Upper Tribunal for Scotland

2024UT34
Ref: UTS/AP/23/0975

DECISION OF

Sheriff Iain Fleming

ON AN APPEAL
IN THE CASE OF

Mrs Moira Lang,
per Mr David Lang,

Appellant

- and -

Mrs Kirsty McCorkindale

Respondent

FTS Case Reference: FTS/HPC/CV/23/0005

31 May 2024

Decision. The appeal is refused.

Introduction

[1] The appellant is Mrs Moira Lang. The respondent is Mrs Kirsty McCorkindale. The property under consideration is situated at 29 Cardell Drive, Paisley, PA2 9AE. The appellant was the applicant before the First Tier Tribunal for Scotland Housing and Property Chamber (hereafter "the FTS") and the respondent was also the respondent before the FTS. What this case is about is the condition in which the respondent left the property following the end of her tenancy and the classification of work which was thereby required to be undertaken by the appellant following the respondent's departure. The appellant carried

out what were claimed to be essential works to the property consisting of cleaning, repair and redecoration. The appellant claimed that the damage to the property was caused by the negligence of the respondent. The respondent claimed that the property was not left in a poor condition and any damage to the property could be properly classified as fair wear and tear.

[2] A hearing took place by teleconference before the FTS on 20 July 2023. The hearing was in respect of an application lodged by the appellant under rule 111 of the First Tier for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 regulations") seeking payment of the sum of £2,335.81. The claim was refuted by the respondent who indicated that insofar as any damage to the property was concerned this was attributable to fair wear and tear. While there were clearly a number of issues before the FTS the matter which the Upper Tribunal has to consider relates only to the issue of fair wear and tear.

[3] At the hearing on 20 July both parties were represented by lay representatives, each of whom presented their respective cases to the FTS. The appellant had lodged an inventory of 202 pages comprising receipts, invoices, photographs and the respondent lodged an inventory which extended to 11 pages comprising a letter from a doctor and invoices. The FTS heard evidence at a hearing which was carried out by video conference and in a decision which extended to 98 paragraphs it made 13 findings in fact. Each of the various heads of claim made by the appellant were considered individually by the FTS.

[4] Having considered the matter the FTS awarded the now appellant £1,008.14. Deducted from this was the deposit of £330.00 and a rent overpayment which meant that the balance due to be paid to the appellant was £622.43.

[5] The appellant made application to seek permission to appeal from the FTS. This was refused on 5 October 2023. The appellant sought and was granted permission to appeal by the Upper Tribunal following a hearing that took place upon 11 January 2024.

[6] Having heard argument the Upper Tribunal granted permission to appeal upon the basis that it was arguable that the decision which was reached by the FTS did not disclose its legal basis for the conclusions reached. In so far as permission to appeal in respect of a contention of judicial bias is concerned, that permission was refused.

[7] Permission to appeal having been granted both parties were provided with an opportunity to make further representations in anticipation of the full appeal hearing. Both indicated that they were content that the matter be dealt with without an oral hearing and made short written submissions. Accordingly, the Upper Tribunal has considered matters upon the basis of all of the written representations made by the appellant and the respondent,

[8] It is clear that the parties entered into a tenancy agreement in relation to the property commencing on 2 August 2015 and ending on 25 February 2022. At the end of the tenancy the appellant claimed that she required to undertake a degree of cleaning, repair and redecoration due to the condition the property was left in by the respondent. Following

the cleaning and redecoration the appellant intimated a claim to the FTS seeking payment of the sum of £2,335.81. The claim was refuted by the respondent who indicated that she did not accept that there was "any damage done to the property" beyond fair wear and tear.

[9] The appellant's appeal is based principally upon a document which was prepared by her husband and lay representative which is effectively a commentary upon the decision of the FTS. In what is an extensive document the appellant has ascribed a significant number of criticisms to the FTS decision. It is also contended that "there is a complete misunderstanding fair wear and tear" by the legal and ordinary members" of the FTS. In addition the appellant variously categorizes the FTS decision as "ridiculous," and "inaccurate and absolute rubbish."

[10] The appellant contends that fair wear and tear refers to the reasonable deterioration that occurs in a rental property over time, as a result of normal, everyday use during the period of a tenancy. It is argued that it is separate from damage caused by misuse, negligence, or intentional actions of a tenant, for which the tenant should be responsible.

[11] It is further argued by the appellant that the property must be left clean to the same standard at the end of the tenancy, no matter if the tenancy lasted one year or six.

[12] With reference to "a decision of Lord Denning" it is argued by the appellant that the tenant "must take proper care of the place". The appellant argues that the "big question is always, what part of any deterioration would have happened naturally…and is considered reasonable". The appellant thereafter distinguishes between damage caused to a property and fair wear and tear.

