EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 11
XA48/20

Lord Malcolm
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Appeal

under Section 48(3) of the Tribunals (Scotland) Act 2014 against a decision of the Upper Tribunal for Scotland (Housing and Property Chamber) dated 28 November 2019

by

SW

Appellant

against

CHESNUTT SKEOCH LIMITED

Respondent

Appellant: Sutherland; Drummond Miller LLP

9 February 2021

Introduction

[1] This appeal against a decision of the Upper Tribunal for Scotland ("the UT") raises issues about the ambit of the functions and jurisdiction of the sheriff which were transferred to the First-tier Tribunal for Scotland by section 16 of the Housing (Scotland) Act 2014.

Relevant statutory provisions

[2] Part 3 of the Housing (Scotland) Act 2014 ("the 2014 Act") makes provision in relation to three specified categories of tenancy and occupancy agreements. Section 16 provides:

> "**16 Regulated and assured tenancies etc.**
>
> (1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal—
>
> (a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),
>
> (b) a Part VII contract (within the meaning of section 63 of that Act),
>
> (c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).
>
> (2) But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.
>
> …"

[3] Regulation 2 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 states:

> **"2. Application of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017**
>
> The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 set out in the schedule apply to proceedings before the First-tier Tribunal for Scotland Housing and Property Chamber when exercising the functions transferred or allocated to it by—
>
> …
>
> k) the Housing (Scotland) Act 2014; …
>
> …"

[4] In terms of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules"), proceedings before the First-tier Tribunal for Scotland Housing and Property Chamber ("the FtT") are commenced by way of an application which is served on the respondent (rules 4 and 5). The Rules do not make any provision for formal answers or defences, or for a counterclaim. Instead, a respondent may make written representations which set out his response to the application (rule 9(1)(b)). The Rules make provision enabling written representations to be amended, subject to certain constraints (rules 13 and 14).

[5] Rules 1, 2, 3, 4, 5, 8, 9, 13 and 14 provide:

"

PART 1

Rules common to all proceedings before the First-tier Tribunal

1.— Application and interpretation

(1) Part 1 of the Rules applies to all proceedings before the First-tier Tribunal.

(2) In these Rules—

…

'application' means an application made to the First-tier Tribunal …

…

2.— The overriding objective

(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.

(2) Dealing with the proceedings justly includes—

(a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;

(b) seeking informality and flexibility in proceedings;

(c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;

(d) using the special expertise of the First-tier Tribunal effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the issues.

3.— Effect of the overriding objective

(1) The Chamber President and the First-tier Tribunal must seek to give effect to the overriding objective when—

(a) exercising any power under these Rules; and

(b) interpreting any rule.

(2) In particular the Chamber President and the First-tier Tribunal must manage the proceedings in accordance with the overriding objective.

(3) The parties must assist the Chamber President or the First-tier Tribunal to further the overriding objective.

4. — Application

An application to the First-tier Tribunal must be in writing and may be made using a form obtained from the First-tier Tribunal.

5.— Requirements for making an application

(1) An application is held to have been made on the date that it is lodged if, on that date, it is lodged in the manner as set out in [rule] … 70 …

(2) The Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.

(3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held to be made on the date that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement.

…

8.— Rejection of application

(1) The Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President, must reject an application if—

(a) they consider that the application is frivolous or vexatious;

(b) the dispute to which the application relates has been resolved;

(c) they have good reason to believe that it would not be appropriate to accept the application;

(d) they consider that the application is being made for a purpose other than a purpose specified in the application; or

(e) the applicant has previously made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, there has been no significant change in any material considerations since the identical or substantially similar application was determined.

…

9.— Notification of acceptance of application

(1) Where rule 8 does not apply, the First-tier Tribunal must, as soon as practicable, give notice to each party—

(a) setting out the detail of the application in such manner as the First-tier Tribunal thinks fit; and

(b) specifying the day by which any written representations must be made.

(2) The day specified for the purposes of paragraph (1)(b)—

(a) must be at least 14 days after the day on which the notice is given; and

(b) may, at the request of any party, be changed to such later day as the First-tier Tribunal thinks fit.

