Upper Tribunal for Scotland

[2019] UT 60
UTS/AP/19/0035

DECISION NOTICE OF SHERIFF PINO DI EMIDIO

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

in the case of

BRIAN MANN, Duncarling Cottage, The Brae, North Queensferry, Fife, KY11 1JJ

Appellant

and

TERRY MYLES, 1 Ferry Barnes Court, North Queensferry, Fife, KY11 1ET

Respondent

FTT Case Reference FTS/HPC/PR/19/1508

31 October 2019

Decision

The Upper Tribunal for Scotland Refuses the appellant permission to appeal the decision of the First Tier Tribunal Housing and Property Chamber dated 6 June 2019 on the proposed grounds set out in his Form UTS-1 dated 23 August 2019 and the accompanying annotated copies of the decisions of the First Tier Tribunal dated 6 June and 14 August both 2019.

Introduction

[1] On 18 February 2019 the appellant submitted an application to the First-tier Tribunal ("FtT") Housing and Property Chamber ("HPC") Administration seeking an award against his former landlord for failure to lodge a tenancy deposit in an approved scheme in respect of a tenancy of 46 Brock Street, North Queensferry, Fife KY11 1JE. He sought an order for payment of a sum amounting to three times the deposit which was stated to be £620 plus a further £100 for failure to return the full deposit at the end of the lease. As explained below that application was not accepted when first considered by the HPC Administration. After further correspondence on 6 June 2019 a legal member of the FtT rejected the application as frivolous in terms of rule 8(1)(a) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328) which are referred to as "the FtT Rules of Procedure". On 14 August 2019 an application for permission to appeal to the Upper Tribunal ("UT") was rejected by the FtT. On 23 August 2019 the appellant submitted a form UTS-1 to the UT seeking permission to appeal. He also submitted copies of the FtT decisions of 6 June 2019 and 14 August 2019 on which he had written more details of his criticisms of the FtT. I have treated these annotated documents as part of the application for permission to appeal. On 3 October 2019 the UT made an Order requiring the appellant to produce a number of specified documents to aid consideration of the application. The appellant has now complied with that Order.

Grounds of appeal

[2] The appellant has stated his proposed ground of appeal as "maladministration". He complains that the FtT should have treated his application as having been lodged on

18 February 2019 notwithstanding the use of the "wrong" form and that on this basis his application was on time as the tenancy did not end until 2 December 2018.

Reasons for Decision

[3] Section 46(4) of the Tribunals (Scotland) Act 2014 ("the 2014 Act") provides that permission to appeal is to be granted where:-

"… the Upper Tribunal is satisfied that there are arguable grounds for the appeal."

In approaching the terms of section 46(4), I have had regard to the discussion by the Lord Justice Clerk (Lord Carloway) in *Czerwinski* v *HM Advocate* 2015 SLT 610 at paragraph [9] together with the authorities cited there (*Hoseini* v *Secretary of State for the Home Department* 2005 SLT 550 and *Campbell* v *Dunoon & Cowall Housing Association* 1992 SLT 1136). That discussion related to a different statutory context, but I have found it helpful in construing the terms of section 46(4). The "arguability" test for permission is a relatively low hurdle.

[4] I have considered carefully all of the documentation submitted in support of the application for permission to appeal. It is important to identify the sequence of events in determining this application

[5] The relevant timeline is as follows

a. 18.02.19 - The appellant submitted an application under Rule 103 of the FtT Rules using the Tribunal's Form F.

b. 19.02.19 – The HPC Administration advised the appellant that it could not process his application because he had used the wrong form. He had used Form F when it should have been Form G. He was requested to submit it within 7 days.

c. 27.03.19 - The appellant wrote to the HPC Administration by email and he stated that the lease ran till October 2018. He also said that he was holding off putting in the application on the "correct" form G for other reasons of his own related to a mortgage application.

d. 04.04.19 - The appellant submitted the "correct" form G with accompanying documents by email. This does not appear to have been received by HPC Administration because the size of the attachments exceeded to limits of the inbox.

e. 15.04.19 – The appellant wrote again to the HPC Administration. This also does not appear to have been received.

f. 25.04.19 - The appellant wrote again to the HPC Administration.

g. 26.04.19 – following a further prompt HPC Administration advised the appellant that it had not received his emails of 04.04.19 and 15.04.19. He was advised to submit attachments in separate emails.

h. 15.05.19 – The appellant submitted application Form G with supporting documents and this was received by HPC Administration. This did not include a copy of the tenancy agreement and evidence about the date of the end of the tenancy.

i. 06.06.19 – The application was considered by a legal member of the FtT. It was treated as having been submitted on 04.04.19. It was rejected by the legal member as having no prospects of success because it required to be lodged no later than three months after the tenancy ended.

j. 03.07.19 – The decision of the FtT of 06.06.29 was intimated to the appellant

k. 1507.19 – The appellant stated in an email that the lease ran till 02.12.18. This is not what he had said originally.

l. 14.08.19 – The appellant's application for permission to appeal was refused by the FtT.

[6] Rule 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 (SSI 2011/176) is in the following terms

> "(1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.
>
> (2) An application under paragraph (1) must be made no later than 3 months after the tenancy has ended."

The mandatory time limit in Rule 9(2) applied to this application.

[7] The FtT Rules of Procedure regulate aspects of the making of applications. Rule 4 is as follows:

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

The only prescribed requirement is that the application is in writing. The provision of forms by the HPC Administration obviously assists parties to focus on those matters that are relevant to an application. However, on the face of it, an applicant cannot be compelled to use a form.