[13] The respondent is content with the decision of the FTS and urges the Upper Tribunal not to interfere.

The Decision

[14] In considering this matter the FTS explains within paragraph 78 of its decision, that having heard evidence, its function was to *"to decide if each item claimed for was justified and if it was down to the fault or negligence of the respondent or fair wear and tear."* In considering that issue the FTS explains in paragraph 79 of the decision the approach that it took and the reasons for the decision it made.

[15] Paragraph 79 reads as follows:

"The Tribunal looked to the websites of the approved tenancy deposit schemes for guidance in relation to fair wear and tear. One definition given and attributed to the House of Lords was 'fair wear tear is reasonable use of the premises by the tenant and the ordinary operation of natural forces'. Further guidance said that 'a variety of factors' should be taken into account. Age is one such factor – how old

is the item or how long ago was the wall decorated? Quality and realistic lifespan is another- some items are made to last longer than others. And the length of the tenancy should be considered too – if you were to fit new carpets in two properties and then rent these out you would expect the check-out conditions for the tenant in property one who moves out after 2 months, and the tenant in property two who stays for 5 year, to be different."

[16] Permission to appeal has already been granted. What that means is that there is an argument capable of being placed before the Upper Tribunal that there has been an error in law. For the appeal to be successful different criteria apply. The Upper Tribunal requires to be satisfied not only that it is arguable that there has been an error in law but that there has been actually been an error in law. When permission to appeal was granted it was concluded that it was arguable that the decision of the FTS did not disclose the legal basis for the conclusions reached.

[17] The function of the Upper Tribunal is a limited one. An appeal under the Tribunals (Scotland) Act 2014 is not an opportunity to re-hear the factual matters argued before the FTS but rather to correct any errors of law that may have come into the decision of the FTS.

[18] One of the criticisms of the FTS decision is that the aforesaid paragraph 79 refers to the fact that it *"looked for guidance"* from websites of the approved tenancy deposit schemes. There is no further description or specification of these websites. Further, there is no evidence within the FTS decision that these websites were referred to by either of the parties during the hearing. Reference is made by the FTS to *"further guidance"* which stated that a *"number of factors should be taken into account."* While the various factors taken into account are specified the source of the *"further guidance"* is unidentified. Without further description there is a basic reference by the FTS to a quote from the House of Lords without referring to a particular source.

[19] One reason that permission to appeal was granted was upon the basis that having regard to the reasons given by the FTS severally and cumulatively it is arguable that the reasoning would result in a disappointed litigant not knowing the reason why they had been unsuccessful.

[20] In analysing the decision of the FTS it is clear that the factors which they considered in assessing whether an identified item was due to the fault or negligence of the respondent or alternatively fair wear and tear are as follows:

- Fair wear and tear is reasonable use of the premises by the tenant and the ordinary operation of natural forces.
- A variety of factors should be taken into account.
- Age and identified questions that should be asked are "how old is the item, how long ago was the wall decorated".
- Quality and realistic lifespan of the item in question – some items are made to last longer than others.
- The length of tenancy.

[21] When one considers all of these factors and compares them with the definition of fair wear and tear by the appellant which is "the reasonable deterioration that occurs in a rental property over time, as a result of normal, everyday use during the period of a tenancy" there is perhaps little to distinguish the position of the appellant and the FTS. The FTS properly identified its function in paragraph 68 of its decision. It cannot be said that the FTS applied the wrong test or legal criteria, simply that it did not evidence its sources. Indeed, consideration of the documentation lodged by the appellant indicates that to a great extent the appellant's dispute is with the application of the test by the FTS to the question of fair wear and tear rather than with the identification of the legal test itself.

[22] The next issue to be considered is whether or not the reasoning of the FTS was adequate. A failure to give adequate reasons where reasons are required in respect of material matters is an error of law *(R) Iran* v *Secretary of State for the Home Department* [2005] EWCA Civ 982. In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, the Court of Appeal said:

> "The duty [to give reasons] is a function of due process and therefore justice… Fairness surely requires that the parties- especially the losing party- … should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know… whether the court has misdirected itself and thus whether he may have an available appeal on the substance of the case."

The Court went on further to state:

> "The rule is the same in all cases: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so: and that will differ from case to case. Transparency should be the watchword."

[23] A decision must leave the informed reader in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it (*Wordie Property Company Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at pages 347 – 348).

[24] The question for the Upper Tribunal is whether the failure to identify the legal source of the criteria and reasoning of its decision by the FTS amounts to an error in law. The basis for the decision is one of a number of publically available and very helpful websites which provide considerable assistance to landlords, tenants and the public at large.