(3) The First-tier Tribunal must notify each party of a change mentioned in paragraph (2)(b)

…

13.— Amendment to a party's written representations

(1) Subject to rule 14, a party may amend their written representations—

(a) any time up to 7 working days prior to the date fixed for a hearing; or

(b) within 7 working days prior to the date fixed for the hearing or during the hearing, with the consent of the First-tier Tribunal and on such conditions, if any, as the First-tier Tribunal thinks fit.

(2) Such amendment must—

(a) be in writing unless it is made during the hearing, in which case the terms of the amendment may be stated orally in the presence of any other party and noted by the First-tier Tribunal; and

(b) comply with any requirement in an enactment which would have applied if the amendment had been included in the application.

(3) On receipt of a written amendment, the First-tier Tribunal must intimate the amendment to the other party in writing unless the amendment was made orally during the hearing in accordance with paragraph (2)(a).

…

14.— Amendment raising new issues

(1) Where the effect of any amendment of the written representations under rule 13(1)(a) by the party would be to introduce a new issue, such amendment may only be made with the consent of the First-tier Tribunal and on such conditions, if any, as the First-tier Tribunal thinks fit.

(2) Where an application is amended to include a new issue, any other party must be given an opportunity to make written representations in response to the amendment, or request the opportunity to make oral representations, by a date specified by the First-tier Tribunal which is not less than 14 days from the date on which—

(a) intimation of the amendment is served; or

(b) the amendment was made orally during the hearing in accordance with rule 13(2)(a).

(3) The party mentioned in paragraph (1) may also make further written representations or request the opportunity to make oral representations, by the date specified under paragraph (2).

(4) The date by which such representations must be made may, at the request of either party, be changed to such later day as the First-tier Tribunal thinks fit.

(5) The First-tier Tribunal must notify all parties of any change under paragraph (4).

(6) Where written representations are amended to include a new issue and the other party requests further time to comply with any duty under an enactment, then, the First-tier Tribunal must allow such further time as it considers reasonable.

…"

Part 3 of the Rules sets out procedure in respect of private rented applications, and Chapter 6 of Part 3 deals with procedure in respect of applications. Rules 65-69 make provision as to procedure in respect of several types of assured tenancy applications, and rule 70 states:

"**70. Application for civil proceedings in relation to an assured tenancy under the 1988 Act**
Where a person makes any other application to the First-tier Tribunal by virtue of section 16 (First-tier Tribunal's jurisdiction in relation to regulated and assured tenancies etc) of the 2014 Act, the application must—

(a) state—
  (i) the name and address of the person;
  (ii) the name and address of any other party; and
  (iii) the reason for making the application;
(b) be accompanied by—
  (i) evidence to support the application; and
  (ii) a copy of any relevant document; and
(c) be signed and dated by the person.

…"

[6] Rule 21.3 of the Ordinary Cause Rules 1993 (Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993) provides:

"21.3.— Objection to documents founded on

(1) Where a deed or writing is founded on by a party, any objection to it by any other party may be stated and maintained by exception without its being reduced.

…"

Rule 19.1 of the Summary Cause Rules 2002 (Act of Sederunt (Summary Cause Rules) 2002) states:

"**Challenge of documents**

19.1.—(1) If a party relies on a deed or other document to support his case, any other party may object to the deed or document without having to bring an action of reduction.

…"

The proceedings before the FtT

[7] The appellant was formerly the tenant under an assured tenancy of a flat in Port Glasgow. The landlord was Chesnutt Skeoch Limited. Following termination of the tenancy the landlord made an application to the FtT for a payment order in respect of rent arrears of £4,050 and for damages (for cleaning and repairs) of £450.

[8] The appellant instructed a solicitor to oppose the application. The solicitor lodged written representations which maintained that the tenancy agreement was void because the appellant's learning difficulties were such that she lacked capacity to enter into it. They also maintained that if the agreement was valid the appellant was not liable for the sums claimed as damages. On 22 January 2019 the FtT convened a case management discussion. At that time the appellant's solicitor confirmed that the defence was as stated in the written representations. A hearing was set down for 13 May 2019 and the FtT ordered that the appellant produce certain documentation by 19 February 2019.

