Upper Tribunal for Scotland

[2020] UT44
UTS/AP/19/0011

DECISION OF UPPER TRIBUNAL JUDGE PINO DI EMIDIO

in an Appeal against a

decision of the First-Tier Tribunal for Scotland

in the case of

MS KATE AFFLECK, Flat 2F2, 59 Forrest Road, Edinburgh, EH1 2QP

Appellant

and

MR CHRIS BRONSDON and MRS SARAH BRONSDON, The Old Castle, East Saltoun, East Lothian, Near Pencaitland, Tranent, EH34 5DY,
per Paris Steele, 1 High Street, Haddington, EH41 3ES

Respondents

28 September 2020

The Upper Tribunal having resumed consideration of the appeal, makes the following Orders.

1. Quashes the decision of the First-tier Tribunal dated 15 January 2019.

2. Remakes the decision under section 47 of the Tribunals (Scotland) Act 2014.

    a. Finds in fact as follows.

        i. In about December 2017 the appellant was looking for new accommodation. She became aware of a suitable space within a flat 2F2 95 Forrest Road, Edinburgh, EH1 2QP ("the flat").

        ii. The flat was owned by the respondents at all material times. Four individual rooms were available for rent to separate tenants. The



individual tenants shared the use of other parts of the accommodation and facilities in the flat including the kitchen, a living room and a bathroom.

iii. After viewing the flat the appellant agreed to move in. She entered into email correspondence with the respondents prior to moving into the flat. On 13 December 2017 the second named respondent sent her various details by email including a tenant's handbook and information about the tenancy deposit scheme. The emails included a "New Tenant Registration Form.Doc", which gave the respondents' bank details and sort code, and gave a date of transfer of the first day of each month, and stated a rent amount of £350 per month. On about 17 December 2017 the appellant replied accepting these terms.

iv. The appellant moved into the flat on 1 January 2018. She was one of four residents, and replaced an outgoing resident.

v. The appellant had exclusive occupation of a bedroom and shared the use of other parts of the accommodation and facilities in the flat including the kitchen, a living room and a bathroom.

vi. The appellant paid rent of £350 per month in terms of her agreement with the respondents. She also paid the respondents an agreed deposit of £350.

vii. The appellant resided in the flat for several months, paying monthly rental, without incident or dispute.

viii. The duration of the lease was not agreed.



ix. Some months after she first moved in the appellant moved to occupy exclusively a different room within the flat after one of the other residents moved out. She continued to share other parts of the accommodation and facilities in the flat including the kitchen, a living room and a bathroom.

x. The appellant's main purpose in leasing the parts of the flat that she occupied exclusively and that she shared with the other residents was to provide her with a home.

xi. The lease of the flat was in existence on 8 October 2018 when the appellant made her application to the First-tier Tribunal under Rule 107 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the 2017 Rules").

xii. As at that date the respondents had not provided the appellant with written terms of the tenancy as they were required to do under section 10 of the Private Housing (Tenancies) (Scotland) Act 2016.

xiii. On 14 January 2019, when the First-tier Tribunal considered the appellant's application under Rule 107 of the 2017 Rules, the respondents had not provided the appellant with written terms of the tenancy.

b. Finds in Fact and Law as follows.

i. The appellant and the respondents entered into a lease on 1 January 2018 in terms of which she was entitled to a one quarter *pro indiviso* share of the flat at a rent of £350 per month. She was entitled to the exclusive

occupation of a bedroom in the flat and to share other facilities in it including the kitchen, a living room and a bathroom. The subjects of the lease were that one quarter *pro indiviso* share of the flat.

ii. The main purpose of the ease was to provide the appellant with a home.

iii. The lease entered into by the parties is a Private Residential Tenancy in terms of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act").

iv. The respondents breached their duty under section 10 of the 2016 Act to provide terms of the tenancy to the appellant.

v. The respondents complied with their duty under section 11 of the 2016 Act.

vi. The respondents had no reasonable excuse for the purposes of section 16(1) (c) of the 2016 Act for their failure to comply with their duty under section 10 of the 2016 Act.

vii. It is appropriate to make an award for payment by the respondents in favour of the appellant in respect of that failure in terms of section 16(2)(a) of the 2016 Act.

3. Makes an award for payment by the respondents in favour of the appellant in the sum of SEVEN HUNDRED POUNDS (£700.00), Orders the respondents to make payment to her within 40 days of the date of intimation of this decision to them and Declares that each of the first and

second named respondents against whom the Order for payment is made is jointly and severally liable for the whole amount due.

