Upper Tribunal for Scotland

2023UT40
Ref: UTS/AP/23/0027

DECISION OF

SHERIFF SG COLLINS KC

ON APPEAL FROM A DECISION OF THE FIRST TIER TRIBUNAL, HOUSING AND PROPERTY CHAMBER

IN THE CASE OF

Mr Michael Ramsay, Seaview, Findhorn, Moray, IV36 3YE

Appellant

- and -

Mr Lodewyk Johnson, MV Tranen, Poplar Dock Marina, London, EH14 5SH

Respondent

FTS Case reference: FTS/HPC/PR/22/1285

24 November 2023

Decision

1. The Upper Tribunal allows the appeal, quashes the decision of the First-tier Tribunal for Scotland ("FTS") dated 20 March 2023, and remits to a freshly constituted panel to reconsider the application in accordance with the directions set out below.

Introduction

2. The appellant has permission to occupy the address stated in the instance, and is the owner of the house at Copper Beeches, Ardgilzean, Elgin, IV30 8XT ("the property"). Pursuant to a written agreement dated 9 October 2021 he granted the respondent permission to occupy a bedroom within the property together with shared use of kitchen, bathroom and other facilities. The start date was 14 October 2021. The rent was £550 per month. A deposit of £1,100 was agreed and paid by the respondent. Subject to absences for holidays etc., the respondent lived in the property until 9 February 2022, that is, a period of just under four months. The appellant did not pay the respondent's deposit into an approved tenancy deposit scheme, and refused to return it to him following his departure from the property.

3. The respondent therefore made an application to the FTS dated 9 May 2022 seeking an order for payment in terms of regulation 10 of the Tenancy Deposit (Scotland) Regulations 2011 SSI 2011/176 ("the 2011 Regulations"). Case management hearings were held on 3 October 2022, 13 January 2023 and 20 March 2023. Following the last of these, and for reasons set out in a written statement of the same date, the FTS found that the appellant had failed to pay the respondent's deposit into an approved scheme in breach of regulation 3 of the 2011 Regulations, and ordered the appellant to pay him the sum of £2,200.

4. The appellant did not dispute that he did not pay the respondent's deposit into an approved scheme. His position before the FTS was that he was exempt from being required to do so. He advanced a number of grounds in support of this position, but subsequently sought permission to appeal to the Upper Tribunal in relation to only one of them. This was that the FTS had misdirected themselves because, he submitted, the tenancy deposit scheme does not apply to deposits paid by lodgers, but only to tenants of households who lease the entire property. He submitted that the respondent in the present case was a lodger, not a tenant, because he, the appellant, was also resident in the property.

5. Permission to appeal was granted by the Upper Tribunal on 10 August 2023. Thereafter and following sundry procedure an oral hearing took place by Webex on 10 November 2023. Both parties attended, made submissions, and provided further information relevant to the issues.

The FTS decision

6. At paragraph 4(d) of its written statement the FTS noted that the appellant sought exemption on the grounds that he "was also a resident in the property", and stated that:

> "The [appellant] confirmed… that he was not resident in the property but explained that he would have been resident, had it not been for covid restrictions. The Tribunal observed that the fact of the matter was that the [appellant] was not resident throughout the [respondent's] occupation of the property and therefore this exception did not apply."

The FTS did not make any formal findings in fact relative to this issue. However it found (at paragraph 7) that the parties had entered into a private residential tenancy under the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act"). Although the written agreement of 9 October 2021 was headed "Interim Lodger Agreement", the FTS was satisfied that a room within the property was let to the respondent as his principal home, that he had access to shared accommodation along with other tenants, and that none of the exceptions in schedule 1 to the 2016 Act applied (paragraph 11).

Discussion

7. The applicability or otherwise of the tenancy deposit scheme to a given case must be found by consideration of the terms of the 2011 Regulations. Regulation 3(1) provides that:

> "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… pay the deposit to the scheme administrator of an approved scheme…"

"Relevant tenancy" is defined in regulation 3(3). It means

> "any tenancy or occupancy arrangement …unless the house is of a type described in section 83(6)… of the [Anti-Social Behaviour (Scotland) Act 2004 ("the 2004 Act")]."

"Occupancy arrangement" is not defined in the 2011 Regulations. But the same expression is defined in section 81(7) of the 2004 Act as meaning:

> "…any arrangement under which a person having the lawful right to occupy a building or part of a building permits another, by way of contract or otherwise, to occupy the building or, as the case may be, the part of it, but does not include a lease."

It can be assumed that the same broad approach is to be taken in relation to the 2011 Regulations. Accordingly the distinction which the appellant sought to draw between lodgers and tenants who lease an entire property irrelevant to the applicability of the tenancy deposit scheme. In any event, in principle, lodgers may also be tenants, albeit common law tenants who do not have the protection of the 2016 Act: see section 1(1)(c); schedule 1, paragraphs 7 – 9.