[9] The appellant did not lodge any evidence to support the defence of lack of capacity. Instead, on 3 May 2019 her solicitor emailed a six page document and several productions to the FtT and the landlord. All of those documents were formally lodged on 4 May 2019. The document was headed "Submission for the Respondent" ("the Submission"). The

productions included a letter from the appellant's social worker and a report from a clinical psychologist. Paragraph 1 of the Submission summarised the landlord's claim. Paragraph 2, which was headed "Matters in dispute", stated that the claim was disputed in its entirety. It indicated that the appellant's position was that the sums claimed were not due because i. (pp 1-4) the tenancy agreement should be "reduced" because it had been induced by facility and circumvention (the circumvention being by the landlord's director Kenneth Johnstone ("Mr Johnstone")); ii. (pp 4-5) the Department for Work and Pensions ("the DWP") had in fact paid the landlord at least some of the rent now claimed as arrears; iii. (p 5) the landlord had failed to mitigate its loss. The damages claim was also disputed on a number of specified grounds (p 6).

[10] The Submission highlighted that the letter from the social worker described the appellant as "a vulnerable woman with a learning disability" who was "vulnerable to harm and exploitation"; that she was provided with support to carry out a range of daily activities, including shopping and budgeting; and that "her comprehension is poor. She benefits from clear, simple language … She struggles with a lot of information at one time". The Submission noted that the letter concluded "her capacity to make some decisions is impaired, particularly in relation to her finances … She requires support with making decisions and to undertake any short and long term planning … She has reported giving money to others and it has been a concern that she is vulnerable to financial exploitation. It is the opinion of the writer, that Ms [W] is open to manipulation with regard to managing her finances". The Submission stated that the report from the clinical psychologist indicated that the appellant had mild learning difficulties; and that having regard to those difficulties the report recommended special arrangements for those working with her.

[11] At the hearing on 13 May 2019 the appellant was represented by her solicitor and Mr Johnstone appeared on the landlord's behalf. At the outset the FtT sought clarification whether the lack of capacity defence was insisted upon. Her solicitor confirmed that it was not insisted upon, and that all of the defences to the application were now stated in the Submission. The FtT next asked whether it had jurisdiction to reduce the tenancy agreement. The appellant's solicitor asked to adjourn the hearing to a later date to allow him to prepare submissions on that matter. The FtT refused that motion, but granted a short adjournment. In its decision the FtT described the solicitor's submissions when the hearing resumed as having been:

> "to the effect that the Tribunal had jurisdiction under Rule 70 and that, whilst no authority could be identified for the proposition, his understanding was that there was Sheriff Court authority that the Tribunal should deal with fundamental issues raised without the need for a separate application."

[12] The FtT was not persuaded by those submissions. It explained:

> "1. The Tribunal did not have jurisdiction to deal with an action for reduction. The reason for this being that section 16 had transferred the jurisdiction of the Sheriff Court in respect of actions *arising from* assured tenancies to the Tribunal, the Tribunal did not consider that an action for reduction was an action arising from an assured tenancy under section 16 of the Act; and
>
> 2. Even if the Tribunal did have jurisdiction it could not deal with the claim as no application had been made on the Respondent's behalf under Rule 70 to do so.
>
> The Tribunal informed the Parties that the claim to reduce the assured tenancy could not proceed …"

The FtT went on to hear evidence and submissions in relation to the other issues in the appeal. It heard oral evidence from the appellant and Mr Johnstone, and it considered the documentary evidence. It found Mr Johnstone to be a credible and reliable witness. Where there were conflicts between his evidence and that of the appellant, it preferred his evidence. It held that a payment of £560 which had been made to the landlord by the DWP should be

deducted from the rent arrears of £4,050; and that the sum due for cleaning and repairs was £425. At the conclusion of the hearing on 13 May 2019 it issued an order for payment by the appellant to the landlord of £3,915. On 17 May 2019 it issued its written decision and reasons.

The proceedings before the UT

[13] On 28 June 2019 the appellant was granted permission to appeal. At the appeal hearing her solicitor submitted to the UT (i) that the FtT had jurisdiction to grant reduction of an assured tenancy agreement; (ii) that the Submission had sought reduction; (iii) that it was an application in terms of the Rules; and (iv) that if it was not, it nevertheless stated that the tenancy should be reduced *ope exceptionis*, and the FtT had jurisdiction to do that.

