representative had been diagnosed with a serious illness, which was the reason for the failure; that it was not the landlord who was ill; that the failure was not intentional; that the breach was serious.

[11] The FtT therefore took into account relevant factors, and made a reasoned decision. Their decision-making process cannot be faulted. The question is whether it led to an award which was within their reasonable discretion.

[12] In order for the present appeal to succeed, the appellant would have to establish (and the onus is always on an appellant) to show that the FtT decision was one which no reasonable tribunal could have reached. He would require, therefore, to show that no reasonable tribunal would have failed to regard this case as at the most serious end of the scale of such failures.

[13] In assessing the level of a penalty charge, the question is one of culpability, and the level of penalty requires to reflect the level of culpability. Examining the FtT's discussion of the facts, the first two features (purpose of Regulations; deprivation of protection) are present in every such case. The question is one of degree, and these two points cannot help on that question. The admission of failure tends to lessen fault: a denial would increase culpability. The diagnosis of cancer also tends to lessen culpability, as it affects intention. The finding that the breach was not intentional is therefore rational on the facts, and tends to lessen culpability.

[14] Cases at the most serious end of the scale might involve: repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals. None of these aggravating factors is present.

[15] The FtT fixed the penalty at, in effect, a middle to upper level. It could have awarded anything from a low financial sum, such as £100, to a single multiplier, a double multiplier or a triple multiplier. Only if it was dealing with the most serious level of case could they be said to have erred. Once the foregoing factors are considered, it is clear that (a) there were rational and principled reasons for not regarding this case as being at the very highest end of fault; (b) in any event, the FtT cannot be said to have come to a decision that no rational tribunal acting properly would have made.

[16] For that reason, the award of twice the deposit cannot be said to be irrational or made in error, and the appeal must fail.

Disposal

[17] The appeal is refused and the award of the FtT dated 28 February 2019 affirmed. I would only add that it is regrettable that leave to appeal was given by the FtT in this case. The appellant did not identify any sufficient error in the reasoning of the FtT to meet the test of "no reasonable tribunal". Accordingly, the grounds did not identify an error of law. The test for wrongful exercise of a discretionary power is a significant one, and mere challenge is not sufficient.