8. The real question raised by the appellant was whether the tenancy or occupancy arrangement granted to the respondent was exempt from the 2011 Regulations because the house was of a type described in section 83(6) of the 2004 Act. Section 83(6)(e) of the 2004 Act, in particular, specifies a house which -

> "…is the only or main residence of the relevant person".

The appellant, as landlord, was the "relevant person": see regulation 3(4) of the 2011 Regulations and section 83(8) of the 2004 Act. "House", for the purpose of section 83(6) (and thus also for the purpose of regulation 3(3) of the 2011 Regulations), is defined in section 101(1) of the 2004 Act. It means -

> "a building or part of a building occupied or intended to be occupied as a dwelling".

But this is subject to subsection (2) which provides that if -

> "…two or more dwellings within a building share the same toilet, washing or cooking facilities, then those dwellings shall be deemed to be a single house for the purposes of this Part."

It follows that if a person lives in part of a house as their only or main residence, and then lets another part of the same house to another person, but with shared toilet, washing or cooking facilities, then the two parts will be deemed to be a single house for the purpose of the 2004 Act and the 2011 Regulations. If so, the let of part of the house will not prevent the house from continuing to be used as the only or main residence of the person granting the let. Accordingly the exception in section 83(6)(e) of the 2004 Act will be applicable, and the tenancy will therefore

not be a tenancy to which the 2011 Regulations apply. This also applies to occupancy arrangements relative to a part or parts of the house falling short of tenancies.

9. Part 8 of the 2004 Act (in which section 83 is found) is directly concerned with registration as a landlord by the local authority - albeit that as just noted some of its provisions are incorporated by reference into the 2011 Regulations. But whether a person occupies a property as their "only or main residence" (or alternatively their "sole or main residence") is relevant in a number of other statutory contexts. A substantial case law has resulted from circumstances where the relevant person has more than one place of residence. The other contexts include liability for council tax and entitlement to council tax reduction (Local Government Finance Act 1992, section 99; Council Tax Reduction (Scotland) Regulations 2012 SI 2012/303, regulation 14(3); *Highland Council v Highland and Western Isles Region Valuation Committee* 2009 SC 1); taxation of capital gains on disposal of property (Taxation of Chargeable Gains Act 1992, section 222; *Simpson v HMRC* [2019] UKFTT 704); and entitlement to repayment of additional dwelling supplement under the Land and Buildings Transaction Tax (Scotland) Act 2013, schedule 2A, paragraph 8; *Duran v Revenue Scotland* 2023 G.W.D. 34-284).

10. The expressions "only or main residence" and "sole or main residence" are not statutorily defined in these contexts. Nor have the courts provided a single definition of "main residence" where the relevant person has more than one. In *Frost v Feltham* [1981] 1 WLR 452 at 455E-F it was suggested that the question was which was the "principal" or "more important" residence, while recognising that this could not be determined solely by reference to the way that the relevant person divided their time between the two. And in *Williams v Horsham District Council* [2004] 1 WLR 1137, at paragraph 26, it was suggested that a person's main residence will usually be the dwelling that a reasonable onlooker, with knowledge of the material facts, would regard as the person's home at the material time. But in any event this is a fact sensitive issue in relation to which various factors may be relevant, depending on the circumstances of the particular case. And it is likely to require a comparison between the nature and extent of the occupation of the various dwellings resided in by the relevant person at the material time.

11. These considerations apply in the present context. Whether a house part of which is let to a third party is the landlord's main residence for the purpose of the 2011 Regulations can be assessed by reference to factors such as: (i) the period or periods during which the landlord is actually living in the house at or around the material time, any periods of absence and the reasons for them, and their intentions as regards occupation of the house in the future; (ii) the nature of the landlord's right of occupation in the let house as compared with that in respect

of any other house which they also occupy (for example, whether they are the owner, tenant, lodger, or occupy the property as tied accommodation); (iii) the nature and extent of their personal ties to each of their houses (for example, the property at which they are registered with the local authority as a landlord, registered for council tax, registered with their doctor or dentist, registered to vote, at which they receive important or official post such as personal bank statements, and/or at which the majority of their possessions are kept); and/or (iv) the nature and extent of their family ties to each of their houses (for example, the property where their spouse or partner lives, where their children live, and where their children are registered as regards their nursery, school or college).

12. This list is not exhaustive. Other relevant factors may arise in particular cases. But many of the factors just noted should be capable of independent documentary verification (for example, by production of copy bank statements, the relevant entry from the voter's roll, letters from the relevant GP, dentist and/or school). Where an "only or main residence" issue arises in relation to an application to the FTS under the 2011 Regulations, therefore, directions for production of such documents may be appropriate at an early stage, with adverse inferences drawn if they are not produced. Careful fact finding will be required. The weight to be given to particular factors will be primarily for the FTS to assess and determine dependent on what it makes of the evidence in the case before it. Tribunals should however be alive to the possibility of sham arrangements by unscrupulous landlords, designed to avoid the requirements for lodgment of tenancy deposits.