[14] The UT issued its decision on 28 November 2019. It dismissed the appeal. It noted in relation to the Submission:

> "14. … The written submissions raised a new argument that the assured tenancy was voidable due to facility and circumvention, and the Appellant was seeking an order that the tenancy be reduced …"

It held that the Submission had not been an application:

> "[16] … If I was to accept the Appellant's submission that an application could be made in that way, it would frustrate the operation of rule 5. That rule sets out that each application to the tribunal is considered by the Chamber President, or a member of the tribunal under delegated powers, to consider whether the application is valid. That does not just rest on the issue of whether the correct information and documentation has been provided, but the Chamber President will also consider Rule 8, which provides for rejection of applications in various circumstances including that the issue has been previously resolved, that the application is frivolous or vexatious, or that there is good reason to believe that it would not be appropriate to accept the application. But there may be other good reasons why the 2017 Rules have been drafted as they have. Scrutiny of the application at an early stage may alert the tribunal to the fact that the application is similar to other (*sic*) pending before the tribunal, and should be heard at the same time (rule 12)."

In relation to the argument that the FtT had the same power as the sheriff to grant reduction *ope exceptionis,* the UT stated:

> "[18] I reject these arguments. The fact that there is such a rule in the Sheriff Court does not really assist the Appellant. It is a different process. Proceedings in the Sheriff Court have specific rules on pleading within particular timescales in order to provide fair notice to each party as to what is to be determined by the court. It is a leap to transpose a specific Sheriff Court rule to the FtT. While it is asserted that both the Court of Session and Sheriff Court had allowed such a defence to be presented with or without specific rules, no authority was provided for that proposition. Similarly the reliance on specific parts of Rule 2 of the 2017 Rules does not take the Appellant any further…
>
> [19] I consider that a separate application should have been made to the FtT regarding the reduction of the lease. That enables the FtT to ensure that the objective of Rule 2 requiring applications to be dealt with justly is achieved. If such an application had been made, it could have been heard alongside the current application, allowing the matter as a whole to be dealt with in a way which was proportionate."

The UT went on to consider what the position would have been if, contrary to its view, a separate application had been unnecessary:

> "[20] If I am wrong that a separate application required to be made, at the very least the Appellant should have sought to have the written representations dealt with in terms of Rule 14 (amendment of written representations raising new issues). The consent of the FtT would require to be obtained (Rule 14(1)). A period of not less than 14 days must be given to the opponent to consider the written representations and make any written representations in response (Rule 14(2)). The written submissions which first raised the issue of reduction were intimated by email on 3 May 2019 for a hearing that took place on 13 May 2019. By any view, the raising of the issue of the reduction of the tenancy came too late. No such application was made by the Appellant to allow these matters to be raised. The fact that Mr Johnstone arranged for a witness to come and give evidence on the issue of capacity underlines the fact that the Appellant has not given adequate notice of their (*sic*) position.
>
> [21] Accordingly I consider that the FtT were correct in law to refuse to consider the issue of reduction of the lease under any of the arguments before me."

The UT referred to *Anderson* v *First-tier Tribunal for Scotland Housing and Property Chamber* [2019] UT 48, where Sheriff Nigel Ross considered section 71(1) of the Private Housing (Tenancies) (Scotland) Act 2016, a provision transferring jurisdiction from the

sheriff to the FtT in relation to civil proceedings arising from private residential tenancies. It also referred to *Parker* v *Inkersall Investments Ltd* [2018] SC DUM 66 (where, in a postscript to his Note (at paragraphs [31]-[45]), Sheriff George Jamieson discussed the jurisdiction of the FtT in relation to private rented housing). The UT made the following *obiter* observations on the jurisdiction issue:

> "[24] It seems to me, that if a valid application had been made to the FtT, then it is arguable that the FtT had jurisdiction to deal with it. The action for reduction can only arise following a lease being entered into. The wording of section 16 of the 2016 (*sic*) Act is potentially wide enough to cover a wide jurisdiction. It transfers the functions and jurisdictions of the Sheriff in relation to assured tenancies to the FtT (section 16(1)). Parliament expressly limited the FtT's jurisdiction in relation to criminal matters (section 16(2)) but did not seek to place other limitations on the FtT. As Sheriff Ross noted 'the natural and ordinary effect of the words 'arising from' is unrestricted and imprecise, and invites a wide, inclusive approach … It tends to show that the legislature intended the FtT to deal with all PRT-related events, to the exclusion of the sheriff court, and not just the core lease.' (*Anderson* v *First-tier Tribunal for Scotland Housing and Property Chamber* [2019] UT 48 at para [14].)
>
> [25] However, that is not a matter which I need to conclusively determine given my decision on the question of whether the FtT had an application before it, or should have considered making an order for reduction as part of its consideration of the case…"

[15] On 28 January 2020 the UT refused permission to appeal to this court, but on 18 August 2020 this court granted permission.

