Upper Tribunal for Scotland

2025UT77
Ref: UTS/AP/25/0065

DECISION OF

Sheriff Komorowski

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

Mr Robert Horne

Appellant

- and -

Slash Property Ltd

Respondent

FTS Case Reference: FTS/HPC/CV/24/2974

Representation
Appellant: Mr. McPhee, Advocate
Respondent: Mr. Reid, lay representative

9 October 2025

Having considered the notice of appeal and heard parties thereon, the tribunal REFUSES permission to appeal.

REASONS

Can a right of independent assessment of rent make fair an otherwise unfair term for rent review?

[1] In the present case, the lease (put shortly) allows a landlord seemingly to increase the rent to an unlimited extent to take effect after one month, whilst a tenant cannot entirely avoid that increase by terminating the lease, as this only takes effect upon two months' notice. The landlord raised an action for payment of rent at a rate increased in line with the rent review clause.

[2] The tenant maintained that a clause providing unlimited power to increase rent was unenforceable as being an unfair term under the Consumer Rights Act 2015, section 62(1). The First-tier Tribunal rejected that contention on the basis, put shortly, that there was a statutory right of independent review of the rent, so that in practice the tenants were not exposed to unlimited increases of rent.

[3] Whilst the tenant accepted he had such a right, he had said that in any individual case there might be no determination. It is not apparent from the First-tier Tribunal's statement of reasons that anything was said as to why that might not occur, or that anything was put forward to substantiate this concern (para. 19).

[4] As I conclude there was no material before that tribunal that could have resulted in a different assessment, I refuse permission to appeal against that tribunal's decision.

The applications for permission to appeal

[5] Permission was sought from and refused by the First-tier tribunal to appeal against that aspect of its decision. The appellant renews his application for permission to the Upper Tribunal. His applications for permission to appeal are essentially a restatement of the submission to the First-tier; it is not stated beyond that in what way the analysis of that tribunal is unsound. It was not said, for instance, why the right to seek independent review would be an inadequate protection.

Fairness is determined according to the circumstances when the contractual term was agreed

[6] I assume, without deciding, that a residential lease is a consumer contract where the tenant is the consumer and the landlord is the trader in terms of the Consumer Rights Act 2015, section 61(1), (3). Section 62(5)(b) provides that the fairness of a contractual term is to be determined "by reference to [*inter alia*] all the circumstances existing when the term was agreed."

The statutory right of independent assessment of rent when the lease was entered into

[7] The lease was a short assured tenancy, and was entered into on 29 July 2016.

[8] The Housing (Scotland) Act 1988, section 34 (as amended), provided as at 29 July 2016, so far as material and omitting surplusage:

> **"34.— Reference of rents under short assured tenancies to private rented housing committee.**
>
> (1) … the tenant under a short assured tenancy may make an application … to a private rented housing committee for a determination of the rent which, in the committee's opinion, the landlord might reasonably be expected to obtain under the short assured tenancy.
>
> …

(3) …. the committee shall not make such a determination … unless they consider—

(a) that there is a sufficient number of similar houses in the locality let on assured tenancies (whether short assured tenancies or not); and

(b) that the rent payable under the short assured tenancy in question is significantly higher than the rent which the landlord might reasonably be expected to be able to obtain under the tenancy, having regard to the level of rents payable under the tenancies referred to in paragraph (a) above.

(4) Where, on an application under this section, a private rented housing committee make a determination of a rent for a short assured tenancy—

(a) the determination shall have effect from such date as the committee may direct, not being earlier than the date of the application;

(b) if at or after the time when the determination takes effect, the rent which, apart from this paragraph, would be payable under the tenancy exceeds the rent so determined, the excess shall be irrecoverable from the tenant; …"

Similar provision exists now, except that now the First-tier Tribunal for Scotland determines the application.

Fairness can only be assessed if the requisite legal and factual material has been provided

[9] At the hearing before me, counsel raised both an objection in principle and practical objections to the First-tier Tribunal's reliance on the tenant's right of reference. There is nothing to suggest these objections were advanced at the first-instance hearing, and they were not articulated in the appellant's written applications for permission to appeal. That might be no barrier to their consideration. As this tribunal has previously said in litigation involving the same parties (*Horne* v. *Slash Property Ltd* [2024] UT 36, Sheriff O'Carroll, para. 20) the duty to consider fairness of the term is "proactive" and engaged "even if that issue is not raised by the parties" (para. 20). If a consumer need not even invoke the 2015 Act, still less is the consumer required to articulate every

manner in which the fairness of the term might be put in issue. There is, though, a need for the "sufficient factual and legal material to enable … [consideration of] the fairness of the term" (s. 71(2)). It was the failure to meet this prerequisite that was fatal to the argument under the 2015 Act in the earlier appeal to this tribunal ([2024] UT 36, para. 24).