Analysis

13. It was clear that the appellant owned the property, and that he also had another address, being that stated in the instance. His position was that he kept a room in the property for his own use. There was no dispute that this room shared toilet and other facilities with the room let to the respondent. The issue of whether the property was the appellant's main residence at the material time therefore arose. But the FTS did not address itself to the relevant law on this matter. It did not identify, nor answer, the correct legal question for present purposes. Rather it decided that the 2011 Regulations applied in the present context because, and only because, the appellant conceded that he was not in fact living in the property during the period of the respondent's tenancy. That was a relevant factor but not, in the circumstances, a sufficient or determinative one. The tenancy lasted only four months. The appellant gave at least a colourable explanation for his absence during this period, but it is not clear what the FTS made of it. It did not make findings in fact on this matter, nor indeed on any other matter relevant

to the question of whether the property was or was not the appellant's main residence at the material time. This was because, erroneously, it did not think that it had to do so in order to find against him on this point. I have sympathy for the FTS, given the number of other, ill-founded arguments which the appellant put before it, and the oblique and unfocused way in which the present issue was presented. But nevertheless, in approaching the matter as it did, and given the legal framework discussed above, the FTS misdirected itself and so erred in law.

Disposal

14. The FTS' error of law having been identified, the question of how to dispose of the appeal was canvassed with parties at the oral hearing. I sought to explore whether it would be possible for me to simply remake the decision, one way or the other, in the light of any further evidence which the parties could provide. However it became clear that this would not be appropriate. Having identified the correct legal question – was the property the appellant's main residence at the material time - and better understanding the range of factors that might be relevant to answering it, both parties identified points of factual dispute and further evidence which they suggested could be made available in support of their positions.

15. Thus the appellant said that the property was his address for the purposes of council tax, his GP, and his bank, and that it was the address held by his children's school for them. He said that he could document all of this. He said that the property at the address in the instance, and in which he was now living, was leased by a friend's company, and he had – perhaps rather precarious - permission to occupy it. He maintained his position that it was only due to Covid, and his vulnerability to this condition through ill health, that he did not live at the property during the relatively short period of the respondent's tenancy. He said that he had previously lived there with his children and that he had intended to return to live there. He also touched on a matter, put before the FTS in seeking permission to appeal, that he was subject to a bail order which may (or may not) have prevented him from living in the property at the relevant time.

16. The respondent, on the other hand, said in particular that the room in the property which the appellant said that he kept for his own use, and in which his personal possessions were stored, was leased out to another tenant during the period of the respondent's tenancy. The appellant denied this, but the respondent said that he should be able to provide a letter or email from the other tenant confirming it. If the position were to be not only that the appellant was not living at the property at the relevant time, but could not have lived there because he had let his part

of the house to another tenant, that might tend to undermine his claim to the house then being his main residence.

17. In the light of all this there is a significant fact finding exercise still to be carried out on this issue before a final decision can be made on the respondent's application. The number of factors relevant to this issue which arise for consideration, the sharp disputes between the parties on some of these matters, and the present non-availability of potentially relevant documentary evidence, all mean that it is not appropriate for the Upper Tribunal to carry out this exercise. The case will therefore be remitted to the FTS for reconsideration.

Conclusion

18. The appeal is allowed. The decision of the FTS of 20 March 2023 is quashed. The case is remitted to a freshly constituted panel for the sole purpose of assessing and determining whether the property was, at the relevant time, the appellant's main residence for the purpose of the 2011 Regulations. In that regard, FTS should consider giving directions to both parties in relation to production of any documentary material which it considers may be relevant to this issue, giving notice that adverse inferences may be drawn from a failure to comply. An oral hearing should be held. If, having assessed all the available evidence, the FTS finds that the property was, at the relevant time, the appellant's main residence it should dismiss the application. If it finds that it is not, then the FTS should confirm the payment ordered by the FTS on 20 March 2023. The appellant sought to dispute the amount of this payment in the course of the appeal hearing, but he did not seek permission to appeal on this ground, and it is now too late for him to challenge it.

19. Any party aggrieved by this decision may seek permission to appeal to the Court of Session. Such an appeal may only be on a point of law. A party wishing to appeal must apply for permission to do so from the Upper Tribunal. Permission to appeal must be applied for within 30 days of the date on which this decision was sent to a party. Any request for permission to appeal to the Court of Session 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) in terms of section 50(4) of the Tribunals (Scotland) Act 2014, state the important point of principle or practice that would be raised in the further appeal or any other compelling reason there is for allowing a further appeal to proceed.

Upper Tribunal for Scotland

Sheriff SG Collins KC
Member of the Upper Tribunal