The appeal to the Court of Session

[16] The grounds of appeal contended that the UT had erred in three respects. First, it erred in holding that the FtT did not have jurisdiction to reduce an assured tenancy *ope exceptionis.* Second, it erred in holding that the Submission was not an application. Third, it erred in deciding that the Submission came too late. The landlord did not lodge answers to the appeal. The appellant enrolled a motion for the appeal to be allowed, for the decisions of

the UT and the FtT to be quashed, and for the case to be remitted to a differently constituted FtT for a re-hearing.

[17] A note of argument prepared by counsel for the appellant was lodged. It was argued that section 16(1) of the 2014 Act had transferred to the FtT all of the functions and jurisdiction of the sheriff arising from assured tenancy agreements. The word "functions" included powers and duties (Interpretation and Legislative Reform (Scotland) Act 2010, section 25 and schedule 1). The word "jurisdiction" essentially meant the power granted to the court (*Dunbar* v *Skinner* (1849) 11 D 945). The words "arising from" had a broad import. The section 16(2) exclusion of any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence reinforced that conclusion. *Prima facie*, any other function or jurisdiction relating to an action which concerned an assured tenancy agreement was transferred from the sheriff to the tribunal.

[18] The sheriff's jurisdiction to grant reduction of an assured tenancy agreement was a jurisdiction "arising from" that agreement. Actions for contractual type remedies, such as actions for payment of rent, actions of damages for breach of the tenancy, or actions for removal at the expiry of the tenancy were not the only actions "arising from" such agreements. The FtT had been wrong to construe section 16 in the narrow way it had. It would be odd, undesirable, and inconvenient if certain types of action relating to assured tenancy agreements had to be raised in the FtT but others had to be raised in the sheriff court. Where it had been intended that the sheriff court should retain particular functions or jurisdiction in relation to the tenancy or occupancy agreements specified in section 16(1), the legislature had made specific provision to that effect, eg section 16(2). It was acknowledged that the sheriff continued to have some functions and jurisdiction in relation to matters concerning those agreements. For example, the sheriff had jurisdiction in relation to anti-

social behaviour orders under section 4 of the Antisocial Behaviour etc. (Scotland) Act 2004, and those orders might involve an agreement of that sort. The sheriff also had jurisdiction in respect of transfers of tenancies between spouses or cohabitants under section 13 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, or between civil partners under section 112 of the Civil Partnership Act 2004, and the tenancy or agreement transferred could be of the type specified in section 16 of the 2014 Act. However, the functions and jurisdiction which the sheriff exercised in relation to such matters were not functions and jurisdiction "in relation to actions arising from" such tenancy or occupancy agreements.

[19] For present purposes there were two aspects of the sheriff's functions or jurisdiction which were relevant and had been transferred to the FtT by section 16(1). First, the sheriff's power to grant decree of reduction where a pursuer included an appropriate crave in the initial writ, or where a defender included an appropriate crave in a counterclaim (Courts Reform (Scotland) Act 2014, section 38(2)(g)). Second, the sheriff's power to reduce a deed or writing *ope exceptionis* where in his defences a defender challenged its validity and asked for it to be set aside. Sheriff courts have had power to permit an objection to a deed or writing founded upon to be stated and maintained by way of exception since the Sheriff Courts (Scotland) Act 1877, section 11 (Macphail, *Sheriff Court Practice*, (3rd ed), paragraph 12.67). The current provisions were in rule 21.3 of the Ordinary Cause Rules 1993 and in Rule 19.1 of the Summary Cause Rules 2002. If, as the appellant maintained, the sheriff's jurisdiction to set aside a deed or writing *ope exceptionis* had been transferred, it did not matter that the 2017 Rules, unlike the rules in the sheriff court, did not make specific provision for it. It was very clear that the 2017 Rules were intended to minimise formality of procedure, particularly in relation to the manner in which a respondent to an application required to state a defence.