Note of Reasons for Decision

[1] In this Note the First-tier Tribunal for Scotland is referred to as "the FtT". A Private Residential Tenancy made under Private Housing (Tenancies) (Scotland) Act 2016 is referred to as a "PRT" and the Act itself is referred to as "the 2016 Act". The appellant made an application to the FtT for findings that the respondents had breached statutory obligations to provide her with terms of tenancy and to provide her with certain information. The application was brought under the 2016 Act. The relevant provisions are cited later in this Note.

[2] On 9 September 2019 this Tribunal concluded that the FtT had erred in law when it concluded that the parties had not reached an agreement which led to the existence of a tenancy but although it found a tenancy had been created it concluded that that tenancy was not a PRT. The decision of this Tribunal refusing the appeal was quashed without a hearing on a further appeal by the appellant by the Court of Session on 10 December 2019, it having been accepted that the terms of section 2 of the 2016 Act had been overlooked. The matter has been remitted back and has been assigned to a different Judge of this Tribunal.

[3] The appeal focuses on the question on which permission was granted by the FtT on 28 February 2019, namely, whether or not a PRT was in existence on the date the FtT received the appellant's application. The FtT had concluded in its original decision dated 15 January 2019 that

the parties had not reached consensus as to the terms of the tenancy. The respondents supported the decision of the FtT when they submitted a response at the commencement of this appeal.

[4] When this appeal was remitted by the Court of Session, in the unusual circumstances, the parties were given an opportunity to make supplementary submissions in the appeal restricted to matters arising from the terms of the decision of this Tribunal of 9 September 2019. In particular, the parties were asked to consider whether they wished to comment on the following issues.

a. Whether the respondents accepted to any extent those parts of the analysis of the Upper Tribunal Judge which were not directly challenged in the appeal to the Court of Session. Reference was made to paragraphs 11, 12, 13, 14 and 15 of the decision of 9 September 2019.

b. How section 2 of the 2016 Act should be construed for the purposes of this appeal.

[5] Notice was also given that, subject to consideration of any supplementary submissions of the parties, it was proposed to deal with this appeal in writing without an oral hearing. Both parties elected to make further written submissions.

The respondents' supplementary submission

[6] The respondents submitted that they had never agreed that the appellant was a stand-alone tenant and they maintained that there was no breach of section 16(1)(a) and (b) of the 2016 Act.



The appellant's supplementary submission

[7] The appellant's submission is lengthy but is printed in very small font which is difficult to read. A substantial part of the submission is irrelevant to the issues that arise in the appeal but at paragraph 12 the appellant states that she considers that this Tribunal should decide the appeal in her favour because the terms of section 2(4) of the 2016 Act mean that the agreement between her and the respondents is a PRT.

Reasons for Decision

[8] The PRT is a creation of the 2016 Act. Section 1(1) provides as follows

> "(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."

Section 2 provides: -

> "(1) This section makes provision about the interpretation of section 1.
> (2) A tenancy is to be regarded as one under which a property is let to an individual notwithstanding that it is let jointly to an individual, or individuals, and another person.
> (3) A tenancy is to be regarded as one under which a property is let as a separate dwelling, despite the let property including other land, where the main purpose for letting the property is to provide the tenant with a home.
> (4) A tenancy is to be regarded as one under which a property is let as a separate dwelling if, despite the let property lacking certain features or facilities—
> (a) the terms of the tenancy entitle the tenant to use property in common with another person ("shared accommodation"), and
> (b) the let property would be regarded as a separate dwelling were it to include some or all of the shared accommodation."



Section 4 provides for an extended meaning of tenancy. In particular it states:

> "For the purposes of this Act—
> (a) if an agreement would give rise to a tenancy but for the fact that it does not specify an ish, it is to be regarded as giving rise to a tenancy,"

[9] The PRT is designed to strike a balance between the interests of tenant and landlord. Some types of tenancy are excluded from classification as a PRT - for example a student let or where there is a resident landlord. Certain statutory requirements must exist before a tenancy can be a PRT. If those requirements are not met, the tenancy is not a PRT. It may, however, be different type of tenancy, such as a tenancy at common law, or a regulated tenancy, or an assured tenancy, depending on date and circumstances of formation. Different rights and duties will arise. In the present case, the appellant seeks certain remedies under the 2016 Act. Whether she can do so depends on whether she is a party to a PRT. The following points emerge from the judgement of the FtT dated 15 January 2019.