[8] Read short, Rule 5 of the FtT Rules of Procedure includes the following provisions:

> "(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 … 103 …, as appropriate.
>
> (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."

Rule 5(1) provides that an application is held to have been made on the date it is lodged subject to certain qualifications. Rule 5(2) requires a decision to be made by either the Chamber President or, as occurred in this case, another member of the FtT acting under delegated powers to assess whether all mandatory requirements for lodging have been met. Rule 5(3) postpones the date when an application is held to have been made to the date when the last of any outstanding documents necessary to meet the required for lodgment has been received by the FtT. If the requests made of him by the HPC Administration were unjustified then the applicant might argue that his application should have been treated as having been lodged validly on 18 February 2019.

[9] Rule 103 of the FtT Rules of Procedure is in the following terms

> "Where a tenant or former tenant makes an application under regulation 9 (First-tier Tribunal orders) of the 2011 Regulations, the application must—
>
> (a) state—
> (i) the name and address of the tenant or former tenant;
> (ii) the name, address and profession of any representative of the tenant or former tenant; and
> (iii) the name, address and registration number (if any) of the landlord;
> (b) be accompanied by a copy of the tenancy agreement (if available) or, if this is not available, as much information about the tenancy as the tenant or former tenant can give;
> (c) evidence of the date of the end of the tenancy (if available); and
> (d) be signed and dated by the tenant or former tenant or a representative of the tenant or former tenant."

[10] Rule 103 does not prescribe a particular form for the submission of such applications to the FtT. Therefore, on the face of it, on 19 February 2019 the HPC Administration may have erred when it rejected the Form F which was submitted by the applicant especially if it

contained all of the material required for the purposes of Rule 103. It is regrettable that thereafter the appellant encountered difficulties with emailing the HPC Administration as noted in the timeline above. His application had been submitted on 18 February 2019. As I read the decision of the FtT decision of 6 June 2019, the appellant's application is taken to have been made on 4 April 2019 for the purposes of rule 5(3). By approaching matters in this way, the FtT has ensured that the appellant has not been prejudiced by any of the delay caused by non-receipt of his emails until some weeks later.

[11] The application submitted on 18 February 2019 complied only with the requirements of rule 03(a) and (d) but otherwise was deficient. The appellant did not provide a copy of the tenancy agreement or state that it was not available as required by rule 103(b). He did not provide evidence of the date of the end of the tenancy or state that it was not available as required by rule 103(c). As noted above, in his later correspondence of 27 March 2019 he chose not to submit the Form G requested of him for his own extraneous reasons but he did state that the lease ran to end October 2018.

[12] The appellant is aggrieved that his application has not been treated as having been lodged on 18 February 2019 with the date of the end of the tenancy being taken to be 2 December 2018. On that basis he argues that the application was made within the time limit of three months and the FtT has fallen into error of law. This proposed argument has significant flaws. It is predicated on the date of termination being taken to be 2 December 2018 even though he did not tell the FtT this until 15 July 2019. It also ignores his failure to comply with all parts of rule 103 when he submitted his application. It was his responsibility to submit a valid and accurate application within the statutory time limit.

[13] The appellant advised the FtT on 15 July 2019 that the date of termination was actually 2 December 2018. He did not suggest that evidence as to this date was not available

to him for some reason on 18 February 2019 when he submitted his application or on 27 March 2019 when he told HPC Administration that the tenancy ran to the end of October 2018.

[14] At paragraph 8 of its reasons for decision dated 6 June 2019 the FtT stated that the application had been submitted in "April 2018". This was obviously a typographical error and was intended to refer to April 2019. The FtT expressly had regard to rule 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 quoted above and correctly decided on the information before it that the application had no prospect of success. It does not matter whether the application was treated as having been submitted on 18 February 2019 or 27 March 2019 or 4 April 2019 or 15 May 2019. The FtT's decision was correct because the information provided by the appellant meant that the application was too late having regard to statutory time limit stated in rule 9. The fact that the HPC Administration required him to submit a different form may have served to muddy the waters but there is no arguable error of law arising out of maladministration which has contributed to any injustice to the appellant.

[15] Even if it is assumed that an arguable error of law may have been identified in the proposed ground of appeal owing to the insistence on a Form G, the materiality of any such error requires to be considered. There has to be a real possibility that the decision would have been different if the error had not occurred. Reference is made to *Tesco Stores Limited* v *Dundee City Council* 2012 SC (UKSC) 278 where Lord Reed said the following in the context of a challenge to a decision of a local planning authority:-

> "[31] …, I would observe that an error by the respondents in interpreting their policies would be material only if there was a real possibility that their determination might otherwise have been different."

Conclusion

[16] No arguable error of law has been identified because the date for termination provided to the FtT meant the application was clearly out of time having regard to the date of termination supplied by the appellant. In so far as the HPC Administration was not entitled to require that a particular form should be used, any error of law was not material in this case. There is no real possibility that the decision of the FtT would have been different if the HPC Administration had not required him to lodge a different form. This is due to the failure of the appellant to comply with the requirements of rule 103(b) and (c). When the appellant did provide a date for termination that date was more than three months prior to the 18 February 2019. Therefore I refuse permission to appeal.

Notice to the Appellant

[17] In terms of rule 3(7) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (No. 2016/232) where the Upper Tribunal refuses to grant permission to appeal, the appellant may make a written application within 14 days of the receipt of the notice of this decision to the Upper Tribunal for the decision to be re-considered at a hearing before a different member or members of the Upper Tribunal. The appellant is entitled to seek such a hearing in relation to the proposed ground discussed above.