[20] If an application seeking reduction had been necessary, then the Submission had fulfilled all of the formal requirements for an application. Rules 5, 8 and 12 had no real bearing on the Submission and the UT had been wrong to suggest otherwise. The UT erred in law in not having proper regard to the overriding objective to deal with the proceedings justly (rule 2), in a manner which was proportionate to the complexity of the issues and the resources of the parties (rule 2(2)(a), and in an appropriately informal and flexible way (rule 2(2)(b)).

[21] The UT discussed what the FtT might have done had it considered whether the appellant ought to be allowed to amend her written representations. It erred in law in concluding that the UT would have been bound to refuse to allow amendment. The fact was that that issue had formed no part of the FtT's reasoning. The FtT had simply decided it did not have jurisdiction.

Decision and reasons

Error of law

[22] An appeal from the UT to the Court of Session is an appeal on a point of law (Tribunals (Scotland) Act 2014, section 48(2)(b)). In order to succeed the appellant requires to demonstrate a material error of law on the part of the UT. Sometimes an error of law can be apparent on the face of the UT's decision, in which case it is usually unnecessary to look at the underlying decision of the FtT. In other cases the UT may have failed to recognise the FtT's error (*Khodarahmi* v *Secretary of State for the Home Department* [2020] CSIH 45, at paragraph [5]). In the present case the appellant maintains that the UT erred in law in a number of material respects. Some of those errors are said to be evident on the face of the

UT's decision. Others are said to be failures by the UT to recognise that the FtT erred in law in relation to material matters.

[23] The landlord has not lodged answers. Nevertheless, where, as here, the court is asked to grant an appeal against a decision of a person or body exercising statutory powers, if the appeal is to succeed the court requires to be satisfied that there are grounds for granting it which are well founded in law (see *McAllister* v *Secretary of State for Work and Pensions* 2003 SLT 1195, Opinion of the Court delivered by the Lord President (Lord Cullen) at paragraphs [3] to [6]).

Was the Submission an application?

[24] It is not entirely clear whether the appellant's solicitor submitted to the FtT that the Submission was an application. The FtT's decision does not note such an argument. However, it does record that the appellant's solicitor maintained that the Submission satisfied all of the requirements of rule 70. Since, arguably, it was implicit in that contention that the appellant was indeed maintaining that the Submission was an application, we are persuaded to proceed on that basis.

[25] However, in our opinion the Submission was not an application. An application requires to be in writing, although it need not be on the form provided by the FtT (rule 4). It must satisfy all of the requirements of rule 70. We conclude that the Submission did not satisfy rule 70(c). It does not appear to have been signed and dated by the appellant. More fundamentally, it lacked another essential attribute. It did not describe itself as an application, and it was not otherwise clearly evident that it purported to be one. If it is not evident that a document is an application, the FtT cannot tell whether its obligation under rule 5(1) (to consider if an application complies with the requirements of the 2014 Rules, etc)

is engaged; or whether it needs to exercise the power in rule 5(2) (to request further documents); or whether it should, as the case may be, give notice of acceptance of the application (rule 9), or reject it (rule 8).

[26] It follows that the UT and the FtT were right to hold that the Submission was not an application.

[27] Since there was no application, the question whether an action for reduction of the agreement was an action "arising from" the agreement is not a live issue. Moreover, we are conscious that we have not had the benefit of a contradictor. In those circumstances we prefer to reserve our opinion on the question until a case arises where its resolution is necessary and where the court has the advantage of fully developed submissions which present both sides of the argument.

The defence seeking reduction ope exceptionis of the agreement

[28] The FtT did not consider whether it had power to entertain a defence that an agreement should be reduced *ope exceptionis*. Once again, there is a degree of obscurity about the precise terms of the oral submissions on this issue which were made to the FtT by the appellant's solicitor. In its decision the FtT summarised the argument as having been that "there was Sheriff Court authority that the Tribunal should deal with fundamental issues raised without the need for a separate application". If that was all that was said, it did not focus the issue with clarity. However, in ground of appeal 2 the appellant provides this account of the relevant discussion:

> "At the Hearing on 13 May 2019 the FtT asked the Applicant's representative why he considered that the FtT had jurisdiction to deal with an application for reduction, and if it did on what basis the FtT could deal with it since no separate application for reduction had been lodged? The Applicant's representative submitted that as the FtT

> had the same jurisdiction as the Sheriff Court, this could be dealt with as a defence to the application without the need for a separate application process."

In our view if that was what was said then the issue was adequately raised by the appellant. In the absence of contradiction we see no reason to disagree with that account. We shall proceed on that basis.