[10] The appellant moved into a flat in Edinburgh on 1 January 2018. She was one of four residents, and replaced an outgoing resident. The flat is owned by the respondents. She did not meet the outgoing tenant. She entered into email correspondence with the respondents, and was sent various details, such as a tenant's handbook and information about the tenancy deposit scheme. The emails included a "New Tenant Registration Form.Doc", which gave the respondents' bank details and sort code, and gave a date of transfer of the first day of each month, and stated a rent amount of £350 per month.

[11] No tenancy agreement was ever provided, but the appellant duly resided in the flat for several months, paying monthly rental, without incident or dispute. She moved room within the



flat during this period. The respondents maintained, by their own admission, a lax regime, and did not provide a written lease.

[12] In about August 2018 a dispute arose. One of the existing tenants moved out and another person moved in. That new tenant asked for a tenancy agreement (as the appellant had done previously, without response). The respondents belatedly supplied a draft tenancy agreement for the appellant to sign.

[13] At that stage it emerged that the respondents and appellant had quite a different idea of what arrangements existed. The respondents claimed that the appellant was jointly and severally liable for the entire rent of the flat. The appellant, not surprisingly, baulked at that suggestion, which had never previously featured in correspondence between the parties.

[14] The respondents tried to create what was, on the evidence, a legal fiction. They claimed that the appellant was bound by a joint and several lease which had been assigned to her by her predecessor. This position was entirely unstateable – not only could they not produce any such lease, but the predecessor (tracked down by the appellant) denied any assignation had taken place. The respondents produced only an unsigned draft of a lease form from 2012, which they claimed was the lease referred to. Bizarrely, that lease form expressly forbade any assignation without consent. They could produce no such consent. They claimed there was a "rolling lease", but could not produce one. Their correspondence with the appellant did not mention joint and several liability. In legal terms their position was incoherent.

[15] Quite why a tenant would willingly assume, or why it was fair to impose, liability for the unpaid debts of complete strangers, was not explained in evidence. The respondents have tried

as landlords to force a tenant, for no other reason than that they share a living space, to pay the rent of non-paying third party co-tenants. That position verges on the oppressive.

[16] There followed five separate draft tenancy agreements, four of which sought to impose joint and several liability. The appellant, understandably, signed none of them, as they all represented one-sided attempts to increase her exposure to liability. Only the fifth draft attempted to identify what part of the flat the appellant would occupy.

[17] The FtT made "findings in fact" which are largely not findings in fact. The comments made by this Tribunal in paragraphs 21 to 24 of the decision of 9 September 2019 explain the ways in which they were defective. The FtT proceeded to find that, contrary to the appellant's position, there was not a PRT in place between the parties. It found that the parties had not agreed the rent, or who was the tenant, or the subjects. These points are dealt with in turn as follows.

[18] The FtT found that there was no agreement as to who was the tenant, because the tenant could be solely the appellant, or all four tenants. That was an error, because the correspondence between the parties is clear that the appellant was a stand-alone tenant, and both parties regarded her as such.

[19] The FtT found that there was no agreement as to subjects. The appellant regarded herself as the tenant of a part only of the flat. The respondents regarded her (but without ever making that clear) as a joint tenant of the whole flat. Neither side is correct. Notably, the appellant is unable to point to which part of the flat was leased to her, and in fact she moved bedrooms during the tenancy. The respondents are unable to point to correspondence where the appellant

agreed a joint tenancy. However, the documents and emails make clear that, whatever parties intended, there was an arrangement, capable of amounting to a lease, of a one-quarter *pro indiviso* share of the flat. Accordingly, the subjects are capable of being regarded as settled, by construing the plain meaning of the parties' correspondence and the actions that followed on that correspondence. The FtT was in error in considering the subjects were not agreed. Leases, like all contracts, are interpreted according to what people have said and done, not according to their innermost thoughts.

[20] The third finding made was that there was no true agreement as to rent. The appellant, understandably, thought that her maximum liability for rent was £350 per month. The respondents, privately, thought her minimum liability was £350 but that, at their discretion, they could demand from her £1,400 (everybody's share) per month. The fact they accepted £350 per month did not alter that understanding. The correspondence, however, had it been analysed by the FtT, shows that the parties agreed in correspondence that the rent would be £350 per month, whatever the respondents' private intentions. The rent, therefore, is identified.

[21] The duration was not specified, but that does not prevent there being a lease between the parties at common law. In any event section 4(a) of the 2016 Act expressly provides that duration need not be specified in a PRT.