[25] The FTS looked to the websites of approved tenancy schemes and obtained therefrom a definition of "fair wear and tear." From the websites the FTS determined that a House of Lords definition was appropriate. The disappointed litigant would have been entitled to know the source of the legal authority beyond the reference to an unidentified website. As a matter of fact and law the House of Lords definition emanated from the decision of Viscount Simonds in the case of *R Property Co. v Dudley*, [1959] A.C. 370.

[26] The appellant refers to a case from the "1950s" and a quote from Lord Denning which he submits is is still applicable to this day. The case of *Warren v Keen* 1954 Q.B.15 is the case to which he is referring and the full quote is as follows;

> "The tenant must take proper care of the premises. He must, if he is going away for the winter, turn off the water and empty the boiler; he must clean the chimneys when necessary and also the windows; he must mend the electric light when it fuses; he must unstop the sink when it is blocked by his waste. In short, he must do the little jobs around the place which a reasonable tenant would do. In addition, he must not, of course, damage the house wilfully or negligently… but apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time or for any reason not caused by him, the tenant is not liable to repair it."

[27] I accept that the law as detailed by Lord Denning still applies today. It was not referred to either before the FTS or in the decision of the FTS. That said, it is both unrealistic and inappropriate to expect the FTS to provide an extensive legal document setting out all of the relevant law. What is required is the detail of the factual and legal reasons for the decision. That the FTS did not specifically reference this quote is not an error of law. The FTS did not require to deal with every point made in submissions. As Lord Hope said in the case of *Shamoon v vThe Chief Constable of the Royal Ulster Constabulary (Northern Ireland)* [2003] UKHL 11 [2003], 2 All E.R. 26 , [2003] N.I. 174 (in the context of an industrial tribunal decision)

> "It is to be expected, of course, that the decision will set out the facts. That is the raw material on which any review of its decision must be based. But the quality which is to be expected of its reasoning is not that to be expected of a High Court judge. Its reasoning ought to be explained, but the circumstances in which a tribunal works should be respected. The reasoning ought not to be subjected to an unduly critical analysis."

[28] Insofar as the appellant's contention that the law regarding fair wear and tear has been misapplied by the FTS the regard should be had to the decision of Lady Poole in the decision of *DS v SSWP* (ESA) [2019] UKUT 347 (AAC) , a decision concerning the adequacy of reasons given by the FTS in a matter involving entitlement to Employment Support wherein it is stated;

> "In my opinion, it is not in keeping with this approach for judges in the First-tier be held to an excessively high standard in statements of reasons. The Upper Tribunal has an important role to play in ensuring the system works justly, and that tribunals do not make legal errors. But the Upper Tribunal does not ordinarily of itself hear evidence. The hearing of evidence and decisions about which facts to find are primarily for the tribunal, which has the benefit of being able to assess witnesses and

> access expertise ….. Accordingly, there are careful statutory limits on the Upper Tribunal's jurisdiction; jurisdiction is limited to errors in point of law."

[29] What is fair wear and tear is very difficult to estimate or evaluate. The FTS decision extends to 98 paragraphs and each item claimed by the appellant is carefully considered and analysed. The appeal does not demonstrate illogicality, perversity or unfairness by the FTS. Their decision was reasoned, extensive and based on the facts. It seems that the appellant's main dispute is not with the definition of the legal test but rather with the application of that test. There is no basis to hold that the FTS erred in law insofar as the application of the law to the facts is concerned.

[30] In this case, while the appellant may disagree with the categorization of the various works carried out, it cannot be said that the correct legal test was not applied or that the appellant was unaware of the reasons for the FTS decision and as such no error of law is apparent. In this case the FTS gave proper reasons for its decision which deal with the substantial questions in issue in an intelligible way. The decision left the informed reader in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it.

[31] The legal criteria applied by the FTS were not carefully or adequately sourced, although they were not wrong. The danger of such an approach is that it renders the decision as being susceptible to challenge on the basis that the reasoning is inadequate. At the very least the disappointed litigant would be entitled to know which website was being considered. Even if the particular website was identified a decision from a judicial body requires to be properly researched and referenced. I recognize in making that observation that tribunals must operate in a user friendly fashion; that they are distinct from courts, and that cases must be handled quickly and efficiently. With specific reference to the FTS it requires to give effect to the overriding objective as detailed within paragraphs 2 and 3 of the 2017 regulations and in particular must seek informality and flexibility in proceedings. In this particular case, while it would undoubtedly have been preferable had the source of the legal principles which were applied been properly researched and identified by the FTS, that shortcoming, in and of itself, is not demonstrative of, and cannot be classified as, an error in law. That is for the reasons that are identified within the quoted authorities. No error in law having been identified the appeal must be refused.

Sheriff Fleming
Member of the Upper Tribunal for Scotland

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.*