[29] The FtT had jurisdiction in relation to the landlord's action for rent arrears and damages. It was plainly one "arising from" the agreement, and in terms of section 16 the functions and jurisdiction of the sheriff in relation to such actions were transferred to the FtT. In our opinion they included the power to entertain all of the defences to such actions which were available before the sheriff. For present purposes it is sufficient to say that the ability to consider those defences was either a function or a jurisdiction of the sheriff. We see no reason why a defence seeking reduction *ope exceptionis* of an agreement may not be stated in response to an application before the FtT which is founded upon that agreement. Otherwise, the transfer effected by section 16 would have made it more difficult for a tenant to defend himself before the FtT than before the sheriff. There is nothing to suggest that that formed any part of the objective of the enactment. Indeed, we consider that such a change would be contrary to the legislative intention. Part of the context for introducing section 16 was a widely-held view that the existing system for resolving private rented housing disputes in the sheriff court was unsatisfactory. It was slow, overly adversarial, weighted against tenants, non-specialist, and prone to inconsistency of decision-making between sheriff courts. These were all matters which it was considered would be improved by transferring the disputes to a specialist tribunal. Those existing problems were the mischief which section 16 was intended to remedy. The purpose of transfer of these disputes to the tribunal was to improve those matters for both landlords and tenants (but in particular for

tenants). It was no part of that purpose that the grounds for raising an action, or the issues to be taken into account when deciding a case, should change. As the matter was put at paragraph 125 of the Stage 1 Report on the Bill in the Scottish Parliament:

> "The grounds which allow someone to raise an action, and the issues to be taken into account when deciding a case, will not change; but decisions will be taken by a tribunal rather than a sheriff…"

[30] Moreover, in our opinion a construction of section 16 which has the effect of removing defence rights would be contrary to the presumption against statutory interference with rights of legal process. As *Bennion on Statutory Interpretation* (7th ed), Section 27.10 puts it:

> "It is a principle of legal policy that by the exercise of state power the rights of a person in relation to law and legal proceedings should not be removed or impaired, except under clear authority of law."

[31] For all of these reasons, in our opinion an informed interpretation of section 16 indicates that the functions and jurisdiction of the sheriff which were transferred by section 16 included the power to grant reduction *ope exceptionis* in actions arising from one or other of the specified tenancy and occupancy agreements. We conclude that the FtT erred in law in deciding otherwise, and that the UT made the same error.

Amendment of written representations

[32] In our opinion the Submission was, in effect, a proposed amendment of the existing written representations. It raised at least one material new issue - the defence of facility and circumvention. Accordingly, the consent of the FtT was necessary if the amendment was to be allowed (rule 14(1)). However, the basis of the FtT's decision was that it did not have jurisdiction to entertain applications for reduction, and that in any case the appellant had not lodged an application seeking reduction. In our opinion, since the FtT was clear that the

Submission was not an application, and it was told that all of the defences to the application were now stated in the Submission, it should have treated the Submission as a proposed amendment of the written representations. It ought to have applied its mind to whether amendment should be allowed (and if so, on what conditions). In our view its failure to address those questions was an error of law.

[33] The UT's reasoning was (i) that there was no motion to amend; and (ii) that had there been the FtT would have been bound to refuse the motion. We disagree with both of those propositions, and in our view each of them was an error of law. We have already explained why in our opinion the FtT ought to have applied its mind to the question of amendment. The fact of the matter is that it did not do so. While we recognise that had it addressed the issue the FtT might have refused to allow amendment, we are very far from convinced that a refusal would have been inevitable. In our view the UT erred in law in failing to recognise the FtT's errors. In our judgement each of the errors was material.

Conclusions

[34] The UT erred in law in the respects which we have described, and those errors were material. In our opinion the appropriate course is to allow the appeal, set aside the UT's decision, and remit the case to a differently constituted FtT for reconsideration.

[35] We are not persuaded that this court should consider the question of whether the amendment should be allowed. In our opinion that is properly a matter for the FtT. The FtT will require to have regard to the whole circumstances at the time it considers the issue, not least the overriding objective set out in rule 2.

Disposal

[36] We shall allow the appeal against the UT's decision of 28 November 2019, set aside that decision, and remit the case to the FtT for reconsideration by a differently constituted FtT. We reserve meantime all questions of expenses.