[22] Accordingly, the terms of the parties' agreement are capable of amounting to a lease. The three principal elements as to parties, subjects and rent were agreed in this case as at the date the appellant moved in. The FtT erred in finding otherwise. There was a later limited adjustment of the contract when some months later the appellant moved to occupy exclusively a different room

in the flat after another resident moved out but that is not significant for present purposes. It follows that the respondents' continued insistence that there was not a lease with a stand-alone tenant is rejected as wrong in fact and law.

[23] The question, however, is not only whether there was a lease between the parties, but whether it was a specific type of lease, namely a PRT. The answer to that question depends primarily on the interpretation of sections 1 and 2 of the 2016 Act set out above and the application of that interpretation to the facts found. The flat was let to an individual, the appellant for the purposes of section 2(2). Having regard to section 2(3), the main purpose of the contract was to provide the appellant with a home. The subjects of the lease include both the exclusive occupation of a room in the flat but also the shared use of a kitchen, living room and bathroom. This is shared accommodation within the meaning of section 2(4) of the 2016 Act. The subjects of the lease can properly be regarded as a separate dwelling for the purposes of section 2. Therefore the statutory conditions for a PRT are met in this case. It follows that as a matter of law the appellant has established that there was a PRT. The appellant's submissions to the Court of Session had made reference to the English House of Lords case of *Uratemp Ventures Limited v Collins* [2002] 1 A.C. 301 and in particular cited a passage from the speech of Lord Bingham of Cornhill at paragraph 12 which considered the phrase "let as a separate dwelling" in the Housing Act 1988 section 1(1). The conclusion expressed there is consistent with the conclusion expressed in this paragraph.

[24] A significant part of the reasoning of the Upper Tribunal Judge who wrote the decision of 9 September 2019 has been used in this section of the reasons for decision. I acknowledge this work with gratitude.

[25] As a result the appeal on the issue dealt with by the FtT succeeds. This Tribunal will remake the decision of the FtT on this issue and make the findings required for the conclusion in law that there was a PRT. In remaking the decision necessary findings in fact have been made in respect of the parties, the subjects of the lease and the agreed rent. It is necessary to consider the consequences that flow for this appeal from the conclusion that there was a PRT. Having made these findings, consideration has been given to the question of the extent to which this Tribunal could and should go further and determine the remainder of the application made to the FtT by the appellant under Rule 107 of the FtT Rules of Procedure. The response to that question requires consideration of the relevant parts of the 2016 Act

[26] So far as material, the relevant statutory provisions of the 2016 Act are set out in this paragraph. Section 10 provides as follows.

> "(1) Where the terms of a [PRT] are not set out in writing between the parties, the landlord must, before the end of the day specified in subsection (2) or (as the case may be) (3), provide the tenant with a document which sets out all of the terms of the tenancy.
> (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,…"

Section 11 provides as follows.

> "(1) The Scottish Ministers may by regulations impose a duty on any person who is, or is to be, the landlord under a [PRT] to provide the person who is, or is to be, the tenant—
> (a) with information specified in the regulations…."



A tenant may apply to the FtT to seek certain orders against a landlord who fails to comply with one or more of the obligations which arise by virtue of sections 10 and 11. Section 16 provides as follows.

> "(1) On an application by the tenant under a [PRT], the [FtT] may make an order under subsection (2) where—
> (a) the landlord has failed to perform a duty arising by virtue of section 10 or 11 to provide the tenant with information,
> (b) at the time the [FtT] considers the application, the landlord has still not provided the tenant with the information, and
> (c) the landlord does not have a reasonable excuse for failing to perform the duty.
> (2) An order under this subsection is one requiring the landlord to pay the person who made the application an amount not exceeding—
> (a) three months' rent, if the order is in respect of a failure by the landlord to perform—
> (i) a duty arising by virtue of section 10, or
> (ii) one or more duties arising by virtue of section 11,
> (b) six months' rent, if the order is in respect of a failure by the landlord to perform—
> (i) a duty arising by virtue of section 10, and
> (ii) one or more duties arising by virtue of section 11."

The extent of possible sanction that may be imposed upon a respondent landlord depends on whether there are breaches under both sections 10 and 11.

[27] In its decision of 28 February 2019 to grant permission to appeal the FtT expressly stated at paragraph 17 that it had not given substantive consideration to the three limbs of section 16(1)(a),(b) and (c) of the 2016 Act in its original decision on the application. This is not what emerges from a close reading of the original decision of 15 January 2019 which ran to 16 pages of single spaced type and consisted of 74 paragraphs. Although the FtT is significantly deficient in its form for the reasons discussed above and set out more fully in the decision of this Tribunal dated 9 September 2019, it does contain an attempt at analysis of the issues that arise under section 16. The FtT explained how it would have decided at least some of the issues that arose



under section 16(1) which were before it for consideration had it concluded there was a PRT. There is sufficient information available in the decision of the FtT under appeal to allow this Tribunal to remake the decision and determine this application without the need to remit to a differently constituted FtT to make further findings.

