Upper Tribunal for Scotland

[2021] UT 23
UTS/AP/19/0050

DECISION OF UPPER TRIBUNAL JUDGE PINO DI EMIDIO

In the appeal

Against

a Decision of the First-Tier Tribunal for Scotland

In the case of

Dr Peter Dymoke and Mrs. Beth Dymoke, Rossie Priory, Inchture, PH14 9SG

Appellants

and

The Hon. Mrs. Caroline Best, Rossie Home Farm Estate Office, Inchture, PH14 9SG

Respondent

Appellants: Parties
Respondent: Bauchope, Solicitor, Edinburgh
FTT Case Reference FTS/HPC/RP/18/1020

7 May 2021

The Upper Tribunal for Scotland having resumed consideration of the grounds of appeal on which permission to appeal was granted in part on 20 March 2020 against the decision of the First-tier Tribunal for Scotland dated 8 May 2019, Refuses the appeal as the appellants no longer have title and interest to pursue their application for enforcement of continuing

obligations under their lease with the respondent, the lease having been lawfully terminated while the appeal was in dependence.

Reasons for Decision

Introduction and Background

[1] In this document Dr and Mrs Dymoke are referred to as "the appellants" unless the context otherwise requires and Mrs. Best is referred to as "the respondent".

[2] On 20 March 2020 the appellants were granted permission to appeal by this Tribunal against a decision of the First-tier Tribunal for Scotland ("FtT") dated 8 May 2019 on certain restricted grounds detailed below. The decision related to the lease of Rossie Priory, Inchture, PH14 9SH ("the property") by the respondent to the appellants in terms of missives of let dated 28 and 30 April 2015. The property is a stately home with a large number of rooms. The appellants made two applications to the FtT under section 22 of the Housing (Scotland) Act 2006 ("the 2006 Act") in which they made a number of complaints that the respondent had failed to ensure that the property met the Repairing Standard as defined in the 2006 Act. The parties were agreed that the respondent was obliged to maintain the property in certain respects though they were in dispute as to the extent to which the Repairing Standard under the 2006 Act was applicable in terms of the lease.

[3] The applications were conjoined by the FtT. The FtT inspected the property and evidence was heard on 26 October 2018 and 4 February 2019. Both parties were represented and their solicitors provided the FtT with written submissions. The conjoined applications before the FtT related to a wide range of complaints about the state of the property and the respondent's alleged failures to comply with her obligations under the lease. The property is a very extensive and complex one of some age. As a result the need for various repairs

arose over the currency of the lease. The respondent carried out a number of repairs to the property. Eventually the outstanding matters in respect of this application were narrowed down to three discrete factual matters. The FtT decided that there was no evidence of any continuing failure to maintain the property at the Repairing Standard. On 30 October 2019 the FtT refused the appellants, who by that time were not represented, permission to appeal to this Tribunal.

[4] In about 2016 the respondent raised an action against the appellants in Perth Sheriff Court in which she seeks *inter alia* decree for payment of substantial amounts of arrears of rent and other payments due under a lease. The appellants defended the action on the basis that they were entitled to withhold rent on account of substantial defects in the property said to have arisen due to the failure of the respondent to comply with her obligations as landlord. I dealt with a debate in that action a considerable time ago and I understand that it is currently sisted.

Procedural History in the Upper Tribunal

[5] The appellants sought permission to appeal from this Tribunal. They lodged very lengthy grounds of appeal. After a hotly contested hearing on the question of permission to appeal, on 20 March 2020 this Tribunal granted permission to appeal restricted three grounds only. Following the grant of PTA the respondent's solicitors lodged a detailed written submission dealing with the three grounds on which permission was granted. The appellants replied to that submission in writing. At that stage the Tribunal advised parties that it did not require to have a further oral hearing in this case. Consideration of this matter was delayed by the shutdown caused by the Covid pandemic. I also required to deal with a second application for permission to appeal in respect of other proceedings between

the parties relating to further complaints about repairs which had been dealt with separately by the FtT (case number UTS/AP/20/0003). On 21 July 2021 permission to appeal was granted on three out of twelve grounds.

[6] The draft decision in this appeal was in course of preparation when on 18 November 2020 the respondent's solicitors wrote to the clerk of the Tribunal in connection with both pending repairs appeals. They advised that the Court of Session had refused of the appellants' application for permission to appeal against the decision of this Tribunal in separate proceedings to uphold an order for their eviction. Following that decision to refuse permission, the appellants had been evicted from the property. The respondent submitted that the appellants were no longer tenants and no longer had title or interest to pursue the pending repairs decision appeals further. The respondent asked for the appeals to be refused.

