



DECISION NOTICE OF SHERIFF NIGEL ROSS

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

MR JAMES MALLOCH, 109 Pilton Avenue, Edinburgh, EH5 2HP

Appellant

and

BERNISDALE HOMES LIMITED, 1A Rosebery Crescent Lane, Edinburgh, EH12 5JR

Respondent

FTT Case Reference FTS/HPC/CV/18/2810

7 October 2019

Decision

The First-tier Tribunal (“FtT”) issued a decision dated 18 February 2019. The appellant sought leave to appeal, which the FtT partially granted on 2 April 2019. The appellant has applied to this tribunal for leave to appeal those elements of the 18 February 2019 decision for which the FtT refused permission.

In terms of Rule 3(6) of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 this tribunal requires to make a ruling in relation to that part of the appeal, prior to proceeding to rule on the merits of the appeal. There is a right to request review (Rule 3(7),

but not further to appeal, any decision to refuse permission where a hearing has not been held.

Leave to appeal, in relation to those grounds of appeal for which leave to appeal has already been refused by the First-tier Tribunal (“FtT”), is refused.

Note:

The permitted grounds

[1] The FtT has given permission to appeal the following question: “Did the Tribunal err in law by interpreting section 89 of the 1984 Act in the context of the facts and circumstances of this particular case. This decision will not address that question. It will require to be addressed on a future occasion, and procedure will be discussed at the end of this decision.

The non-permitted grounds

[2] Leave to appeal the remaining grounds is refused, for the following reasons:-

Ground 1 – non enforcement of procedural regulations

[3] This ground founds on an alleged failure by the respondent to fail to supply written submissions. It also refers to the alleged misdescription of (but not by) the respondent’s representative as a solicitor. It is said it fatally undermines the integrity of the FtT.

[4] For facts to justify a ground of appeal, they require to be shown to have affected the outcome of the appeal. Even if these points were true, this ground fails to identify any effect on the outcome.

[5] The FtT has the power to regulate its procedure, which includes the power to excuse non-compliance if such non-compliance has no material effect on the hearing or the

outcome. This ground amounts to a complaint, but not a demonstration of any injustice. The FtT did not err in proceeding without written representations, because it was a matter for their discretion, and in any event such a failure is likely to hinder, not assist, the respondent in presenting their case. Equally, the status of the person making representations is irrelevant, and the FtT did not make any decision based on status. There is no material which would allow this tribunal to regard the FtT as having erred in law. This ground is unarguable.

Ground 2 – misrepresentation of evidence

[6] This ground founds on the evidence heard by the FtT. It raises a number of issues. The first issue is that the FtT did not ask questions in particular respects. The hearing is not inquisitorial, and it is the parties' responsibility to present such evidence as they require. The FtT is entitled to clarify issues and question factual assertions, but it is not compelled to ask questions, and cannot be faulted for not doing so. If evidence was not before the FtT, it is not the FtT's function to investigate further.

[7] The second issue is based on assertions about the validity of evidence. The assessment of evidence, what evidence to accept, what inferences that evidence supports, and what findings in fact are made, are all issues for the FtT. The FtT were entitled, and required, to reject evidence which they did not find proved. There is no evident error in the FtT's assessment of the evidence. Disagreement with that assessment is not enough to ground an appeal.

[8] Accordingly there is no material which would support an appeal on this ground. This ground is unarguable.

Ground 3 – impartial assessment of the evidence

[9] This ground refers to one part of the evidence, namely evidence of the appellant's insistence on paying rent in advance. As set out above, the interpretation of evidence is one part of the FtT's function, and it is not enough that the appellant disagrees with the interpretation – it must be shown to be contrary to the evidence taken as a whole. It is not enough to rely only on selected pieces of inconsistent evidence.

[10] This ground, and the evidence mentioned, forms only one part of the overall evidence, and is therefore an incomplete representation of the matrix of fact upon which the FtT reached its final decision. It does not demonstrate, by itself, that the FtT reached the wrong conclusion.

[11] Further, the content of the email chain does not have the effect contended for by the appellant. The email correspondence had, on its face, nothing to do with how the obligation would be constituted (“doesn't there need to be something in writing”), but rather whether a new agreement would be needed at all. The conclusion in paragraph 34 does not relate to either of these matters, but the separate matter of how the 12-month advance came to be discussed and agreed at all: was it a requirement imposed by the landlord, or was it a freely-made offer by the tenant? The email was regarded as an “indication” by the FtT, but not the only source of evidence.

[12] This ground is selective, incomplete, and does not provide sufficient material to conclude that the FtT misdirected themselves in fact. This ground is unarguable.

Ground 4 – failure to apply FtT's own interpretation of the 1984 Act

[13] This ground appears only to be a different way of approaching the question of interpretation of the 1984 Act, in relation to which leave to appeal has been granted (below).

It does not add to that question, and is not truly a separate ground. It appears to criticise the FtT for not seeking evidence that the appellant made an offer to pay 12 months' rent in advance. Where a fact is admitted (as this is), it is not necessary to lead evidence of that fact.

[14] This ground does not raise any separate issue to ground 5 (below), because application of the 1984 Act is fundamentally regulated by what interpretation is to be placed on the 1984 Act provisions. It is not a separate arguable ground.

Ground 5 – whether the FtT interpreted the 1984 correctly.

[15] Leave to appeal has been granted by the FtT.

Further procedure

[16] There is a right to apply for a review of this decision. Please note that any review will apply the same principles as set out above. A clear error will require to be demonstrated before a review can be successful.

[17] In any event, this appeal already raises the fundamental issue between the parties, namely the correct interpretation of the 1984 Act. The foregoing grounds do not add anything material.

[18] If no review is sought, it is necessary to fix further procedure. This case now hinges on the correct interpretation of the law. It is therefore unlikely that any further evidence will be required. Parties can elect to have the matter considered without a hearing if they wish.

[19] I would normally fix an oral hearing, but if both parties agree they don't need a hearing, then the matter can proceed by written submission only. I will leave parties to decide. The matter will go to an oral hearing unless both parties say they don't want one. In either event, I am likely to ask both parties to submit written legal submissions in advance,

and send copies to each other, so both parties know what the other side's position is, and have a fair chance to consider them in advance.

[20] Accordingly, parties should contact the clerk within 14 days of receipt of this decision, and should say whether they wish an oral hearing or not. Further procedure can then be identified.