[28] At paragraph 69 of the decision of 15 January 2019 the FtT expressly addressed section 16(1)(a) and the respondents' obligation under section 11. The FtT stated that had it not decided that there was no lease it would have concluded that the respondents had complied with their duty under section 11. That conclusion is a properly reasoned one. Had the FtT not erred in law in its conclusion as to the existence of a PRT it would have been entitled to decide that there was no breach of section 11. That is significant because it meant that the respondents' exposure to liability an award under section 16(2) could only be a maximum of three months' rent. I have made findings that reflect the conclusion of the FtT on the section 11 aspects of this case.

[29] At paragraph 70 of the decision of 15 January 2019 the FtT expressly addressed section 16(1)(a) and the respondents' obligation under section 10 to provide terms of the tenancy. That discussion criticises the appellant for failing to give notice prior to the hearing as to why she was not content with the terms of tenancy which the respondents sought to impose on her. With respect, the FtT's analysis on this point is misconceived. It was plain that the appellant objected to the attempted imposition by the respondents of joint and several liability for the whole flat. For the reasons set out above, she was correct to do so. The respondents' erroneously insisted before the FtT on trying to create what was, on the evidence, a legal fiction as to joint and several liability.



[30] Standing the decision of this Tribunal that there was a PRT on the basis of a rent of £350 per month, it is indisputable that that the respondents have not complied with section 16(1)(a) as regards the duty to provide the terms of the tenancy in writing under section 10. Further, as none of the five documents proffered by the respondents in the FtT proceedings accurately reflected the terms of the tenancy they had entered into with the appellant in a material respect, it is indisputable that for the purposes of section 16(1)(b) they continued to be in breach of the section 10 duty. I have made findings that reflect this conclusion on the section 10 aspects of this case. These findings follow from the error of law as to the existence of a PRT identified in this decision.

[31] At paragraph 71 of the decision of 15 January 2019, the FtT discusses the issues which arise under section 16(1)(c) at length. That discussion is also tainted by the error of law which has been identified in this decision. The FtT abstained from criticism of the conduct of the respondents because it thought that both parties had made assumptions which were not shared by the other when the appellant took occupancy. This error follows from the FtT's failure to conclude that as a matter of law there was a concluded contract of lease which was a PRT. The respondents tried to create what was, on the evidence, a legal fiction. It was their insistence on seeking to impose joint and several liability where none existed that has been central to the dispute that has arisen between the parties. The FtT's discussion of section 16(1)(c) is inadequate.

[32] Having determined that this Tribunal is in a position to conclude that the respondents have breached section 10 but not section 11, consideration has been given to whether this Tribunal was in a position to consider the remaining issues which were not properly addressed by the FtT due to the error of law which it made in failing to conclude that there was a PRT.



These matters are the issue of reasonable excuse under section 16(1)(c) and, in the event that the conclusion is that there was no reasonable excuse, the appropriate level of any discretionary penalty under section 16(2). Any such remit would delay further the determination of this case.

[33] This Tribunal has enough information available to it to allow it to decide both of these questions. The approach taken by the respondents was a deliberate attempt to impose conditions that were oppressive in their terms and which related to a matter (joint and several liability) which was not discussed between the parties prior to the conclusion of the PRT contract. All five sets of written terms proffered to the FtT failed to reflect the terms that the parties had agreed when they entered into the PRT. There is no reasonable excuse for the way that the respondents dealt with their obligation under section 10. Their conduct when forced to produce terms was incoherent in legal terms for the reasons given above.

[34] There is a discretion as to whether any award should be made. This is a case where an award should be made. This is a significant breach of the respondents' statutory obligation to supply written terms of the tenancy. The maximum statutory amount for a breach of section 10 only is three months' rent. As observed in the decision of 9 September 2019, it is unprincipled and exploitative for a landlord to force a tenant, for no other reason than that they share a living space, to pay the rent of non-paying third party co-tenants. The respondents accepted before the FtT that they maintained a lax regime. Their laxity has led to the problems deal with in this case. I consider that an appropriate level of award in the circumstances described above is two months' rent, i.e. the sum of seven hundred pounds and I have made an award in that sum.

Notice to the parties

[35] 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 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.

Sheriff Pino Di Emidio

Member of the Upper Tribunal for Scotland