[7] The appellants confirmed that they had been evicted but advised that they wished to insist in both repairs appeals. I decided that the issue of the appellants' title and interest should be dealt with separately before any final decision was made in respect of the two appeals. I invited further written submissions from both parties on this new issue. On perusal of the initial written submissions, and in the unusual circumstances which had arisen, I identified some further issues on which I invited the parties to make submissions. Those further issues were (a) the relevance of paragraph 7(1) and (3) of Schedule 2 of the 2006 Act to these appeals; (b) the effect, if any, of section 22(1B) of the 2006 Act which contemplates that certain third parties may bring proceedings before the FtT; and (c) the likely effect, having regard to the grounds on which permission had been granted, if the appeals were to be successful in whole or in part; (d) the relevance, if any, of the sisted sheriff court proceedings between the parties; and (e) how the relative private and public

interests that are in play in these appeals are to be balanced. The parties have provided further written submissions dealing with these matters.

Submissions for the respondent

[8] The respondent submitted that the appellants no longer had title and interest to pursue these appeals. Under reference to *Donaghy* v *Rollo* 1964 S.C. 278 and especially a passage in the opinion of the Lord Justice Clerk (Lord Grant) at pages 285 and 286 they submitted that "on principle, title to sue involves not merely an initial title to raise the action but a continuing title to pursue the action to final judgment." They also made reference to *Bentley v Macfarlane* 1964 SC 76 as authority for the need for a party whose title is challenged in the course of proceedings to set out the basis of its title. On the question of interest they cited a passage in Macphail's Sheriff Court Practice (3rd ed.) at paragraph 4.33. They went on to submit that recent authority for the general principle that one requires to continue to have both title and interest to continue a court action was to be found in *Combined Corporation (BVI) Limited v George Lawrence Souter* [2018] CSIH 81 citing a passage by the Lord President (Lord Carloway) at page 11. This case, which was a statutory appeal from the Lands Tribunal for Scotland, is now reported under the name *Souter v Combined Corporation (BVI) Limited* at 2019 SC 261. The passage referred to appears in the Opinion of the Court at paragraph [18] and is reproduced below.

Submissions for the appellants

[9] The appellants made written submissions which were supported by Shelter. In summary they disputed that the lease had been lawfully terminated. They advised that a complaint had been made as to the conduct of the application for permission to appeal to the

Court of Session in the eviction proceedings. Even if this Tribunal concluded the lease was lawfully terminated, it should allow the appeal and remit to the FtT so that it could exercise its discretion under paragraph 7(3) of schedule 2 of the 2006 Act to allow the application to continue to final determination. The authorities relied on by the respondent were not specific to the Tribunal system and should not be followed. They expressed their strong desire for these proceedings and the other repairs appeal to be determined so that they could be remitted to the FtT to inquire into the facts. The submissions for the appellants included an attack on the professional integrity of the respondent's solicitors which was unwarranted. The respondent's solicitors have done no more than put forward arguments on behalf of their client in a determined and professional way.

[10] Having considered the detailed written submissions and supplementary written submissions by both parties I decided I did not require to fix a hearing on the question of title and interest.

Decision

[11] There is no dispute that the appellants had title and interest to bring these proceedings at the time when they were commenced before the FtT. The appellants have been evicted following an unsuccessful attempt to seek permission to appeal from the Court of Session against the decision of this Tribunal to refuse their appeal against an order for their eviction from the property. There is no doubt that for present purposes the lease has been lawfully terminated. Paragraph 7(1) of schedule 2 of the 2006 Act provides:

> "(1) A tenant may withdraw an application under section 22(1) at any time (and the tenant is to be treated as having withdrawn it if the tenancy concerned is lawfully terminated)."

There are two scenarios in paragraph 7(1). The first involves withdrawal of the application by the tenant and the second treats the application as withdrawn on lawful termination of the lease. Paragraph 7(3) of schedule 2 of the 2006 Act provides:

> "(3) Where an application is withdrawn after it has been referred to [the FtT, the FtT] may—
> (a) abandon [its] consideration of the application, or
> (b) despite the withdrawal—
> (i) continue to determine the application, and
> (ii) if [it does] so by deciding that the landlord has failed to comply with the duty imposed by section 14(1), make and enforce a repairing standard enforcement order."

Paragraph 7(3) confers a discretionary power on the FtT to continue to determine an application where it is withdrawn.

[12] In the case of *Donaghy* v *Rollo* the pursuer had raised an action of interdict against a union of which he was a member against the use of funds for a particular purpose. It emerged that he had ceased to be a member of the union. The court held he required not only to have title and interest when the action commenced but a continuing title to pursue the action to final judgment. The pursuer no longer had an interest in the way the funds were used but the court allowed the substitution of a new pursuer who was a member and did have such continuing title.

[13] The passage in *MacPhail on Sheriff Court Practice* at paragraph 4.33 is in the following terms:

> "Besides a title to sue, the pursuer must have an interest to pursue the action, which has been defined above as some benefit from asserting the right with which the action is concerned or from preventing its infringement. The grounds of the rule that interest is necessary as well as title are that it is the function of the courts to decide practical questions, and that no person is entitled to subject another to the trouble and expense of a litigation unless he has some real interest to enforce or protect."