The tenant's principled objection

[10] Counsel for the tenant submitted that there was an objection in principle to the tenant requiring to have recourse to someone else to assess the rent. I do not agree, and I do not consider that any arguable point arises in that respect. It is in the nature of legal rights that one party or another may have to initiate litigation to determine and enforce their rights. In commercial leases a rent review clause setting an indeterminate standard with a mechanism for independent determination, such as setting the new rent at the market rate to be determined by an arbitrator if not agreed, is commonplace. I do not consider it matters in principle whether the method of determination of the limit to an increase in rent is contained in the contract itself or imposed by statute. The nature of a rent reference means that the litigation is initiated by the tenant, rather than the landlord by means of an action for payment, but I cannot see that this fundamentally matters. I do not see how this could be a categorical objection. It would depend on the effectiveness of the rent reference mechanism and any burdens to the exercise of that right.

The tenant's practical objections

Delay

[11] Counsel for the tenant submitted that a determination of a rent reference would likely take longer than the notice period for the increase in rent. That might well be so, but I do not think it can be assumed without evidence. There ought to be "material" to establish this.

[12] In any event, a tenant could withhold payment of the disputed element of any increase and ask for any proceedings to enforce payment of that element to be sisted whilst the rent reference was to be determined. If the determination was made as to a point in time after the new rent fell due, the tenant would surely be entitled to repetition of the difference between that and any rent paid. The decision-maker would, surely, fix the effective date to reflect the state of the market, so that, where satisfied that the sum a landlord might reasonably expect to obtain significantly exceeded the contractual rent as at the date of the application, the determined rent would take effect from that date of application. I do not accept, therefore, even if there was some delay, it would occasion anything more than a minor burden on the tenant.

Lack of comparators

[13] An important qualification to the power is whether there are "a sufficient number of similar houses in the locality" (s. 34(1)). That is not something the tribunal determined, but then it is not apparent that they were given any material to determine that question. I do not consider the theoretical possibility of there being a lack of sufficient comparators, when the lease was entered into, at the date of any rent review, to be one of the "circumstances existing when the term was agreed" (2015 Act, s. 62(5)(b)). It would be for the tenant to show, at the time the lease was entered

into, that there was likely to be a lack of comparators (or perhaps to show, at the time the lease was entered into, there was some prospect of a lack of comparators in future when rent was reviewed). Again, without that, the tribunal would lack "sufficient … factual material" (s. 71(2)).

Conclusion

[14] In view of these considerations, I am not satisfied there is any arguable point arising as would entitle me to grant permission to appeal. I reject as unarguable the contention there could be any objection as a matter of principle to the tenant's right of recourse to independent review of the rent. The practical objections raised before the Upper Tribunal to a tenant's right of rent reference being an effective amelioration of a landlord's right of unlimited increase of rent are theoretical rather than real; the First-tier Tribunal was not given material to give substance to such objections.

***Obiter* – Doubtful that a right to increase rent could be unlimited**

[15] Had I granted permission to appeal, I would have required parties to address whether truly the lease provided for an unlimited power to increase rent. I would have thought it did not.

[16] As a generality, courts will imply constraints on an *ex facie* absolute discretion that one contracting party can exercise to the detriment of another (*Braganza* v *BP Shipping Ltd*, [2015] UKSC 17, [2015] 1 WLR 1661). That has included a power to vary the interest rate on a loan (*Paragon Finance plc* v *Nash*, [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685, para. 32). I cannot see how a term setting the time cost of land would be different from that setting the time cost of money. What sort of limits ought to be implied is a more difficult question. But, as difficult as that question might be,

it would have been necessary to answer it to determine what the term truly provided for, before determining whether that term was unfair.

There is no right of reconsideration of this decision as it has been made after a hearing: cf. Upper Tribunal for Scotland Rules of Procedure 2016, r. 3(7).

There is no appeal against this decision or right of review: Tribunal (Scotland) Act 2014, section 55(2).

Sheriff Komorowski
Member of the Upper Tribunal for Scotland