Upper Tribunal for Scotland

[2020] UT 13

UTS/AP/19/0032

DECISION NOTICE OF SHERIFF F MCCARTNEY

On an application for permission to appeal
(Decision of Upper Tribunal for Scotland)
in the case of

SW
per Brown & Co. Legal LLP,
Legal Services Agency, 9 Sir Michael Street, Greenock, PA15 1PQ

Appellant

and

CHESNUTT SKEOCH LIMITED, 30 East Main Street, Darvel, KA17 0HP

Respondent

FTT Case Reference FTS/HPC/CV/18/3093

28 January 2020

Decision

Permission to appeal to the Court of Session is refused.

Reasons

[1] This is an application for leave to appeal the decision of the Upper Tribunal's decision of 28 November 2019.

[2] Dealing firstly with the background, the Respondent made an application to the First Tier Tribunal for Scotland Housing and Property Chamber ('the FTT') for unpaid rent and certain losses said to be arising from the termination of an assured tenancy between the parties. The FTT issued a decision on 13 May 2019, making a payment order against the Appellant in the sum of £3,915. The Appellant sought to defend the application both on its merits and, originally, that the tenancy agreement was void on the basis that the Appellant did not have capacity to enter the agreement. The FTT held a Case Management Discussion on 22 January 2018 when the issue of capacity was discussed in detail, and the FTT made certain orders for documents to be produced on the issue of capacity. The hearing took place on 13 May 2019. On 3 May 2019 the Appellant's written submissions were lodged. Those written submissions referred to the tenancy agreement being voidable due to facility and circumvention. Nothing was said in the written submissions on the tenancy agreement being void due to lack of capacity. On the morning of the hearing, the Appellants indicated they were no longer arguing the issue of capacity but indicated it was now intended that the FTT adjudicate on the issue of whether the tenancy agreement should now be reduced on the basis that the Appellant felt intimated into signing the agreement and given the Appellant's learning disability, the agreement should be reduced.

[3] The FTT asked to be addressed on the basis on which the FTT was being asked to deal with reduction. The hearing adjourned to allow the Appellant's representative time to address the FTT. The Appellant's representative argued that rule 70 of the First-tier Tribunal for Scotland Housing and Property (Procedure) Regulations 2017 (referred to as "the 2017 Rules") allowed the FTT to consider an application for reduction, and that there was Sheriff Court authority that the FTT should deal with fundamental issues raised without the need for a separate application (page 3 of the FTT's decision). The FTT refused

to deal with the issue of the reduction of the tenancy, saying it had no jurisdiction to do so, and even if it had, it had no application for reduction before it in terms of rule 70 of the 2017 Rules.

[4] Permission to appeal to the Court of Session is sought on two grounds. Firstly it is said that there was an error of law in respect of what is said to be treating the reduction of the lease as purely a procedural matter rather than a matter of jurisdiction. Secondly it is said that the Upper Tribunal was wrong to say that the written representation seeking reduction should have been dealt with in terms of rule 14 of the 2017 Rules.

[5] In relation to the first ground, the Appellant has misunderstood the Upper Tribunal's decision. The position is not that the FTT cannot deal with an application to reduce a lease, but that the way that the Appellant sought reduction was wrong. It is a matter of practice of the Sheriff Court that within the written pleadings to defend a claim, that defence can rely on the argument that a document should be reduced as part of a defence. That practice is clearly set out in the Ordinary Cause Rules (OCR 21.3). There is no equivalent rule in the 2017 Rules, but that does not mean that the Appellant could not have raised the issue of whether the tenancy agreement should be reduced. The Appellant could have sought a specific order for reduction. Whilst the jurisdiction of the Sheriff Court in relation to private tenancies has, for most civil matters transferred to the FTT, the Appellant fails to recognise that the FTT has its own procedural rules. The reference to section 38 (2) (g) of the Courts Reform (Scotland) Act 2014 does not add to the Appellant's argument. That section provides the Sheriff Court with the jurisdiction to deal with proceedings for reduction. How such proceedings are procedurally dealt with is a matter for the Ordinary Court Rules in the Sheriff Court, and the 2017 Rules in the FTT.

[6] The second ground in relation to the operation of rule 14 is misguided. The Appellant did not seek to amend their written case to introduce a defence that the tenancy agreement should be reduced. As the Appellant concedes, the combination of reading rules 13 and 14 of the 2017 rules means that amendment of written representations is allowed up to 7 days prior to a hearing when the amendment does not introduce a new issue. If so, the consent of the FTT is required. The consent of the FTT was not sought at any stage before or at the hearing. It is notable that the reduction of the lease as an issue first arises in the Appellant's written submissions to the FTT dated 3 May 2019 (for a hearing on 13 May 2019). Those written representations do not, at any point, identify that the Appellant is departing from the argument that the lease is void. It does not, at any point, identify that the Appellant proposes to raise a new argument that the lease should be reduced or treated as reduced. The Appellant suggests that the FTT would not have granted permission as it took the view that it had no jurisdiction. That argument was neither raised before the FTT or the Upper Tribunal. However, it misses the point. Whilst the Appellant criticises the Respondent for failing to realise that the issue of reduction was an 'additional argument' (paragraph 18 of the application for leave to appeal), the Appellant lodged the written submissions without flagging that an existing argument was being departed from, and an entirely new argument was being pursued. The Appellants did not provide authority to the FTT for the proposition that no separate application was required. Either way, the new argument – that the Appellant did not enter into the lease of her own free will – would have required factual determination. The Respondent would have been expected to dispute and possibly lead factual evidence to dispute the circumstances of the signing of the lease. The application had been subject to a Case Management Discussion in January 2019 to allow the issues in dispute to be identified. The 2017 Rules seek to resolve cases in a proportionate

and just way. For the Appellant to significantly alter position 10 days before the hearing, in a way that did not make their position clear or alternatively seek permission to do so, undermines the purpose and intend of the 2017 Rules.

[7] The case is fact specific. No important point of principle or practice arises in this case.

[8] Permission is refused.