The authority cited for this statement is the opinion of the Lord Ordinary (Lord Ardwall) in *Swanson v Manson* 1907 SC 429. He said the following:

> " ….though a pursuer has a title to sue, yet if he has no interest he is not entitled to insist in an action. The grounds of this rule are (1) that the Law Courts of the country are not instituted for the purpose of deciding academic questions of law, but for settling disputes where any of the lieges has a real interest to have a question determined which involves his pecuniary rights or his status; and (2) that no person is entitled to subject another to the trouble and expense of a litigation unless he has some real interest to enforce or protect." It follows that while a 'title' is necessary to enable a person to raise an action, and the possession of such title renders an action competent, want of interest may be successfully pleaded as a defence unless the pursuer can satisfy the Court that interest exists".

Although the Lord Ordinary's decision on the question of title and interest was reversed by the First Division his reasoning in the passage cited was not disapproved.

[14] In *Souter v Combined Corporation (BVI) Limited* cited above the Lord President at paragraph [18] said the following in repelling the objection to the appellant's title and interest:

> "18. It was the respondent who made the application to the Lands Tribunal. The Keeper of the Registers had identified the appellants as persons with an interest in the disputed ground. The appellants were allowed to become a party to the proceedings as such a person (Lands Tribunal for Scotland Rules 2003, r 21). As at the date of the Tribunal decision, they remained a party to the application. The decision would be res iudicata in relation to them and potentially any successors in title. The Tribunals and Inquiries Act 1992 provides, in relation to the Tribunal, that: (1) …if any party to proceedings before any tribunal …is dissatisfied in point of law (sic) with a decision of the tribunal he may …appeal from the tribunal to the [Court of Session] …".
> The appellants were parties to the proceedings throughout. They have a statutory right to appeal and are entitled to exercise that right (cf, for cases at first instance, Donaghy v Rollo 1964 SC 278). In any event, given the existence of the warrandice clause, in the disposition to the new proprietors, the appellants retain both a title and an interest to pursue the appeal. Even if they did not, upholding a plea of this nature at this stage would simply cause a delay until either the new proprietors were sisted as interested parties or a suitable assignation was executed."

[15] In *Souter* the challenge to the appellants' title and interest in the course of the appeal to the Court of Session was unsuccessful. The court concluded that as the appellants were exercising a statutory right of appeal from the Lands Tribunal for Scotland under the Tribunal and Inquiries Act 1992 they were entitled to exercise that right to appeal.

Furthermore the appellants continued to have a title and interest to pursue the appeal because although they had conveyed the subjects in question to another party, the disposition granted by them contained a clause of warrandice. The effect of upholding a plea as to title and interest would be to cause delay as a new party would be sisted or an assignation granted.

[16] In the present case the appellants are exercising a statutory right of appeal under the 2014 Act. That appeal relates to a claim based on alleged breaches by the respondent of the landlord's obligations under the lease of the property. While the appeal has been in dependence before this Tribunal there has been a change in circumstances in that the lease has been lawfully terminated. The second part of paragraph 7(1) of schedule 2 of the 2006 expressly provides that an application under section 22 of that Act is to be treated as withdrawn if the tenancy concerned has been lawfully terminated. The rationale for that provision can be readily understood in that a former tenant under a lawfully terminated lease can no longer have a real practical interest to secure the enforcement of repairs obligations applicable while the lease subsisted. The respondent has successfully obtained an order for eviction and has evicted the appellants after the exhaustion of all available statutory appellate processes. This is not a situation where a new applicant could be substituted before the FtT as the lease has been lawfully terminated. I accept that the appellants continue to feel very aggrieved at what they consider to be serious breaches of the respondent's obligations under the lease. However the fact remains that they are seeking the enforcement of repairing obligations that no longer subsist because the lease which imposes those obligations has been lawfully terminated.

[17] The related sheriff court proceedings for recovery of unpaid rent do not provide a basis for allowing the present proceedings to continue. In that action the present appellants

are defenders. The issue which arises is whether they were entitled to retain rent during the currency of the lease owing to breaches of the respondent's obligations as landlord. Any question of historic proof of the condition of the property can be dealt with in the context of that action. Similarly any question of title and interest can also be dealt with in that process.

[18] The case of *Souter* suggests that challenges based on attacks on a party's title and interest in the course of an appeal are to be discouraged if they are likely to cause delay. The nature of the interest changed from that of proprietor to grantor under a clause of warrandice. That is entirely different from a lease which has been lawfully terminated so that the former tenant cannot seek to enforce what were ongoing obligations of repair during the currency of the lease. The argument as to lack of continuing title and interest was not available to the respondent until the current appeal process was well underway. *Souter* can be distinguished because:

a. the core position is that the appellants are treated by statute as having withdrawn the application following lawful termination of the lease;

b. they do not have any comparable rights that could be assigned to another party; and

c. there is nothing comparable to the continuing interest arising from the grant of warrandice.

As a result this appeal will be refused for lack of a continuing title and interest to pursue it on the part of the appellants.

Notice to Parties

[19] 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 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.